Advisory Bulletin

Employment Law Update
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In this issue:

Welcome

In this month's bulletin, we report on the progress to date of the Restriction of Public Sector Exit Payments Regulations 2020. These have now been approved by both Houses of Parliament and will come into force three weeks after they are made i.e. signed. To date, we have no information as to when that will be.

We also report on the consultation paper, Reforming Local Government Exit Pay, issued by the Ministry for Housing, Communities & Local Government on 7 September. The closing date for responses is 9 November.

The coronavirus pandemic continues to lead to developments in areas affecting employers. We report further details of the Job Retention Bonus and the rules that need to be applied when calculating a statutory week's pay for staff who have been furloughed. There are also details of the new Job Support Scheme and the changes that have been made to allow those isolating at home before a hospital procedure to claim statutory sick pay.

In other news, we report the fact that the Government has issued a revised HR1 form which needs to be sent to the Secretary of State where redundancies of more than 20 are to be made.

Finally, we report two cases this month. *K v L* is a case concerning the very difficult area of determining what action to take in a case where an employee (in this case a teacher) has been accused of downloading indecent images of children. The second case, *Glasgow City Council v Johnstone*, concerns a finding by the Scottish EAT that in the circumstances of that case a couple who were foster carers were employees of the Council.

Further information

Receiving the bulletin	The Advisory Bulletin is available to local authorities by registering on our website at www.local.gov.uk and selecting the 'Employment Law Update' from the list of email updates available at http://www.local.gov.uk/about/news/e-bulletins. For other organisations the Advisory Bulletin is available through subscription. If you have any queries about the bulletin please e-mail eru@local.gov.uk.
The employment law advisers	Philip Bundy, Samantha Lawrence and Kelvin Scorer will be pleased to answer questions arising from this bulletin. Please contact us on 020 7664 3000 or by e-mail on eru@local.gov.uk
Address	The Workforce Team, Local Government Association, 18 Smith Square, London SW1P 3HZ
Website	https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations
Obtaining legislation and other official publications	Copies of legislation can be found at www.legislation.gov.uk

Key data

SMP, SPP, ShPP and SAP basic rates	£151.20 or 90 per cent of normal weekly earnings if lower from 5 April 2020
SSP	£95.85 from 6 April 2020
'A week's pay'	£538 – statutory limit for calculating a week's pay from 6 April 2020
	£560 in Northern Ireland from 6 April 2020

Contents

RESTRICTING PUBLIC SECTOR EXIT PAYMENTS: £95K CAP UPDATE

On 21 July the Government published its response to the 2019 consultation on draft regulations to implement the £95,000 cap on public sector exit payments (see Advisory Bulletin 669 and Advisory Bulletin 682). The response provided that the cap will go ahead much as was set out in the 2019 consultation. The Government published the draft Restriction of Public Sector Exit Payments Regulations 2020 which needed the approval of both the House of Lords and the House of Commons and indicated that they will be followed by updated guidance and HM Treasury Directions which will 'take into account' detailed responses made as part of the consultation process. The guidance and the Directions will cover issues such as the circumstances in which the cap may or must be relaxed.

The updated guidance and HM Treasury Directions have not yet been published. However, the regulations were approved in the House of Lords on 21 September and House of Commons on 30 September. Once the Regulations have been made i.e. signed, they will come into force in three weeks. At this stage we do not know when this will happen and, given the implications for local authority employers, we are seeking urgent clarification on the position of those employees who are in the process of leaving after that date, as well as the apparent conflict with existing LGPS regulations and the process for waivers.

We will keep local authorities up to date via our Employment Relations webpage.

MHCLG CONSULTATION ON FURTHER EXIT PAY REFORMS

In addition to the £95,000 public sector exit payment cap reported above, the Ministry for Housing, Communities & Local Government (MHCLG) has launched a consultation on changes to the Local Government Pension Scheme (LGPS) and Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (the Compensation Regulations). The consultation covers the required changes to the Compensation Regulations and pension regulations to implement both the £95,000 exit payment cap and the public sector exit payments further reform proposals issued by HM Treasury (HMT) in 2016.

This feature summarises the main points of the MHCLG consultation and then sets out the consultation questions with some LGA commentary. The LGA will be responding to the consultation, but we

also encourage local authorities and other affected employers to respond to the consultation direct. Details of how to respond are in the consultation document and responses should be sent to LGExitPay@communities.gov.uk with the subject heading 'Consultation on Exit Payment Cap', by the closing date of **9 November 2020**. We should also be grateful for views on the consultation questions and if a copy of any response sent directly could be forwarded to us at eru@local.gov.uk as soon as possible given the tight timescales involved.

Current position

Before setting out the proposed MHCLG reforms, it is worth summarising the current position.

Under the Compensation Regulations local authorities have two main powers:

- to calculate redundancy payments on an employee's actual weekly pay rather than the statutory maximum (currently £538), or any amount up to an actual week's pay; and

- to pay an enhanced severance payment of up to 104 weeks' pay (including the statutory redundancy payment) to an eligible employee.

