Advisory Bulletin

Employment Law Update
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In this issue:

Welcome

In this month's bulletin we report two cases. The first, Rodgers v Leeds Laser Cutting, deals with the difficult issue of when a person may be said to have absented themselves from work due to serious and imminent danger, in this case in the context of the Covid-19 pandemic. The case is helpful, although very fact specific, as it looks at the issues which a tribunal may take into account when considering whether a dismissal for refusing to attend the workplace is automatically unfair on health and safety grounds.

The second case, Nursing and Midwifery Council v Somerville, addresses the complex area of worker status in the context of an overarching contract that excludes obligations to offer or accept work. The Court of Appeal has ruled that this does not prevent a finding of worker status for the time that a person is actually carrying out work.

Also this month, we report the publishing by the Government of statutory guidance on Special Severance Payments for best value authorities. This guidance is part of the Government's continuing agenda on severance pay in the public sector and emphasises the need for special severance payments (as defined) to be made only in exceptional circumstances.

Following the Queen's Speech, which did not contain an Employment Bill, we report the Government's announcement of its Future of Work review. The aim of the review is to make recommendations to guide long-term, strategic policy making on the labour market.

Finally, we include links to Government information to assist employers who may be considering offering work to people coming from Ukraine and also details of the latest development in the ban on exclusivity clauses, plus the employment law timetable.

UNFAIR DISMISSAL: HEALTH AND SAFETY/COVID-19

In **Rodgers v Leeds Laser Cutting** [2022] EAT 69, the EAT held that an employment tribunal was not wrong to find that an employee dismissed after absenting himself from work during the Covid-19 lockdown had not been automatically unfairly dismissed because of fears for his safety at work.

The facts

Mr Rodgers commenced work for Leeds Laser Cutting (LLC) as a laser operator on 14 June 2019. He worked in a large warehouse type space about the size of half a football pitch with a small number of other employees, typically five at a time. On 16 March 2020, a colleague of Mr Rodgers displayed symptoms of Covid-19 and was sent home and told to self-isolate. At some point shortly afterwards Mr Rodgers developed a cough. He initially attributed it to dust and cold but then feared he might have been exposed to Covid-19 and decided to self-isolate. The country was experiencing the first lockdown and Mr Rodgers informed LLC that he would not be returning to work until the lockdown had eased. This was on the basis that he had a vulnerable child and also a young baby. Towards the end of April Mr Rodgers was dismissed.

Mr Rodgers did not have sufficient service to claim ordinary unfair dismissal but claimed that he had been automatically unfairly dismissed on health and safety grounds.

The law

Section 100 of the Employment Rights Act 1996 (ERA) states:

"100.— Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that— …

> (d) in **circumstances of danger** which the **employee reasonably believed** to be **serious** and **imminent** and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
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> (e) in **circumstances of danger** which the **employee reasonably believed** to be **serious and imminent**, he took (or proposed to take)

appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them." [**emphasis added**]

Case law had also suggested that appropriate steps to be taken by an employee to protect themselves would be reporting their concerns to the employer.

The employment tribunal

The tribunal dismissed Mr Rodgers' claim.

Evidence provided by Mr Rodgers was at times contradictory but the employment tribunal made decisions about the facts. Mr Rodgers had no written contract or written statement of particulars and seemed to have no access to the staff handbook. However, LLC managers had been clear about the communications with staff about the Covid situation.

Following the announcement of the first national 'lockdown' on 23 March 2020, LLC published, on 24 March 2020, an employee communication'. This document confirmed that the business would remain open, asked staff to work as normally as possible and stated "we are putting measures in place to allow us to work as normal".

A risk assessment was carried out by an external professional in mid-March 2020. That assessment identified the level of risk of various scenarios, with recommendations to reduce risk. Many of these recommendations referred to social distancing and wiping down surfaces, as well as staggering start/finish/lunch/break times and were already in operation before the formal risk assessment was carried out, although there was evidence of only partial adherence to these specific recommendations.

There were conversations with staff at the premises in relation to safety measures to protect against Covid-19. These included conversations about social distancing and the need for handwashing and Government advice was reiterated. Mr Rodgers accepted some of this.

The tribunal found that it was possible for Mr Rodgers to socially distance at work, certainly for the majority of his role. Mr Rodgers accepted that was the case most of the time, but at times he had to work closely with a colleague performing certain tasks although he had not raised this with LLC. Mr Rodgers was also sometimes asked to go out on deliveries, although he had not raised that as an issue with LLC.

Mr Rodgers gave vague evidence about a lack of masks for workers saying the dispenser was empty and that he was sent out on deliveries without a mask. The tribunal preferred LLC's consistent view that masks were available and managers had never been spoken to about lack of masks.

