

## LGA draft comments and questions on:

### Statutory guidance on the making and disclosure of Special Severance Payments by local authorities

The LGA wishes to make the following comments and raise the following questions in relation to the guidance published for consultation. In order to provide references for our comments we have included, from page three of this document onwards, a paragraph numbered version of the guidance.

1. Para 1 and onwards – where reference is made to ‘redundancy’ terms or payments we suggest this would be clearer as ‘redundancy and severance’
2. Para 1 – we would suggest special severance payments has capitals
3. Para 5 last bullet – there already exist requirements to publish some payments so could this say ‘Further clarify’?
4. Para 9 – contractual entitlements to severance payments are rare as councils must not fetter their discretion within policies made under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (the 2006 Regulations). Where a contractual entitlement does exist it will normally be due to it being protected under the TUPE Regulations. The guidance should reflect this fact.
5. Para 10 – we are not sure that ‘where in accordance with legislation’ is necessary in this context as all such payments must be legal for the council to make.
6. Para 10 – the decision may be delegated so suggest ‘elected members’ is replaced with ‘employers’.
7. Para 11(a) – we suggest ‘Any’ is removed as settlement agreement payments can also include payments which would not count as Special Severance Payments (SSP).
8. Para 12(a) – the statement in brackets will need further clarification. For example, will a payment pursuant to a pay in lieu of notice clause be counted as a contractual entitlement?
9. Para 12(b) – we would suggest this needs to be clarified to include strain costs made under reg 30(8) in respect of benefits under 30(5) and as a result of additional benefits granted under reg 31(b).
10. Para 12(b) – would a reg 31(a) additional pension or a Reg 16 employer funded APC be considered to be a SSP if the member left within a certain time period?

11. Para 13(b) – see earlier comment about contractual entitlements being rare.
12. Para 13(c) – this should probably refer to ‘the employer’s policy under the’ rather than ‘the requirements of’. Also, could you clarify the position of payments made under any ‘exceptional clause’ in a severance policy?
13. Para 16 bullet point – there are also equalities issues which need to be included in the list.
14. Para 17 first bullet – suggest adding ‘or other’ after tribunal.
15. Para 17 second bullet – presumably this refers to payments made ‘solely’ to avoid the actions listed?
16. Para 17 third bullet – private sector practice is significantly varied and will include examples of much higher payments as well as lower. This would be difficult to achieve in any meaningful way.
17. Para 17 fourth bullet – we would suggest ‘concerning those complaints’ is added after ‘whether cases’
18. Para 19 – this point also relates to practice in respect of public health functions where local authority employers have been asked to consider amending their 2006 Regulations discretionary compensation policies to recognise past service with an NHS employer, in order to aid recruitment and retention. Depending on what the view is on whether an SSP includes non-standard payments under those policies, we suggest that something like the following could be added to para 19: ‘Authorities may also consider that a Special Severance Payment is appropriate in circumstances where to help recruitment and retention an employee had been told that a higher severance payment might be available, which would be based on past service with another non-Modification Order employer’.
19. Para 21 – we would suggest you replace ‘winning’ with ‘successfully defending’.
20. Para 22 – this wording may be too specific depending on the particular circumstances and local arrangements. We would suggest wording along the lines of ‘payments should be approved under the employer’s appropriate scheme of delegated authority and signed off by the appropriate statutory officer (CEX, S151 or Monitoring Officer)’
21. Para 24 – capitals for Monitoring Officer (consistency with para 25).

# Statutory guidance on the making and disclosure of Special Severance Payments by local authorities

## Introduction

1. Most public sector workers enjoy statutory and contractual redundancy terms that are significantly better than the minimum statutory redundancy entitlement and are often higher than the value of redundancy payments made in the private sector. The Government is of the view that paying additional, discretionary sums on top of these entitlements (“special severance payments”) do not usually provide good value for money or offer fairness to the taxpayers who fund them and so, should only be considered in exceptional cases.
2. This guidance forms part of the best value regime. The best value duty, as set out in section 3 of the Local Government Act 1999 (“the 1999 Act”), provides that “A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”. The best value duty is relevant to local authority duties to deliver a balanced budget (Part 1 of the Local Government Finance Act 1992), provide statutory services (including adult social care and children’s services) and secure value for money in spending decisions. This will include decisions to make Special Severance Payments.
3. Authorities subject to the best value duty (termed “best value authorities”) are defined in section 1 of the 1999 Act. A list of these bodies can be found on page 6 of this guidance.
4. This guidance also sets out the Government’s position on the use of Special Severance Payments made by local authorities.
5. The purpose of this guidance is to:
  - Set out the Government’s view that Special Severance Payments do not usually represent value for money and should only be considered in truly exceptional circumstances
  - Set out the criteria employers should consider in the exceptional circumstances in which it may be appropriate to make a Special Severance Payment
  - Give examples of the truly exceptional circumstances in which Special Severance Payments may be appropriate
  - Clarify the disclosure and reporting requirements for Special Severance Payments.
6. Redundancy payments can be an important mechanism to allow employers to reform and react to new circumstances in the workplace, but employers have a

responsibility to ensure that Special Severance Payments are only made when there is a clear, evidenced justification for doing so.

