

Consultation on New Best Value Statutory Guidance: Special Severance Payments

Response of the Association of School and College Leaders

A. Introduction

1. The Association of School and College Leaders (ASCL) represents over 21,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million young people in more than 90 per cent of the secondary and tertiary phases, and in an increasing proportion of the primary phase. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation.

B. Key points

3. The consultation document on the draft statutory guidance states:

The 2015 Government manifesto committed to ending six-figure exit payments in the public sector for the best paid staff. As part of taking this commitment forward, we are proposing to issue the enclosed draft statutory guidance for local authorities in England.

The Best Value duty is set out in section 3 of the Local Government Act 1999 and this statutory guidance would form part of the existing Best Value regime. The intention of the guidance is to limit the use local authorities make of Special Severance Payments. These are defined in the guidance as payments made to employees, officeholders, workers, contractors, and others outside of statutory, contractual or other requirements when leaving employment in public service.

Specifically, this draft guidance sets out the Government's view of:

- *the criteria local government employers should consider before making a Special Severance Payment;*
 - *the kinds of truly exceptional circumstances in which Special Severance Payments may be appropriate;*
 - *the disclosure and reporting requirements for Special Severance Payments. In line with the requirements at section 26(2)(c) of the Local Government Act 1999, we are consulting the authorities and others likely to be affected by this draft guidance. The guidance will apply to all local authorities in England and a full list of bodies affected is included in the draft guidance.*
4. Although ASCL is not included in the list of bodies directly consulted on this guidance, we have members who may be affected by it so feel it is important to submit a response on their behalf.
 5. Before commenting on the draft guidance, we feel we must state our objection to some of the language used in the consultation document and the draft guidance. It seems, in

places, to provide guidance for a cost saving exercise rather than a Best Value guidance to statutory payments.

6. The guidance is presumably intended to form an intrinsic part of the Best Value regime, but aspects of the guidance simply do not seem aligned to providing Best Value guidance. For example, in Chapter 4: *'whether there is any feasible possibility of exiting the individual at a lower cost. Only where there is no such possibility should a Special Severance Payment be considered;*' – this appears to be more implicitly representative of a crude cost cutting exercise than part of the Best Value regime.
7. Many of the Severance Payments included in the guidance do not, in our considered view, constitute 'Special' Severance Payments. We have commented where this is the case.
8. Furthermore, we feel that the term 'Special' Severance Payment in itself is inappropriate. This would be far better addressed as Additional Severance Payments.
9. Notwithstanding the self-evident necessity for public sector finances to be used appropriately, we must voice our concern at the government manifesto commitment to ending six figure exit payments in the public sector. This appears to be an arbitrary figure which is not necessarily mindful of the full circumstances around certain exit payments and what they include. In some cases, for example, this is a contractual entitlement based on current salary and the terms and conditions of employment.
10. Some of these issues were raised by ASCL, and many other consultees, in the significant consultation and subsequent legislation that followed with respect to the Public Sector Exit Cap which was then revoked shortly after implementation. We consider that it is important that the same does not happen with this guidance and consultative process.

C. Our comments on the draft guidance

11. ASCL offers the following in response to the draft guidance:

Guidance Introduction

12. ***Introduction, paragraph 1:*** *Most public sector workers enjoy statutory and contractual redundancy terms that are significantly better than the minimum statutory redundancy entitlement and are often higher than the value of redundancy payments made in the private sector. The Government is of the view that paying additional, discretionary sums on top of these entitlements ("special severance payments") do not usually provide good value for money or offer fairness to the taxpayers who fund them and so, should only be considered in exceptional cases.*

It is our view that this should say *'most public sector workers are entitled to...'* rather than enjoy. It is unlikely that anyone would 'enjoy' being made redundant. As is stated, these are either statutory or contractual *entitlements*. We also suggest that "special severance payments" should be capitalised throughout for consistency.

13. ***Introduction, paragraph 5:*** *The purpose of this guidance is to:*
- *Set out the Government's view that Special Severance Payments do not usually represent value for money and should only be considered in truly exceptional circumstances*
 - *Set out the criteria employers should consider in the exceptional circumstances in which it may be appropriate to make a Special Severance Payment*

- Give examples of the truly exceptional circumstances in which Special Severance Payments may be appropriate
- Clarify the disclosure and reporting requirements for Special Severance Payments

As there are already existing requirements to publish some payments, the fourth bullet point should read 'to provide further clarification on the'.

Chapter 1

14. **Chapter 1, paragraph 3:** *The following types of payments are likely to constitute Special Severance Payments:*
- a) Any payments reached under a settlement agreement between the employer and employee to discontinue legal proceedings without admission of fault;*
 - b) The value of any employee benefits or allowances which are allowed to continue beyond the employee's agreed exit date;*
 - c) Write-offs of any outstanding loans;*
 - d) Any paid special leave, such as gardening leave;*
 - e) Any honorarium payments or gifts;*
 - f) Any hardship payments;*
 - g) Any payments to employees for retraining related to their termination of employment*

There are other payments which could be included in a settlement agreement which are not Special Severance Payments, so we suggest removing 'any' from the start of bullet point a) and adding 'save where those payments relate to a statutory or contractual entitlement'.