Authorities must have a written policy on how they grant severance payments.

In addition, employees in the LGPS qualify for an immediate unreduced pension if they are retired early on the grounds of redundancy or business efficiency and are aged 55 or over. The employer funds the additional cost to the pension scheme of that early payment of pension, and that is normally referred to as the 'strain cost'.

If an employee has not received an enhanced redundancy payment under the Compensation Regulations, an authority can compensate a member for redundancy by providing an award of additional annual pension up to a maximum of £7,194 (as at 1 April 2020) under regulation 31 of the LGPS Regulations 2013 (provided the resolution to award additional annual pension is made within 6 months of the date the member's employment ended). This can be provided to a scheme member of any age (under age 75).

Who is covered by the proposed changes to the Compensation Regulations

Employees of all local authorities who are eligible to join the LGPS are covered by Compensation Regulations, and so with the implementation of the £95,000 cap applying to them as well, they will see a range of limitations to scheme redundancy benefits. There will also be LGPS scheme employers who are not covered by either the cap or the Compensation Regulations where employees will see different outcomes.

HMT regulations set out the bodies covered by the £95,000 cap – 'capped employers' - while revised Compensation Regulations (as yet unpublished) will set out the bodies covered by the further MHCLG reform changes – 'reform employers'. Some LGPS employers (e.g. local authorities) will be both capped and reform employers but others will fall into one or neither camp.

What is covered by the further reform proposals in the MHCLG consultation?

These proposals will limit the payments made to, or in relation to, employees of 'reform employers' in addition to statutory redundancy entitlement as follows:

- The actual pay used in severance calculations will be limited to an annual salary of £80,000.

- The maximum severance (including statutory redundancy pay) will be limited to 3 weeks' pay per year of service or 15 months' pay, whichever is the lower (currently local authorities can pay up to 104 weeks' severance pay, although most authorities do not pay as much as that).

- No discretionary severance will be payable if the member receives an immediate pension with a payment by the employer to cover the cost of early release of pension - the strain cost - except in the case of the severance amount exceeding the strain cost in which case the excess would be payable (see below).

- The amount available for any pension strain cost if applicable will be reduced by the statutory redundancy payment, even if the strain costs and statutory redundancy payment together are below the £95,000 cap. For example, if someone has a pension strain cost of £50,000, and a statutory redundancy entitlement of £10,000, the strain cost the

employer will be able to pay is reduced to £40,000, and the employee receives their statutory redundancy payment direct. A further reduction would be made to reflect any voluntary payments made by the employer to provide an additional pension under regulation 31 of the LGPS Regulations 2013.

- Where a pension strain cost is paid (reduced by the amount of the statutory redundancy pay), an employer will not normally be able to pay any discretionary severance payment. However, in the rare case that a discretionary severance payment would have a higher value than the strain cost paid by the employer, then the employee will be entitled to retain the difference in cash between the strain cost paid by the employer and the discretionary severance payment. This would be in addition to the statutory redundancy payment.

Any reduction in strain cost payable by the employer due to the factors set out above (and including the £95K cap) may be made up by the employee from their own resources, which could include their statutory redundancy pay.

Element of choice

MHCLG wants to introduce an element of choice for those entitled to a pension strain cost. At present, employees have no option but to take an immediate payment of their pension on being made redundant after age 55. The consultation therefore proposes that for those aged 55 or over they can either take an immediate pension with strain cost as set out above or:

- choose to forego the pension strain/enhancement and instead immediately receive an actuarially reduced pension (under standard early retirement factors) and the discretionary redundancy payment; or

- choose to forego the pension strain/enhancement but defer their pension benefits as accrued with no enhancement and instead take the discretionary redundancy payment.

Calculation of pension strain costs

Currently, the method for calculating strain cost for an early payment of pension is set locally by each LGPS fund. This is of no concern to employees at present as

a full pension is paid regardless of any differential in cost. Under the new proposals, strain costs that are capped result in reduced pensions and therefore any differential in strain costs across funds would lead to different outcomes for scheme members. Therefore, the consultation proposes that a standard methodology is to be used to calculate strain cost across all funds in respect of exits that are subject to the cap, but that some flexibility will be available when calculating strain costs for non-capped employers.

Consultation questions

We set out below the consultation questions, with LGA comments, which employers may want to consider when responding to the consultation. We would be interested in your feedback and if authorities have further points to make as this is a sensitive balance of cost, change and fairness. There may appear to be repetition at times and this is because the consultation questions have repetitive elements and it is not always particularly clear what element of the proposal they are asking about.

It is also important to note that these new further reform proposals are based on proposals first published in 2016 and are intended go beyond the Government's policy to cap public sector exit payments at £95K which is already established. In that respect they are unrelated to the £95K cap although the interaction of the two measures will have practical implications which might be different depending on whether an employee's severance pay exceeds the cap or not. Therefore, references to the £95K cap are included to explain the context of the comments.