7. They should also ensure that all relevant internal policies and procedures have been followed and all alternative actions have been fully explored and documented.

8. In the exceptional circumstances where it is decided that a Special Severance Payment should be paid, it is the responsibility of both individual employers and sponsoring departments to ensure their Special Severance Payments arrangements are fair, proportionate, lawful and provide value for money for the taxpayer.

## Chapter 1 – What is a special severance payment?

9. In the context of this guidance, Special Severance Payments are payments made to employees, officeholders, workers, contractors, and others outside of statutory, contractual or other requirements when leaving employment in public service. Employers may sometimes consider making such a payment in situations where the individual concerned resigns, is dismissed, or agrees a termination of contract. Which types of payments are Special Severance Payments will vary according to an employees' particular circumstances, and therefore the examples below are illustrative only.

10. It is established case-law<sup>1</sup> that such payments, where in accordance with legislation, may only be made where there is a convincing case that they are in the interests of taxpayers. Local authorities may not be generous at the expense of taxpayers and must genuinely consider payments to be in the public interest. In taking decisions elected members must make all proper enquiries and consider all available material that can help in coming to a decision.

11. The following types of payments are likely to constitute Special Severance Payments:

- a) Any payments reached under a settlement agreement between the employer and employee to discontinue legal proceedings without admission of fault;
- b) The value of any employee benefits or allowances which are allowed to continue beyond the employee's agreed exit date;
- c) Write-offs of any outstanding loans;
- d) Any paid special leave, such as gardening leave;
- e) Any honorarium payments or gifts;
- f) Any hardship payments;

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<sup>1</sup> In *Re Hurlle-Hobbs's Decision* (1944) 1 All E.R. 249

g) Any payments to employees for retraining related to their termination of employment

12. The following types of payments may constitute Special Severance Payments, depending on the terms of the individual's contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:

a) Pay or compensation in lieu of notice (depending on the contractual basis for its payment);

b) Pension strain payments arising from employer discretions to enhance standard pension benefits;

13. The following do not constitute Special Severance Payments:

a) Statutory redundancy payments;

b) Contractual redundancy payments, whether applicable to voluntary or compulsory redundancy, and whether agreed by collective agreement or otherwise

c) Redundancy payments made in line with the requirements of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006;

d) Payment for untaken annual leave;

e) Payments ordered by a court or tribunal or agreed as part of a judicial or non-judicial mediation;

f) Payments made to compensate for ill-health, injury or death of the worker.

## Chapter 2 - Considerations for councils on potential Special Severance Payments

14. This Chapter provides guidance on relevant considerations for English local authorities in relation to making Special Severance Payments.

15. Local authorities must comply with the duty of Best Value explained in the introduction. In considering whether it is appropriate to make a Special Severance Payment, the Government expects local authorities to consider whether such a payment would be a proper use of public money.

### *Economy*

16. Councils should be able to demonstrate their economic rationale behind proposed Special Severance Payments including consideration of:

- whether there is any feasible possibility of exiting the individual at a lower cost. Only where there is no such possibility should a Special Severance Payment be considered;

- how the exit payment will be perceived by the public and whether it is in line with the duty to manage taxpayers money appropriately;
- what alternative use could be made of that expenditure. All Special Severance Payments necessarily reduce the funds that would otherwise be available to deliver important public services;
- the setting of any potential precedent (e.g. where a Special Severance Payment is made to certain employees and not others);
- evidence for additionality, i.e. that those offered Special Severance Payments would not have, under any circumstances, been willing to leave with their statutory and contractual benefits alone.

#### *Efficiency and effectiveness*

17. In considering the impact of Special Severance Payments on efficiency and effectiveness, local authorities should:

- Seek legal advice on the prospects of successfully defending an employment tribunal claim, if an employee were to take a legal route to appeal any grounds of their employment being terminated. The chance of success and the costs likely to be incurred should be noted and weighed up against the costs of making a Special Severance Payments;
- Ensure that these payments are not used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment;
- Consider aligning with private sector practice, where payments are typically less generous. This is important given the added duty in the public sector to prudently manage taxpayers' money;
- Manage conflicts of interest to ensure that individuals who are the subject of complaints play absolutely no role in deciding whether cases should be settled from public funds.

### **Chapter 3 - Exceptional circumstances in which it may be appropriate to consider making Special Severance Payments**

18. There may be exceptional circumstances where the existing statutory or contractual entitlements, or both, are insufficient to facilitate an exit or to offer sufficient compensation for loss of employment or office. This can apply to office holders as well as staff. These circumstances, which we expect to be truly exceptional and provide value for money, may be taken into account by local authorities in deciding whether or not to make a Special Severance Payment.