Having left work to self-isolate, later on 29 March 2020 Mr Rodgers sent an email to Mr Thackery, his line manager, saying "unfortunately I have no alternative but to stay off work until the lockdown has eased. I have a child of high risk as he has siclecell [sic] & would be extremely poorly if he got the virus & also a 7 month old baby that we don't know if he has any underlying health problems yet".

Mr Thackery replied: "ok mate, look after yourselves".

Mr Rodgers was self-isolating from 28 March to 3 April 2020 and obtained a self-isolation note from NHS 111 for the period. However, on 30 March he drove his friend Mr Knapton, who had broken his leg, to hospital. Mr Rodgers said that both he and Mr Knapton wore masks, that Mr Knapton sat in the back of the car and that he did not accompany Mr Knapton into the hospital itself. Mr Rodgers also told the tribunal that he had not left home for nine months during the pandemic, but that he had also spent a period of time working in a pub at some point during the pandemic, where safety measures were in place.

There was no further contact between Mr Rodgers and LLC to clarify the position or discuss furlough or sick pay until Mr Rodgers sent a text on 24 April 2020 saying: "just been told iv been sacked for self isolating, could you please send it to me in

writing or by email…with an explanation of why my employment ended with the date it ended. i also need my p45 sending out as soon as possible".

The tribunal was not convinced by Mr Rodgers's evidence about why he decided not to come into work. He gave evidence that if all the measures described by LLC were in place, that would make the business as safe as possible from infection. He gave evidence that this would possibly make the workplace safer than the community at large, but not safer than his own home. Although he had referenced driving his friend to hospital and working in a pub where safety measures were in place, he gave evidence that he was not sure that any measures would have made him feel safe enough to work at LLC. The evidence about any concerns he had and how these were raised was also confusing. He said that he didn't make any complaints. He said that he raised issues but was told 'there's the door'. He said he and colleagues talked about their concerns. He said he did mention this to Mr Thackery, but could not give any firm examples. When asked if he had complained to Mr Thackery that the risk assessment measures (wiping down, etc.) were not happening, he said "probably not in them words". He was then asked if he made that complaint and he said "not that I can remember." When asked whether he told managers, or just discussed with colleagues, he said that he had chats with colleagues, but Mr Thackery 'knew about it'. When asked if he said to Mr Thackery measures are not in place and so the workspace isn't safe, Mr Rodger's replied "I can't say that I remember saying that. I'd be lying." Mr Thackery said that there were some general conversations about Covid-19, but only in relation to general society and he had no recollection of ever threatening Mr Rodgers with his job as alleged.

The tribunal held that Mr Rodgers did not raise concerns with his employer that could reasonably be described as meaningful concerns or complaints, which would inform LLC that he thought there were circumstances of imminent danger within the workplace.

The judge concluded that Mr Rodgers' decision to stay off work entirely was not directly linked to his working conditions; rather, his concerns about the virus were general ones, which were not directly attributable to the workplace. In his oral evidence, it was clear he was concerned as to the virus in general, he referred to his own home as being the safest place and he told the tribunal that he chose to self-isolate "until the virus calms

down".

When communicating to his employer his intention to stay away from work, Mr Rodgers made no reference to the working conditions as playing any part in his decision. The text on 29 March 2020 said he was going to stay off work until the lockdown eased; nothing to do with the conditions of employment.

LLC sent a P45 on 24 April 2020 that was received by Mr Rodgers on 26 April 2020. LLC accepted that Mr Rodger's receipt of the P45 constituted a dismissal. The tribunal did not make a finding of fact about the reason why the respondent sent the P45, so there was no specific finding of fact about LLC's reason for dismissing Mr Rodgers.

In the tribunal's judgment, whilst conditions pertaining to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, it did not consider that they did so in this case. It did not consider that Mr Rodgers reasonably believed that the circumstances were of serious and imminent danger, for the reasons set out above.

When considering s100(1)(d) of the ERA, the tribunal concluded that Mr Rodger's decision to stay off work was not directly linked to his working conditions. This was not a case where he refused to return to his place of work, or any dangerous part of his place of work due to the conditions in that environment; he refused to return to his place of work until the national lockdown was over. The tribunal held that could not lie at the door of the employer and the criteria in s100(1)(d) were not made out.

When considering the test within s100(1)(e) the tribunal concluded that Mr Rodgers had not reasonably believed that the circumstances were of serious and imminent danger. Furthermore, the steps he took in absenting himself entirely were not appropriate and that he did not take appropriate steps to communicate any belief that there were circumstances of serious and imminent danger to his employer. Therefore, s100(1)(e) was not engaged.