Question 1

Are there any groups of local government employees that would be more adversely affected than others by our proposed action on employer funded early access to pension?

LGA comments

The Government Actuary Department has published a draft impact assessment of these proposals. We welcome your views on this analysis and also whether or not you consider that there are any other groups in your authority that may be affected.

- If so, please provide data/evidence to back up your views?

The Government Actuary's Department has already provided some illustrations of the likely effects, but we

would also appreciate any further data or evidence that local authorities can provide on the impacts of the proposals.

- How would you mitigate the impact on these employees?

It seems that the only way to mitigate the full effects if the proposals are introduced without amendment would be to not dismiss people which is unrealistic.

This policy will impact on all workers over 55 in the pension scheme, including those who are lower paid and with a small pension. One way to mitigate the impact would be to allow the relaxation of the proposed restriction to enable the employer to pay statutory redundancy pay in addition to the full strain on fund costs (providing the total is below £95K).

In particular, the provisions around statutory redundancy pay being either deducted from the pension strain cost resulting in a lower pension for life, or paid to the employee and then paid into the pension fund in order to part-pay the strain on fund cost will hurt the poorest paid who are most in need of a cushion when made redundant. It also introduces a layer of unnecessary administrative bureaucracy disproportionate to the situation for local authorities and administering authorities to deal with. It will also be confusing for employees and may need appropriate amendments to be made to the statutory redundancy regime in the Employment Rights Act 1996.

Question 2 **What is the most appropriate mechanism or index when considering how the maximum salary might be reviewed on an annual basis?**

LGA comments

There is a range of possibilities, for example:

- CPI
- RPI
- NJC pay award
- Average economy wage growth

We would be interested to know if local authorities would support a particular method and, if so, on what basis.

Question 3 **Are there any groups of local government employees that would be more adversely affected**

than others by our proposed ceiling of 15 months or 66 weeks as the maximum number of months' or weeks' salary that can be paid as a redundancy payment?

LGA comments

Typically, local authority discretionary severance schemes use the statutory redundancy calculator to determine the number of week's pay and then apply a small multiplier and so do not reach these limits although it is possible some will be affected.

- If so, please provide data/evidence to back up your views?

We would appreciate feedback/evidence from local authorities on this question.

- How would you mitigate the impact on these employees?

The proposed ceiling itself would not impact on most employees for the reasons set out above. There are other areas of the proposals which are of more significance and mitigation should be considered in respect of those – please see the response to question 5.

Question 4

Are there any groups of local government employees that would be more adversely affected than others by our proposal to put in place a maximum salary of £80,000 on which an exit payment can be based?

LGA comments

£80,000 is a significant salary in local government so this will affect the most senior positions. Considerable experience and skills will be required for such posts and so this will be more likely to affect older workers, although not exclusively so.

In respect of the level of the cap, no other part of the public sector has yet implemented reforms in addition to the proposed £95K cap and we would wish to see if this level of cap is reflected in other sectors.

- If so, please provide data/evidence to back up your views?

We would appreciate any evidence or data which validates or contradicts our assumptions.

- How would you mitigate the impact on these employees?

We welcome views on this question.

Question 5 **Do you agree with these proposals? If not, how else can the Government's policy objectives on exit pay be delivered for local government workers?**

LGA comments

The original policy objective was to curb excessive exit payments in the public sector. The additional reform was about fairness and consistency across the public sector workforce, the other parts of which have as yet seen no changes. These new proposals will impact on all local government employees in two ways, before there has been any wider public sector reform and regardless of salary level:

1) by reducing the strain on fund payment by the statutory redundancy payment regardless of the amount of the strain on fund payment and

2) by removing any entitlement that an employee will have to their employer's discretionary compensation payment (which unlike other parts of the public sector are modest).

The result will be a reduced pension going forward and only statutory redundancy pay to support them during a time in which older workers may find it increasingly difficult to find alternative employment. In particular, the provisions around statutory redundancy pay being either deducted from the pension strain cost resulting in a lower pension for life, or paid to the employee and then paid into the pension fund in order to part-pay the strain on fund cost will hurt the poorest paid who most need a cushion when made redundant. It also introduces a layer of unnecessary administrative bureaucracy disproportionate to the situation.

Whereas there are powers which will be set out in HMT Directions in relation to the £95K cap, powers to waive elements of the further reform proposals where they are likely to create undue hardship or create legal conflicts in relation to disputes under statute or contract law should be reserved to the council of the local authority concerned.