19. Authorities may consider a Special Severance Payment in order to set aside what would otherwise be a reduction in entitlement caused by a break in

continuity of service (e.g. where a member of staff has taken a break in service to accompany their spouse on military service overseas).

20. Authorities may also consider a Special Severance Payment in order to settle disputes, where it can be properly demonstrated that other routes have been thoroughly explored and excluded. After receiving appropriate professional advice, it may then possibly be concluded that a special severance payment is the most suitable option and prudent use of public money.

21. Those approving a Special Severance Payment related to a settlement agreement should be provided with appropriate evidence that attempts were made to resolve disputes before they escalated to a legal claim. They should also bear in mind that even if the cost of defeating an apparently frivolous or vexatious claims will exceed the likely cost of that settlement to the employer, it may still be desirable to take the case to formal proceedings. This is because winning such cases will discourage future frivolous or vexatious claims and demonstrate that the council does not reward such claims.

## Chapter 4 - Accountability and disclosure

### *Accountability*

22. The Government expects that any Special Severance payments should be personally approved and signed off by the Chief Executive Officer (CEX), with a clear record of the Leader's approval and that of any others who have signed off the payment.

23. A system of legal duties also requires councillors to spend public money with regularity and propriety. Under section 151 of the Local Government Act 1972, "every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that one of their officers [the section 151 officer or Chief Finance Officer] has responsibility for the administration of those affairs". The section 151 officer has an important role in holding councils to account and has duties to alert councillors and the auditor in the case of unlawful expenditure.

24. This role is complemented and reinforced by authorities' duty under section 5 of the Local Government and Housing Act 1989 to appoint a monitoring officer, who must report to the council when any proposal, decision or omission is likely to lead to contravention of any enactment, rule of law or statutory code.

25. As part of their duties, an authority's s151 Officer, and where appropriate, the Monitoring Officer, should take a close interest in and be able to justify any special severance payments that are made by that authority and in particular any payments made that are not consistent with the content of this guidance.

## Disclosure

26. Clear and transparent reporting on exit payments is essential to make available better data on the number and level of exit payments made in local government. The availability of data on exit payments in the public domain by local authorities enables local accountability as well as effective management of public money and public confidence. In 2015, the Local Government Transparency Code was issued to increase democratic accountability through open access to information.<sup>2</sup>

27. MHCLG have initiated a new annual collection of data on exit payments (initially collecting data from 2014 – 2021) and the results will be published into official statistics and made available on the gov.uk website, subject to any necessary anonymisation or redaction to comply with data protection law. This data will help others to assess the number and level of exit payments made in local government.

28. Section 38 of the Localism Act 2011 requires the council to produce and publish a pay policy statement, which must include the authority's policies on termination payments. Further information on what the Localism Act 2011 requires can be found in existing guidance<sup>3</sup>

29. In addition, Regulation 60 of the Local Government Pension Scheme Regulations 2013 requires local authorities to prepare a statement of its policy in relation to the exercise of the discretion to enhance pension benefits under Regulations 16(2)(e) and 16(4)(d) (funding of additional pension), Regulation 30(6) (flexible retirement), Regulation 30(8) (waiving of actuarial reduction); and Regulations 31 (award of additional pension)

As well as following existing guidance<sup>4</sup> on reporting exit payments councils should also disclose in their annual reports all redundancy payments, pension fund strain costs and other special severance payments made in consequence of termination of employment or loss of office (but excluding payments on death or ill-health retirement). All reporting should be anonymised and comply with data protection law.

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<sup>2</sup> Local Government Transparency Code 2015, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408386/150227\\_PUBLICATION\\_Final\\_LGTC\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf)

<sup>3</sup> Openness and accountability in Local Pay: Guidance under Section 40 of the Localism Act 2011 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85886/Final\\_Supplementary\\_Pay\\_Accountability\\_Guidance\\_20\\_Feb.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85886/Final_Supplementary_Pay_Accountability_Guidance_20_Feb.pdf)

<sup>4</sup> CIPFA, Code of Practice on Local Authority Accounting in the United Kingdom 2020/21

## List of bodies this guidance applies to

- an English local authority, including
  - a county council in England, a district council or a London borough council
  - the Council of the Isles of Scilly;
  - the Common Council of the City of London in its capacity as a local authority;
  - the Greater London Authority so far as it exercises its functions through the Mayor.
- a National Park authority [for a National Park in England]
- the Broads Authority
- the Common Council of the City of London in its capacity as a police authority;
- a fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies, and a [metropolitan county fire and rescue authority in England]
- the London Fire Commissioner
- an authority established under section 10 of the Local Government Act 1985 (waste disposal authorities);
- an Integrated Transport Authority for an integrated transport area in England;
- an economic prosperity board established under section 88 of the Local Democracy, Economic Development and Construction Act 2009;
- a combined authority established under section 103 of that Act;
- a sub-national transport body established under section 102E of the Local Transport Act 2008;
- Transport for London