Mr Rodgers appealed.

The EAT

The EAT dismissed his appeal.

The components of s.100(1)(d) relevant to the appeal were:

- whether Mr Rodgers believed that the circumstances of danger were serious and imminent;

- whether any such belief was reasonable; and

- whether he could reasonably have been expected to avert the serious and imminent circumstances of danger.

The fact that the Government had made statements that Covid-19 presented a serious and imminent threat to public health and that Mr Rodgers had genuine concerns about the pandemic at large, and particularly about the safety of his children, did not mean that he necessarily had a genuine belief that there were serious and imminent circumstances of danger, either at work or elsewhere, that prevented him from returning to work.

The tribunal had concluded that Mr Rodgers considered that his workplace constituted no greater a risk than there was at large. Mr Rodgers did not reasonably believe that there were circumstances of danger that were serious and imminent, at work or at large, that prevented him returning to his place of work.

The tribunal had found that having regard to all the circumstances, as Mr Rodgers knew them, he could reasonably have been expected to avert any dangers, by abiding by the guidance at that time, namely by socially distancing within the large, open workspace, by using additional personal protective equipment if he wished to do so, and by regularly washing/sanitising his hands. If there were specific tasks which he felt removed his ability to socially distance, it seemed these were tasks he could reasonably have refused to carry out or raised specifically with his employer. There was no evidence he did so.

The EAT concluded that despite the topicality and the potential importance of employment issues arising from the Covid-19 pandemic, the sympathy that one necessarily has for the concerns that Mr Rodgers had about the safety of his children, and the arguments advanced on his behalf, no error of law had been established. The tribunal had accepted that the pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but this case failed on the facts.

Comments

It is important to note that the EAT agreed with the position taken by the tribunal that the pandemic could in principle trigger protections under s.100 ERA and that this case was dealt with very much on the evidence and credibility of witnesses, neither of which favoured Mr Rodgers. It therefore remains possible that different facts could create a bigger challenge for tribunals to decide upon. However, in such cases we anticipate that local authority employers would have taken a much more thorough approach to investigating, explaining the situation and considering alternative courses of action before any decision to dismiss were taken.

WORKER STATUS AND MUTUALITY OF OBLIGATION

In **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229, the Court of Appeal held that the fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working.

The facts

Mr Somerville was a panel member and chair of a Fitness to Practice Committee of the Nursing and Midwifery Council (the Council), a professional regulatory body. The Council maintains a pool of appointed persons to sit as panel members of Fitness to Practise Committees. Mr Somerville was appointed for two four-year periods in 2012 and 2016 under a panel members services agreement (the 2012 and the 2016 Agreements). He agreed to sit on particular days, but was free to refuse to accept any particular hearing date, or to cancel a hearing that he had agreed to attend by notifying the Council that he was no longer available on that date.

In 2018, Mr Somerville brought a claim for unpaid annual leave under the Working Time Regulations 1998 (the Regulations). To be successful in his claim, he needed to establish that he was a worker under Regulation 2(1) of the Regulations. It is this issue which is the subject of this case report.

The law

Regulation 2(1) provides that:

> ""worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment; or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing,

whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

The employment tribunal

The tribunal held that Mr Somerville was a worker for the purposes of regulation 2(1) of the Regulations.

The tribunal began by considering whether Mr Somerville had a contract of employment and was therefore a worker due to regulation 2(1)(a). The tribunal found that there was an overarching contract between Mr Somerville and the Council governing his period of appointment. This was contained in the appointment letters and the 2012 and 2016 Agreements. However, the terms of this contract provided that the Council was not obliged to ask Mr Somerville to provide services, and Mr Somerville was not obliged to provide them, if asked to do so. This contract was therefore not a contract of employment.

The tribunal also found that there were a series of individual contracts which arose when hearings were assigned to Mr Somerville and under which he agreed to provide his services personally in return for a fee. The tribunal held that these contracts were also not contracts of employment, as Mr Somerville could withdraw from the assignment at any time. There was not therefore the necessary mutuality of obligation necessary through the whole period of the engagement. (Note: This aspect of the tribunal's decision was inconsistent with the subsequent Court of Appeal decision in *The Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Limited* [2021] EWCA Civ 1370 (the *PGMOL* case). In the *PGMOL* case, the Court held that the tribunal in the *PGMOL* case had erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation. See Advisory Bulletin 695 for further details.)

Having found that Mr Somerville did not have a contract of employment and therefore did not fall under limb (a) of regulation 2(1), the tribunal then went on to consider whether he was a worker under limb (b).