Question 6	**Do you agree that the further option identified at paragraph 4.8 should be offered?**
LGA comments	The option of deferring pension benefits and receiving a discretionary redundancy payment under the employer scheme rather than taking a reduced pension with statutory redundancy pay only will be a flexibility that could assist some employees depending on their financial situation and it seems sensible that it should remain as an option.
Question 7	**Are there any groups of local government employees that would be more adversely affected than others by our proposals?**
LGA comments	The proposals will adversely affect all employees over the age of 55 in the LGPS. Those with long service will be particularly affected because of the interrelationship between strain on pension fund payments and other discretionary and statutory redundancy payments. The majority of employees in local government roles are women and many will be at the lower ranges of pay. The proposals will affect all salary ranges as the GAD impact assessment illustrates. They will have a greater effect in pure financial terms on longer serving higher earners, but may have a more significant impact on lower paid workers who may have greater need for a financial cushion. See also the response to Q8 below.
Question 8	**From a local government perspective, are there any impacts not covered at Section 5 (Impact Analysis), which you would highlight in relation to the proposals and/or process above?**
LGA comments	First of all there are concerns that a full impact assessment was not available at the commencement of the consultation. The GAD impact assessment has since been published in draft. We would be obliged if authorities could let us know if they agree with the GAD impact analysis and if there are further points to make.
Question 9	**Are these transparency arrangements suitably robust? If not, how could the current arrangements be improved?**
LGA comments	The transparency requirements in local government are established and would seem adequate but we cannot speak of the consistency with similar

requirements in other parts of the public sector or across all workforces covered by these reform proposals.

Question 10 **Would any transitional arrangements be useful in helping to smooth the introduction of these arrangements?**

LGA comments

These reform proposals will have a dramatic effect on some employees who will have built current severance arrangements into their long-term planning. Therefore, it would seem that some transitional provisions would be appropriate.

Existing employees who prudently joined the Local Government Pension Scheme will have based their retirement and contingency planning on the current rules of the LGPS in respect of access to pension and their employer's scheme in respect of a redundancy payment. Those who are approaching, or are already in, the age bracket whereby they are entitled to an unreduced pension and redundancy payment will be particularly adversely affected by these proposals should they be made redundant, particularly in the current economic climate. We welcome local authorities' comments on whether or not they would support some form of transitional arrangement which reflects this.

In order to avoid a chaotic situation, there should be provision for dealing with those employees already in redundancy/reorganisation situations. Employers need some certainty when attempting to reorganise their workforces. Major restructuring requires statutory periods of consultation with staff and recognised trade unions under the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 which includes details of severance packages and also notice of any dismissals. Long-serving employees will require 12 weeks' notice of dismissal. Therefore, it will significantly inhibit reform if this issue is not addressed in some way, otherwise employers will not be able to present critical financial calculations to staff knowing they might change to the detriment of staff during the process and before the date of dismissal.

Should the £95K cap come into force before the MHCLG further reforms then, subject to any HMT Directions which provide suitable transitional provisions and waivers, guidance will be required for

	the interim period between the £95k cap implementation and the MHCLG/LGPS further reform changes as it appears to cause conflict between two sets of regulations.
Question 11	**Is there any other information specific to the proposals set out in this consultation, which is not covered above which may be relevant to these reforms?**
LGA comments	The stated aims include consistency and fairness across the public sector and so a comparison with other public sector severance schemes would be beneficial. In local government a sensitive balance is achieved between the rules of the Local Government Pension Scheme which provides a contingency membership benefit to contributing members who lose their job at an age when they may find it harder to continue their career, and local authorities' redundancy policies which cushion the immediate blow of losing a job. These proposals will mean that employees will have to choose between one or the other.
Question 12	**Would you recommend anything else to be addressed as part of this consultation?**
LGA comments	It should be made clear that the restrictions do not apply to TUPE protected benefits. As with the £95k cap, there should be scope for relaxation of the restrictions where: a. not exercising the power would cause undue hardship; b. not exercising the power would significantly inhibit workforce reform. c. commitments have legitimately been made by an authority in redundancy/re-organisation processes before the changes come into force.
JOB SUPPORT SCHEME	The Coronavirus Job Retention Scheme ends on 31 October. It is to be replaced by the Government's Job Support Scheme which commences on 1 November 2020 and will run for 6 months until April 2021. The stated aim of the Job Support Scheme is to protect viable jobs in businesses who are facing lower demand over the winter months due to Covid-19, to help keep their employees attached to the workforce.

The company will continue to pay its employee for time worked, but the burden of hours not worked will be split between the employer and the Government (through wage support) and the employee (through a wage reduction), and the employee will keep their job. The employee must work at least 33% of their hours for the scheme to apply. The Government will then pay a third of hours not worked up to a cap of (£697.92 per month), with the employer also contributing a third. This will ensure employees earn a minimum of 77% of their normal wages, where the Government contribution has not been capped.

Employers using the Job Support Scheme will also be able to claim the Job Retention Bonus (see further below) for employees if they have previously claimed payments for those employees under the Coronavirus Job Retention Scheme and they retain them in employment until 31 January 2021 if they meet the other eligibility criteria.

The Government has produced a Job Support Scheme Factsheet although further detail of the practical application of the scheme is awaited. For example, the position of its application to local authorities and other public bodies is a little unclear because of conflicting information. The factsheet indicates that all employers will be eligible to use the scheme provided they have a UK bank account and UK PAYE scheme. However, much of the language is focussed on business such as references to reduced turnover and restrictions placed on distributions to shareholders while employers claim via the scheme.