15. **Chapter 1, paragraph 4:** *The following types of payments may constitute Special Severance Payments, depending on the terms of the individual's contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:*
- (a) Pay or compensation in lieu of notice (depending on the contractual basis for its payment);*

Pay in lieu of notice is a legal entitlement, deriving either from statute (statutory notice) or from an employee's contract of employment (contractual notice). Further to the introduction of Post-Employment Notice Pay (PENP) tax in April 2018, termination payments made where there is outstanding notice are treated as earnings by HMRC and are subject to income tax. Accordingly notice pay, whether or not paid in lieu, is not compensation and provided the same arises from an entitlement under statute or a contract of employment, it should not be treated as a Special Severance Payment. Including pay in lieu of notice as a category of Special Severance Payment is inappropriate as it potentially discourages employers from paying the same in accordance with employees' legal entitlements, which will lead to claims for breach of contract/wrongful dismissal being brought against local authority employers where notice pay (or less than full notice pay) is received. Reference to pay in lieu of notice should be removed from paragraph (a).

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

Whilst there may be discretion in diverse schemes, this is not so in the Local Government Pension Scheme (LGPS). Members aged 55 or over in the LGPS who find themselves facing redundancy are statutorily eligible for an unreduced pension with the

strain cost necessarily met by the employer. This needs to be explicit within the guidance.

Chapter 2

16. **Chapter 2, paragraph 4:** *In considering the impact of Special Severance Payments on efficiency and effectiveness, local authorities should:*
- *Seek legal advice on the prospects of successfully defending an employment tribunal claim, if an employee were to take a legal route to appeal any grounds of their employment being terminated. The chance of success and the costs likely to be incurred should be noted and weighed up against the costs of making a Special Severance Payments;*
 - *Ensure that these payments are not used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment;*
 - *Consider aligning with private sector practice, where payments are typically less generous. This is important given the added duty in the public sector to prudently manage taxpayers' money;*
 - *Manage conflicts of interest to ensure that individuals who are the subject of complaints play absolutely no role in deciding whether cases should be settled from public funds.*

The fourth bullet point should make clear that this applies to cases related to the complaints.

Chapter 3

17. **Chapter 3, paragraph 1:** *There may be exceptional circumstances where the existing statutory or contractual entitlements, or both, are insufficient to facilitate an exit or to offer sufficient compensation for loss of employment or office. This can apply to office holders as well as staff. These circumstances, which we expect to be truly exceptional and provide value for money, may be taken into account by local authorities in deciding whether or not to make a Special Severance Payment.*

Determination of whether a Special Severance Payment is appropriate should not rest on whether the circumstance is truly exceptional; rather, in accordance with bullet point 1 on page 4 of the guidance, it should involve a consideration by the local authority employer of whether the employee's prospective claims are legitimate (as opposed to vexatious or malicious) and the prospects of successfully defending those prospective claims that the employee in question has arising upon or from the termination. Employment Tribunals do not only make findings in favour of Claimants or compensation awards in cases that are 'truly exceptional' and use of this measure as a means of attempting to throttle the number of otherwise appropriate settlement payments is misguided.

Whilst we appreciate that the Government's intent may be aspirational, employment tribunal claims in connection with the termination of employment, including in local authority employment, do not only arise in truly exceptional cases unfortunately. The suggested wording implies that such occasions will be very rare, which has not been our experience. Such wording is likely to inappropriately discourage local authority employers from making Special Severance Payments in legitimate circumstances that arise, which is contrary to the public policy of reducing the number of claims brought through the already overburdened Employment Tribunals system and Acas Early Conciliation.

18. **Chapter 3, paragraph 4:** *Those approving a Special Severance Payment related to a settlement agreement should be provided with appropriate evidence that attempts were made to resolve disputes before they escalated to a legal claim. They should also bear in mind that even if the cost of defeating an apparently frivolous or vexatious claims will exceed the likely cost of that settlement to the employer, it may still be desirable to take the case to formal proceedings. This is because winning such cases will discourage future frivolous or vexatious claims and demonstrate that the council does not reward such claims.*

We feel that 'winning' is not the most appropriate descriptor to use here, suggest rewording to 'by securing a successful outcome' or similar.

Chapter 4

19. **Chapter 4, paragraph 3:** *This role is complemented and reinforced by authorities' duty under section 5 of the Local Government and Housing Act 1989 to appoint a monitoring officer, who must report to the council when any proposal, decision or omission is likely to lead to contravention of any enactment, rule of law or statutory code.*

Monitoring officer should be capitalised for consistency.

D. Conclusion

20. I hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

Louise Hatswell
Conditions of Employment Specialist: Pay
Association of School and College Leaders
12 August 2021