To qualify as a worker, three conditions must be satisfied:

- there must be a contract between Mr Somerville and the Council;
- the contract must be one in which he undertook to perform work personally for the Council;
- and the Council must not be a client or customer of a profession or business carried on by Mr Somerville.

The tribunal had already found that Mr Somerville was engaged under an overarching contract and a series of individual contracts under which he had agreed to provide his services personally. Therefore, the first two of the above elements were met.

The tribunal also concluded that the Council was not a client or a customer of a profession or business carried on by Mr Somerville. The tribunal looked at the overall picture and took into account the method of recruitment, the significant degree of integration into the operation, the element of subordination in the conduct/performance procedure and the absence of any negotiation in respect of pay.

The tribunal also considered the effect of the absence of mutual obligations to offer/accept a minimum amount of work. It held that this was not incompatible with a finding of worker status.

The tribunal therefore concluded that Mr Somerville was a worker for the purposes of limb (b).

The Council appealed to the EAT.

The EAT

The EAT dismissed the appeal. Before the EAT, the Council argued that Mr Somerville could not be a worker because there was not the necessary mutuality of obligation. However, the EAT held that mutuality of obligation was not a prerequisite for worker status.

The EAT granted the Council permission to appeal to the Court of Appeal.

Court of Appeal

The Court of Appeal dismissed the appeal.

The Council argued that a contract cannot fall within the scope of limb (b) unless it includes an irreducible minimum of obligations on the parties. That meant that

each contract had to include an obligation on the part of the worker to perform some minimum amount of work. There were no such obligations in the present case, as provided by the 2012 and 2016 Agreements.

The Council further submitted that the irreducible minimum obligation was an obligation on the putative employer to offer work in future and an obligation on the worker to undertake that future work when it was offered. It was not about whether an individual was legally obliged to continue with a particular assignment until it was completed. The Council argued that this was consistent with the policy underlying the Regulations, which was to protect individuals who were in a dependent position and, in circumstances where there was no irreducible obligation, a person would not be in such a position of dependency.

In response, Mr Somerville argued that the concept of an irreducible minimum obligation was relevant to establishing whether an individual has a contract of service extending beyond a single assignment. However, that obligation was not relevant to assessing whether the requirements of the limb (b) definition of a worker had been met. Where, as here, he had agreed to perform services by attending a hearing, and had done so and had been paid, he was a worker within the meaning of the Regulations.

The Court considered the requirements of the definition of a limb (b) worker. Firstly, there must be a contract i.e. there must be legally enforceable obligations owed by both parties. On the part of the individual, the obligation must be one whereby the individual undertakes to do or perform any work or services and to do so "personally". Finally, the other party must not be a client or customer of any profession or business undertaking carried on by the individual.

In this case, there were two different types of contract. The first was contained in the 2012 and 2016 Agreements and governed Mr Somerville’s appointment as a panel member and chair. These agreements did include mutually enforceable obligations and so did give rise to *a* contract. For example, the Agreements imposed obligations on the Council to provide communications on guidance and procedure and to provide training. Mr Somerville was obliged to comply with relevant guidance and to provide information when required and to deal with information confidentially. The Agreements did not,

however, include the type of obligations which were necessary to bring them within the scope of a worker's contract. The Agreements did not amount to a contract of employment (i.e. limb (a) of the definition of worker) because they did not impose any obligation on the Council to offer or pay for work or place any obligation on Mr Somerville to provide any services. Furthermore, they did not *of themselves* include obligations of the kind necessary to make them worker's contracts within limb (b). More specifically, they did not include an obligation on the claimant to do or perform personally any work or services.

However, the tribunal had found that Mr Somerville and the Council had also entered into a series of individual contracts. Each time the Council offered a hearing date, and Mr Somerville accepted it, he agreed to attend that hearing and the Council agreed to pay him a fee. By those individual agreements, and the obligations contained in the 2012 and 2016 Agreements setting out how Mr Somerville was to carry out the task of conducting a hearing, Mr Somerville "agreed to provide his services personally".

The tribunal had also found that the Council was not the client or customer of a profession or business carried on by Mr Somerville. Those findings were sufficient to entitle the tribunal to conclude that Mr Somerville was a worker in that he entered into (and had worked under) a contract whereby he undertook to perform services personally for the Council and the Council was not a client of his business or professional undertaking.

The fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working. The position is clearly established in relation to contracts of employment by the decision in the *PGMOL* case and the Court held that similar principles apply when considering the relationship between a general or overarching contract and individual contracts to do work or perform services personally.