We shall be seeking to clarify these issues.

JOB RETENTION BONUS

The Chancellor announced further details of the new Job Retention Bonus Scheme at the end of July.

The Job Retention Bonus is a one-off payment to employers of £1,000 for every employee who they previously claimed for under the Coronavirus Job Retention Scheme, and who remains continuously employed through to 31 January 2021, provided that they are not serving notice of dismissal at that point. Eligible employees must earn at least £520 a month on average between 1 November 2020 and 31 January 2021. Employers will be able to claim the Job Retention Bonus after they have filed PAYE for January and payments will be made to employers from

February 2021.

Employers can claim the Job Retention Bonus for all employees who meet the criteria, including office holders, company directors and agency workers, including those employed by umbrella companies. The above criteria must be met regardless of the frequency of the employee's pay periods, their hours worked and rate of pay.

There was a limited take up of the Coronavirus Job Retention Scheme in local authorities as it was not intended to apply widely to roles in the public sector for which employers already had public funding in place. However, in areas where employment was supported by trading income from customers or payments by parents in schools some local authorities and academies successfully applied for the grant. Therefore, these employers may seek to apply for the bonus. Further details about applying for the bonus can be found on the gov.uk website under Check if you can claim the Job Retention Bonus from 15 February 2021.

STATUTORY WEEK'S PAY: FURLOUGHED EMPLOYEES

The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 set out how a week's pay is to be calculated in the case of an employee who has been furloughed under the Coronavirus Job Retention Scheme, for the purposes of calculating various rights under the Employment Rights Act 1996. These include such matters as statutory redundancy pay, statutory notice pay, time off to look for work or training and compensation for unfair dismissal.

Broadly speaking, an employee who works normal hours and receives the same pay is to be treated as if their week's pay is their full rate of pay at the calculation date, disregarding any reduction as a result of being furloughed. This applies where the calculation date was on or before 31 October (the date the Job Retention Scheme Ends).

Where earnings vary and therefore an averaging calculation is required to be made on the calculation date, then if a week when an employee was furloughed is included in the 12 week period it should be treated as the full reference salary when the employer claimed the Job Retention Scheme grant used (i.e. normal full pay). This will apply where any week included in the

average 12 weeks includes a week where an employee was furloughed so may affect redundancies made into January next year and possibly later depending on the working pattern.

The Coronavirus Job Retention Scheme was not used widely in local government and so these regulations will be relevant to small numbers of employees who were both furloughed and then made redundant or otherwise dismissed. The week's pay provisions are notoriously complex in normal circumstances where an employee's earnings vary so with this added layer of complexity employers making furloughed employees redundant should take extra care to understand the full impact of the regulations on their calculations.

With the introduction of the Job Support Scheme which replaces the Coronavirus Job Retention Scheme there will presumably be a further need for regulations to specify how employees on the new scheme will have any similar entitlements calculated should the need arise.

STATUTORY SICK PAY: COVID ISOLATION BEFORE HOSPITAL APPOINTMENT

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations 2020 have amended Schedule 1 to the Statutory Sick Pay (General) Regulations 1982 to provide that a person is entitled to statutory sick pay if they—

- have been notified that they are to undergo a surgical or other hospital procedure;
- have been advised to stay at home for a period of up to 14 days prior to being admitted to hospital for that procedure; and
- stay at home pursuant to that advice.

Organisations that employ fewer than 250 employees can claim back up to two weeks' SSP. For further details see the Government's guidance on statutory sick pay.

The NJC for Local Government Services issued a circular on this issue on 12 June - COVID-19: return to work, test & trace and admission to hospital.

This states:

"Self-isolation prior to admission to hospital
The NHS has instructed that anyone who is due to go into hospital as an in-patient (including day surgery) for planned or elective surgery / medical care must self-isolate, along with all members of their household, for 14 days prior to admission.

Unless already on sick pay, and in line with previous NJC guidance, all employees should remain on normal full pay for the duration of the self-isolation period. Those who can work from home (either in their own role or on alternative duties), should do so. We very much hope that dates scheduled for hospital admission do not get deferred, resulting in a further period of self-isolation being required, but this may be something that employers will unfortunately have to accept as a consequence of the current situation."

COLLECTIVE REDUNDANCIES: REVISED GUIDANCE AND HR1 FORM

The Government has issued revised redundancy guidance for employers explaining the obligations to inform the Secretary of State in advance where they propose to make 20 or more redundancies. The revised guidance is accompanied by a revised HR1 form.

The requirement to notify the Secretary of State is a separate obligation to that which requires employers to consult representatives of recognised trade unions although the information on the HR1 form submitted to the Secretary of State must also be shared with the representatives as part of those consultations.

UNFAIR DISMISSAL: RISK OF REPUTATIONAL DAMAGE

In **K v L** (UKEATS/0014/18) the Scottish EAT held that a dismissal due to the risk of future damage to the reputation of the employee's employer was unfair.

The facts and employment tribunal decision

K was employed in a school and had over 20 years' service when his house was raided by police. They confiscated three computers from his house due to intelligence that an IP address associated with K had been used for the download of indecent images of children.

Shortly after this, K informed the school what had happened but denied that he was responsible. He was suspended and an investigation was carried out.

K was charged by the police who referred the matter to the Procurator Fiscal. Based on the information provided, the Procurator decided not to prosecute. In the letter that confirmed this decision, K was informed that there was an obligation on the prosecutor to keep cases under review and they reserved the right to prosecute the case at a future date.

As part of the investigation, the school contacted the Crown Office and Procurator Fiscal Service (COPFS) and explained the difficulty they had in trying to make an informed decision as to whether or not it was appropriate for K to continue to work with children. They asked the Crown to share the evidence they had against K. The Crown sent a redacted copy of the summary of evidence to the school's HR Advisor for the purpose of the investigation, with the stipulation that it was not used or disclosed for any other purpose. The COPFS said it could not give a view as to whether K was a risk to children. It stated that he had not been reported to COPFS on any analogous matter. The HR Advisor did not share the letter with anyone else, including the other investigating officer or the Head of Service who chaired the disciplinary hearing.

At the investigatory meeting, K informed the school that his solicitor had advised him that the Procurator Fiscal's letter was "bog standard" and was issued to anyone against whom it had been decided not to take proceedings. The reason why the right to prosecute was reserved in such situations was in case evidence of further offending behaviour came to light, in which case the Procurator Fiscal could prosecute both offences as they could potentially corroborate one another.

An investigatory report was drawn up. It concluded that the charges were of a serious nature and, if it became publicly known, may bring the school into disrepute. K was invited to attend a disciplinary hearing by a letter which stated that the reason for the hearing was due to him being involved in a police investigation into illegal material of indecent child images on a computer found in his home and the relevance of this to his employment as a teacher. No mention was made of the risk that, if it became known that he had child images on a computer in his home, this might lead the school to suffer reputational damage.

At the hearing, K accepted that the Police had found indecent images on the computer. He said he did not know how they got there. He denied downloading them. He pointed out that he was not the only person with access to the computer as he shared the house with his son, and his son and his son's friends had access to the computer. K's solicitor gave evidence about the reasons why the Procurator Fiscal may choose not to prosecute, which include insufficient evidence of a crime or the identity of perpetrator, or the fact that the offence had been downgraded warranting it too minor to merit prosecution.

Although the issue of reputational loss was referred to by the HR Advisor during the hearing, there was not a great deal of discussion on the issue.

The Head of Service conducting the hearing concluded that there was insufficient material to hold that K was responsible for downloading the images. She decided however that K should be dismissed.

In her decision letter, she referred to the charges and the right the Procurator Fiscal had reserved to prosecute in the future. She stated that she was unable from the evidence before her to exclude the possibility of K having been responsible for the indecent images of children which he had admitted to having been found on a computer in his home. She went on to state that 'As a consequence of the set of circumstances which have arisen, risk assessments have concluded that it would present an unacceptable risk to children for you to return to your teaching post or any current vacancy within the Council'. She referred to the statutory responsibility that the Council had for child protection and continued 'If in the future, either by criminal prosecution or otherwise it was shown that you had committed an offence involving indecent images of children it would cause the Council serious reputational damage if we continued to employ you in any post in circumstances whereby it became public knowledge that we were aware of the allegations against you yet continued to employ you.' She concluded that the set of circumstances had resulted in an irretrievable breakdown of trust and confidence between K and the Council and an unacceptable level of risk to the Council of serious reputational damage.

K brought a claim of unfair dismissal. The employment tribunal dismissed his claim. K appealed to the EAT.

The EAT

The EAT upheld his appeal on a number of grounds:

- the lack of notice that he was at risk of being dismissed on the grounds of reputational damage;
- the use of an incorrect burden of proof in relation to misconduct and reasonableness of dismissal; and
- the unreasonableness of dismissing due to risk of reputational damage.

Notice of dismissal for reputational damage

The letter inviting K to the disciplinary hearing did not mention the fact that there was a possibility that he might be dismissed on the grounds of potential reputational damage. Only the investigatory report had mentioned reputational loss.

The principles of natural justice require that an employee should know the nature of the complaint they face. The employee should know what issues they should be ready to address by way of suitable evidence and supporting submissions.

The EAT was unwilling to accept that an employee can be dismissed on the basis of a matter which is not set out in the complaint that is made against them, but is referred to in the investigatory report. An investigatory report may be used to interpret the letter of complaint, but it cannot be used to supply a wholly separate basis for dismissal.

The employment tribunal had found that reputational loss was mentioned in passing in the disciplinary meeting. This supported the proposition that it was not under active consideration at the meeting. The ground had not been addressed by K. The EAT held that it would be entirely unjust if this ground was a basis for dismissal. The dismissal was therefore unfair.