Similarly, the fact that Mr Somerville could withdraw from the agreement to attend a hearing even after he had accepted it did not alter matters. Mr Somerville had entered into a contract which existed until terminated. Furthermore, if it was not terminated and Mr Somerville did chair the hearing, he would, in the language of the Regulations, have worked under a contract personally to

perform services. Nor does the reference to "undertakes" in limb (b) indicate that there must be some distinct, superadded obligation to provide services independent from the provision of the services on a particular occasion. "Undertakes to do or perform" in this context means no more than "promises to do or perform". Finally, when deciding whether a specific agreement to provide services on one particular occasion amounts to a worker's contract, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant.

The Court dismissed the Council's argument that the Regulations were designed to protect those who were in a dependent relationship, which was not the case where there was no irreducible minimum obligation. The purpose underlying the Regulations is to ensure that the relevant rights are available to employees, and also to those who are self-employed and who do work or provide services personally (otherwise than for clients in a business carried on by the self-employed person on his own account). The Court could see no policy reason for giving the words in the definition of worker a narrower definition.

Comments

This case confirms that a person who is engaged under an overarching contract in which it is made explicitly clear that there are no obligations to offer and accept work can be a worker when actually carrying out work. There is no requirement for there to be an irreducible minimum of obligation which extends beyond the contract for a specific engagement, although this may be something which may be taken into account in some cases when assessing whether there is a lack of subordination in the relationship, which is inconsistent with the status of a worker, as in the case of *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, which concerned discrimination claims.

However, a worker who only establishes that they meet the limb (b) test in respect of specific engagements will have limited employment rights. For example, in relation to paid annual leave under the Working Time Regulations, their entitlement would be limited to the leave accrued during the engagement. In many cases, it is likely that this would be paid in lieu at the end of an engagement, unless it was a lengthy engagement.

SPECIAL SEVERANCE PAYMENTS: STATUTORY GUIDANCE

On 12 May 2022 the Department for Levelling Up, Housing & Communities (DLUHC) issued statutory guidance, which applies to "best value authorities", when making Special Severance Payments (SSPs) from that date.

The guidance is issued under section 26 of the Local Government Act 1999 and its purpose is to set out:

- The Government's view that SSPs do not normally represent value for money
- What or what is not an SSP
- The criteria employers should consider in the 'exceptional circumstances' in which it may be appropriate to make an SSP
- Examples of those exceptional circumstances
- Clarify the disclosure and reporting requirements for SSPs

What bodies does the guidance apply to?

The guidance applies to best value authorities. They are listed at the end of the guidance and include English local authorities, combined authorities and fire rescue authorities. Welsh local authorities are not covered.

On the face if it therefore the guidance applies in respect of maintained school employees, as the local authority is the employer in those schools, and to combined and fire and rescue authority employees. However, the response to the consultation states:

"8.4. The government's preference is to take forward these measures as broadly as possible while retaining valuable certainty as to coverage. Further discussions are being undertaken across government to ensure that a comprehensive and effective set of controls are in place across the public sector. While that is being undertaken, we will clarify that at present this guidance will not apply to any staff working for a combined authority or a fire and rescue authority, nor will it apply to staff working for a PCC or a Police Fire and Crime Commissioner. In addition, it will not apply to those local government staff employed in a maintained school."

LGA comments: We have not yet received any separate clarification, but the expectation is that maintained schools and fire and rescue authorities are not covered

by the guidance, but in turn they may be covered by any future education or fire-sector specific guidance.

What is a Special Severance Payment?

SSPs are described as payments made to employees, office holders, workers, contractors and 'others' outside of statutory, contractual or other requirements when leaving employment in public service. The key then to whether such exit related payments are SSPs will be whether they exceed statutory, contractual, or other requirements. To assist with this assessment the guidance sets out the following examples.

The following types of payments are **likely** to be SSPs:

- Settlement agreement payments, to discontinue legal proceedings without admission of fault
- the value of any employee benefits or allowances which are likely to continue beyond the employee's agreed exit date
- loan write-offs
- honorarium payments
- hardship payments
- retraining payments related to termination of employment (LGA comments: this will not include the right under section 52 of the Employment Rights Act 1996 to take paid time off when under notice of redundancy to arrange training, as that is a statutory right).

The following payments **may** be SSPs "depending on the contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions":

- pay or compensation in lieu of notice where the amount of the payment is not greater than the salary due in the contractual notice period (LGA comments: whether such a payment is an SSP is likely to link back to whether there is a contractual obligation, for example under a pay in lieu of notice clause, to make that payment in the particular circumstances of the employee not working their notice period. We are however seeking confirmation from DLUHC.)

- pension strain payments arising from the employer discretions to enhance standard pension benefits e.g. for example in relation to regulation 30(5) of the LGPS Regulations where the employer agrees to waive the reduction of benefits on a retirement before normal pension age (see regulation 30(8)) or grants additional pension under regulation 31. (LGA comment: we have asked DLUHC what factors would suggest the pension strain payment is, or is not, an SSP.)

The following payments are **not** SSPs:

- statutory and contractual redundancy payments
- severance payments made under the authority's policy under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006
- pension strain payments for those who leave by reason of redundancy or business efficiency aged 55 or over (see regulation 30(7) LGPS Regulations), or where the employer waives the reduction on a flexible retirement (see 30(6) and (8) LGPS Regulations)
- payments for accrued annual leave
- payments ordered by a court or tribunal or those agreed in judicial or non-judicial mediation (LGA comment: we have asked DLUHC to confirm that any mediation process not under the auspices of a court or a tribunal would fall into the definition of a non-judicial mediation)
- payments made as part of the ACAS Early Conciliation process
- payments made to compensate for injury or death of the worker
- payments made as consequence of the award of an ill-health pension under regulation 35 of the LGPS Regulations.

Considerations on making Special Severance Payments

In deciding whether it is appropriate to make an SSP the Government expects that local authorities should consider whether the payment would be a proper use of public money. That includes considering the economic rationale for making such payments, as well as the impact on efficiency and effectiveness.
In respect of economic factors, the guidance provides that local authorities should consider:

- the feasibility of achieving exit at lower cost
- how the payment will be perceived by the public and whether it is in line with duty to manage taxpayers' money appropriately
- what alternative use could be made of the money
- does it set a potential precedent?
- evidence for 'additionality': evidence that employee would not have accepted statutory and contractual benefits alone.

LGA comments: We anticipate that in nearly all cases where SSP-type payments are being made, local authorities will already be considering those points.

In respect of efficiency and effectiveness, the guidance provides that local authorities should:

- seek legal advice on the prospects of successfully defending a claim if the employee where to bring one, alongside the likely legal costs
- ensure that payments are not used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment
- consider alignment with the private sector (LGA comment: the guidance assumes that private sector severance payments "are typically less generous")
- manage conflict of interests: individuals who are the subject of a relevant complaint should have no role in deciding payments

LGA comments: As with the economic considerations, we anticipate that local authorities will in nearly all cases be taking those factors into account, apart from routinely considering alignment with the private sector. The reason for that is that very often there is a lack of transparency around SSP-type payments made in the private sector, so 'benchmarking' is simply not possible. Further, in any event, the driving consideration in most cases will be the prospects and costs of defending any claim that may be brought by the employee.

What are exceptional circumstances?

The guidance sets out the exceptional circumstances under which SSPs may be payable.

The first is where an authority considers making an SSP to set aside a break in service which would otherwise reduce entitlements. The example is given of where a member of staff has taken a break in service to accompany their spouse on military service overseas. Related to that, the guidance provides that an SSP may also be appropriate in circumstances where, to help recruitment and retention, the authority has indicated that it will recognise for severance payment calculation purposes past service with another non-Modification Order employer.

The second circumstance where the guidance provides that an SSP may be considered is to settle disputes, where it can be demonstrated that other avenues have been explored and excluded. In such circumstances and after receiving appropriate professional advice, an SSP may be the most suitable and prudent use of public money.

LGA comments: In practice, we anticipate that settling disputes will already be the most common example of where authorities make SSP-type payments. In such cases it is very likely that they will have considered and exhausted alternative options and obtained the necessary advice before making the payment. Therefore, this part of the guidance is unlikely to lead to any significant change in authorities' practices.

This part of the guidance concludes by stating that those approving an SSP should be provided with evidence of the attempts to resolve a dispute before they escalated to a legal claim. In relation to frivolous or vexatious claims, even where the costs of defending that claim will exceed the likely costs of settling it, the guidance provides that it may be more desirable to defend the claim as that will

discourage future similar claims.

LGA comments: These types of practices and considerations will all already be commonplace in local authorities where SSP-type payments are being considered.

Accountability

The guidance sets out the approval process for SSPs and provides:

- payments of £100,000 and above must be approved by a vote of full council, as [already] set out in the Localism Act 2011 [and the supplementary guidance issued under section 40 of that Act].

- payments of £20,000 and above, but below £100,000, must be personally approved and signed off by the Head of Paid Service, with a clear record of the Leader's approval and that of any others who have signed off the payment

- payments below £20,000 must be approved according to the local authority's scheme of delegation. It is expected that local authorities should publish their policy and process for approving these payments.