Burden of proof

K argued that he could not be dismissed on the basis that he might have committed the offence. He argued that the employer must be satisfied that on the balance of probabilities he had committed the offence.

The EAT agreed. The Head of Service had concluded that there was insufficient evidence that K had been responsible for downloading the images and that he

was guilty of gross misconduct. However, she went on to say that she was unable to exclude the possibility that he was responsible. The approach she took was that unless she could exclude the possibility that he was guilty of the misconduct she was entitled to take it into account.

The EAT held that the obligation on an employer to act reasonably in the context of a dismissal requires them to apply the balance of probabilities burden of proof. If it is necessary to find facts established, then those facts must be proved to this standard. The fact that the matters in this case were extraordinarily serious for both K and the school did not alter the standard of proof. It was unreasonable to apply a test that in effect entitled the employer to dismiss unless all doubt as to the employee's guilt had been excluded.

The *Burchell* guidelines require the employer to have a 'reasonable suspicion amounting to a belief' that the employee is guilty of the conduct in question. The balance of probabilities standard was endorsed in *Burchell* where it was held that "…a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion". Clearly, in concluding that there was insufficient evidence to show that K was guilty of misconduct the Head of Service could not have had the requisite belief.

Reputational damage

Recognising that the above two decisions may be challenged on appeal, the EAT went on to consider the fairness of the decision to dismiss on grounds of reputational damage.

The EAT compared the circumstances of this case with those of the case of *Leach v Office of Communications* [2012] IRLR 839. That case concerned dismissal for reputational damage and its interrelationship with misconduct allegations. However, the circumstances of that case were very different to that of the present case.

In *Leach*, the employer had been warned by the Metropolitan Police Child Abuse Investigation Command (CAIC) that they had intelligence that indicated that their employee had engaged in paedophile activity in Cambodia and warned that he was a risk to children. At the disciplinary hearing, the employer expressed concern that if the allegations

turned out to be true and became public knowledge they would suffer reputational loss if they continued to employ him. They were also concerned that the employee had not disclosed potentially damaging information to them before the hearing. It decided to dismiss on the grounds of breach of trust and confidence. The Court of Appeal ultimately upheld a finding of fair dismissal.

The circumstances in the case of *Leach* were quite different to those in the current case. K had admitted that indecent images had been found on a computer in his home, but denied responsibility for them and there were other credible explanations. There was no press interest at the time. There was no prosecution and no indication that this would change.

The case of *Leach* demonstrates that dismissals based on reputational damage may be fair even though the conduct in question is disputed and the employer has not concluded that the employee was in fact guilty of the misconduct alleged. However, the circumstances in this case were far narrower than those in *Leach.* Other than the fact that K had admitted that indecent images had been found on a computer in his home, the employer had no further evidence to assist it. It was possible to infer from the charge that evidence existed, however, due to the Procurator Fiscal's unwillingness to prosecute it was difficult to infer the nature of that evidence. The EAT concluded that the evidence in this case was insufficient to support a dismissal based on reputational damage.

The employment tribunal had appeared to use the decision in *Leach* as a basis for holding that, where an employee works with children, dismissal on the basis that they posed a risk would generally be justified. However, the EAT held that it was unable to read the judgment in this way. Furthermore, the legal regime for those dismissed because of suspected child sex offences is the same for employees who face other grounds of dismissal. There are not two regimes, although what is reasonable will vary according to the nature of the case. The EAT did conclude however, that, although the comments made in *Leach* did not support the proposition that an employee can be dismissed because of mere risk, it did raise the question of whether some response short of dismissal is appropriate where there is doubt but no proof that the relevant conduct occurred. However, it noted that

the comments made were expressed in cautious terms.

Finally, in relation to reputational damage, the extent of risk to reputation had to be proved based on the knowledge available at the time. It was not reasonable to hypothesise as to future prosecutions and convictions.

The Procurator's letter could not be taken to mean that the Crown intended to prosecute at some later stage. The proper inference was that unless there was a change in circumstances K was not going to be prosecuted. The Head of Service was not entitled to assess matters on the basis of unknown risk but on the basis of the evidence known to her. The employment tribunal had erred in accepting that her approach was reasonable.

Comments

Any case of this nature clearly gives rise to very difficult decisions for an employer. Obviously, at the forefront of their minds will be the safety of the children that they are responsible for. However, this case demonstrates that an employer must still keep sight of the rights that employees have to not be unfairly dismissed and that those rights are not diminished due to the circumstances of their employment. The employer must act reasonably in dismissing for the reason that they do. The circumstances that apply will be taken into account in this balancing act. However, in this case, the balance had not tipped in favour of dismissal. According to the Scottish EAT, the employer had been unable to demonstrate a reasonable belief that the employee was responsible for the images on his computer and there was insufficient justification for a dismissal on the grounds of reputational damage.