Where the proposed SSP is to the Head of Paid service, to avoid a conflict of interest, it is expected that the payment should be approved by a panel including at least two independent persons.

Finally, this part of the guidance sets out the legal duties of elected members to spend public money with regularity and propriety, as well as the role of the s.151 (finance) officer and Monitoring Officer in ensuing expenditure is lawful and justified.

LGA comments: It is this part of the guidance that potentially raises the most issues and questions for local authorities.

The first point to note is that on the face of it this approval process only applies to the SSP element of a severance payment, except where it is referring to duties already in place i.e. under the Localism Act 2011 and the duties to spend public money with propriety as well as the existing s.151 officer and Monitoring Officer duties, in which case those duties apply to the whole payment. Assuming so,

this potentially raises an issue where the total severance payment is £100,000 or more, but the SSP element is under that figure but £20,000 or above. The SSP guidance would on the face of it require the SSP element of the payment to be signed off by the Head of Paid Service, with a clear record of the Leader's approval and of any others who have signed off the payment. However, the Localism Act 2011 requirements would still apply, so the whole payment would still need to be approved by a vote of full council.

Because of this, we have asked DLUHC to confirm the position and whether it is in fact the intention that Head of Paid Service and Leader approval is still needed for the SSP element, where full council approval will in any event be sought through a vote for the whole severance payment. In doing so we have pointed out to DLUHC the accountability and transparency that applies under the Localism Act process and in particular that the guidance provides that authorities should set out clearly the components of severance packages.

This second issue on this part of the guidance concerns the requirement that the Leader's approval must be sought where the SSP is over £20,000 but under £100,000. Staffing functions are non-executive functions. The Leader's involvement in the decision-making process for an SSP therefore raises governance issues, and we have raised these with DLUHC, as we have previously, and have asked for a response.

Aside from those governance issues, involving an individual Leader in an SSP's approval may also run contrary to the general principle that there is a need for democratic accountability and transparency, and that this is enabled through taking these matters through committee or full council. Related to that, the guidance itself recognises at the last bullet point of 3.3 that for reasons of managing conflicts of interest, individuals who are the subject of complaints should have no role in deciding whether those complaints are settled by making an award. This raises questions about how to deal with a situation where there is a complaint against the Leader, as the approval process would still on the face of it seem to require the Leader's approval for any SSP made in relation to that complaint, where the SSP fell between £20,000 and £100,000. We have raised the issue of dealing with this potential conflict of interest with DHLUC.

Further, in any event not all local authorities will have a Leader. In such circumstances we have asked DHLUC whether it can be assumed that the Elected Mayor is the equivalent.

The third issue concerns the requirement that where the proposed SSP is to a Head of Paid Service, it is expected that the payment should be "approved by a panel of at least two independent persons". Independent persons are not defined, nor other legislation referred to. We have asked DLUHC if they are intended to be the independent persons appointed under s.28(7) of the Localism Act 2011.

If that is the case, it raises potential conflict issues. The question of an SSP to a Head of Paid Service and approval of that payment may be part of a settlement negotiation. If that negotiation does not conclude and/or the panel including the independent persons does not give their approval then it could result in dismissal procedures against the Head of Paid Service. If that is the case, then the Local Authorities (Standing Orders) (England) Regulations 2001 (as amended by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015) require the involvement of a panel made up of at least two Localism Act appointed independent persons in that dismissal. If the independent persons in the approval and then the dismissal processes were the same people then that could raise conflict issues, and potentially compromise the fairness of a dismissal. The issue could be managed by using two different independent persons in the dismissal process, but that may mean having to find, and in some cases having to appoint, those other persons.

Disclosure

This part of the guidance sets out the requirements to publish information on pay and exit payments under the Local Government Transparency Code, section 38 of the Localism Act and regulation 60 of the LGPS Regulations. It also refers to the requirement under regulation 10 of the Accounts and Audit Regulations 2015, which requires local authorities to publish an annual statement of accounts, governance statement and narrative statement. As well as following existing guidance on reporting exit payments under the CIPFA Code of Practice on Local Authority Accounting, the SSP guidance provides that local authorities should also disclose in their annual accounts all severance payments, pension fund strain costs and other SSPs made in consequence of termination of employment or loss of office (but excluding

payments on death or ill-health retirement). Such data may be anonymised though in order to comply with data protection requirements.

Related to this the guidance refers to DLUHC's annual collection of data on exit payments, and it states that the results will be published on gov.uk, subject to necessary anonymisation to comply with data protection law.