Those involved in the safeguarding of children will be familiar with the Childcare Act 2006 and the Childcare Disqualification Regulations 2009, which can result in the disqualification of a teacher if they live with someone who has committed a relevant offence. This case is one step removed from those circumstances. It appears that an offence may have been committed in K's house, but no proceedings were taken, possibly due to the fact that the police were unable to find enough evidence as to the perpetrator, although this is not clear

The case *of Reilly v Sandwell Metropolitan Borough Council* (see Advisory Bulletin 659) is also of interest. In this case, a headteacher was fairly dismissed for failing to disclose her relationship with a person who had been convicted of possessing indecent images of children.

Although the EAT in this case overturned the employment tribunal's finding of a fair dismissal, it should act as a reminder to those in positions of trust that they should take extra care about the activities that those in their household, including visitors, undertake while in their house.

CASE IN BRIEF: FOSTER CARERS - EMPLOYMENT STATUS

In the case of **Glasgow City Council v Johnstone** (UKEATS/0011/18) the Scottish EAT has held that foster carers, Mr and Mrs Johnstone, were employees of the council.

A key feature in the findings of previous cases which have needed to assess the status of foster carers is that the basis of the relationship is the statutory regime which establishes the need for an agreement and fees to cover the costs of looking after the foster child who lives with the foster parents as part of their family. For example, foster parents are normally free to pursue their own career like any parent and foster children would be taken on family holidays.

In this case, the facts were quite different in that the foster parents were part of a specialised programme with very different terms. They received a professional fee of £32,000 per annum whether they had a child in their care or not, in addition to the fee for looking after a child when a child was in their care. They were required to attend weekly meetings and submit daily reports. They received paid holiday with no obligation to take any child in their care with them and were prohibited from taking on other employment.

Therefore, the judge decided that although the written agreement included much of the statutory elements of foster care arrangements, the additional features, particularly the professional fee over and above care allowances and the high degree of control held by the council on working obligations, created mutuality of obligation and changed its status to one of an employment contract.

The judge commented:

'In finding for the claimants in this case I am not in any way making a finding about the status of ordinary mainstream foster carers. What I am saying is that on the basis of the facts in the current case, the claimants were employees of the respondents.'

The decision in this case was clearly very fact-dependent. We still await the outcome of the appeal from the EAT decision in the case of *NUFC v Certification Officer* (see Advisory Bulletin 674) which is assessing the worker status of 'ordinary or mainstream' foster carers in England. The EAT held that given the statutory basis of foster carer engagements they were not workers for the purposes of rights under employment legislation.

EMPLOYMENT LAW TIMETABLE

We set out some of the key recent employment law developments, as well as those to look out for over the coming months.

Delayed from March 2018	Trade Union Act: check off provisions (see Advisory Bulletin 646). Due to lack of Parliamentary time, the Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017 have not yet been brought into force. We await information on when they will.
1 April 2020	Increase in National Minimum Wage rates (see Advisory Bulletin 676)
6 April 2020	Changes to employer national insurance treatment of termination payments over £30,000 (see Advisory Bulletin 653 and Advisory Bulletin 679). This was originally due to come into force in April 2019 but was delayed (see the Budget 2018 feature in Advisory Bulletin 664). Good Work Plan developments: • removal of Swedish derogation in the Agency Workers Regulations 2010 • changes to written statement entitlement • reduction in employee numbers required to request employer to negotiate an agreement in respect of information and consultation from 10% to 2% • statutory holiday pay reference period increased from 12 to 52 weeks.

	For further details see Advisory Bulletin 665, Advisory Bulletin 670 and Advisory Bulletin 676 and Advisory Bulletin 679. Changes to National Minimum Wage relating to salaried hours workers (see Advisory Bulletin 677 and Advisory Bulletin 679). Introduction of parental bereavement leave and pay (see Advisory Bulletins 662, 665 and 676 and Advisory Bulletin 679).
6 April 2021	Changes to IR35 rules and extension of obligations to large and medium private sector organisations (see Advisory Bulletin 676). This was postponed from April 2020.
To be confirmed – exit payment cap and recovery, and pension reforms	Implementation of various proposals to reform exit payments in the public sector: • The fixing of a cap on exit payments made to employees departing public sector employers. Consultation on draft legislation closed on 3 July 2019 (see Advisory Bulletin 669 and Advisory Bulletin 671). For details of the Government's response and draft regulations see this Advisory Bulletin and Advisory Bulletin 682. • Recovery of exit payments made to high earners who leave the public sector on or after the implementation date if they return to the public sector within 12 months of leaving. This was referred to in the 2019 Conservative Party Manifesto. • Other associated reform of redundancy payment limits and related pension scheme provisions (see this Advisory Bulletin)
No set date	Extending redundancy protection for women and new parents (see Advisory Bulletin 672). Measures to prevent misuse of confidentiality clauses (see Advisory Bulletin 668 and Advisory Bulletin 672). Extension of period required to break continuous employment from one week to four weeks.