Further developments and information

As further information becomes available from DLUHC on the issues we have raised in this feature, we will report them in future editions of this bulletin.

FUTURE OF WORK REVIEW

The Queen's speech setting out the Government's legislative programme for 2022/23 did not include an Employment Bill. Although there has been some comment about the lack of an Employment Bill to deliver various employment law commitments already made, the Government has stated that the vast majority of legislation to improve workers' rights does not need to come in a single legislative package entitled 'Employment Bill'. The Government has also announced a review into the Future of Work to be led by Matt Warman MP. The review would identify key questions as the government seeks to grow the economy after the COVID-19 pandemic.

The Terms of Reference state that the objectives will be to:

a) Build on existing Government commitments (including those made in response to the Matthew Taylor Review) to assess what the key questions to address on the future of work are, as we look to build back better from the pandemic. It should then select a few of those to focus on, without attempting to provide detailed consideration of every future challenge.

b) Provide a more detailed assessment of selected issues, engaging widely with independent experts, academics, think tanks and relevant government departments and drawing on international comparisons where appropriate.

c) Based on this assessment, make recommendations to guide long-term, strategic policy making on the labour market.

The review will be conducted in two parts. The first phase will produce a high-level assessment of the key strategic

issues on the future of work. The second phase will then provide a more detailed assessment of selected areas of focus from the first phase. This will not attempt to answer every challenge that the future labour market is likely to face. Rather, the review will focus on areas where Government policy thinking is least developed, where the least consensus exists, or where the size of the opportunity for change is the greatest.

The review will be conducted over spring and summer 2022, before findings are evaluated and a written report, including recommendations, will be submitted to the Prime Minister.

It is therefore hard to predict when we might see new employment legislation. However, it is possible we may see a number of separate legislative proposals or employment legislation attached to other pieces of legislation passing through Parliament to deliver on commitments already made. Alternatively, the Government could wait until the outcome of this latest review before acting.

OFFERING WORK TO PEOPLE COMING FROM UKRAINE

The Government has published Guidance for businesses offering work to people coming from Ukraine and has also amended its guidance on right to work checks to provide specific information in respect of Ukrainian nationals arriving in the UK.

EXTENDING THE BAN ON EXCLUSIVITY CLAUSES IN CONTRACTS OF EMPLOYMENT

Following the conclusion of the consultation on extending the ban on exclusivity clauses in contracts of employment (see Advisory Bulletin 687), the Government has responded saying that it will legislate to extend the ban to employment contracts where the guaranteed weekly income is below or equivalent to the Lower Earnings Limit, currently £123 a week.

The legislation will also provide the right for employees not to be unfairly dismissed or subjected to a detriment for failing to comply with an exclusivity clause.

The Government has given no indication of when the legislation will be laid or the ban come into effect.

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.
4 November 2020	Introduction of a £95,000 cap on public sector exit payments (see our webpage on local government exit pay reforms). **Note:** On 12 February 2021 the Government announced that the cap was disapplied with immediate effect. On 25 February the Restriction of Public Sector Exit Payments (Revocation) Regulations 2021 (the Revocation Regulations), were then placed before Parliament which came into force and formally revoked the Exit Cap Regulations on 19 March 2021. More detail on this is in Advisory Bulletin 688.
6 December 2021	Increase in maximum salary for political assistants in local authorities in England (see Advisory Bulletin 695).
1 April 2022	Increase in National Minimum Wage rates (see Advisory Bulletin 696).
To be confirmed – further exit pay and pension reforms	Implementation of further proposals to reform exit payments in the public sector: • DLUHC (previously MHCLG) reforms to exit pay for local government workers (see Advisory Bulletin 688) • 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. • Following revocation of the £95,000 cap on public sector exit payments, the reintroduction of different legislation to cap or place additional limits on certain public sector exit payments.
No set date	Extending redundancy protection for women and new parents (see Advisory Bulletin 672)

	Introduction of carers' leave (see Advisory Bulletins 679 and 694)
	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.
	Duty to prevent sexual harassment (see Advisory Bulletin 694).
	Extending the ban on exclusivity clauses in contracts of employment (see this bulletin).

Key data

SMP, SPP, ShPP, SAP and Statutory Parental Bereavement Pay basic rates	£156.66 or 90 per cent of normal weekly earnings if lower from 3 April 2022
SSP	£99.35 from 6 April 2022
Lower Earnings Limit	From 6 April 2022-23 limit: £123 per week
'A week's pay'	£571– statutory limit for calculating a week's pay from 6 April 2022
	£594 in Northern Ireland from 6 April 2022

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
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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