CARDIFF COUNCIL
CYNGOR CAERDYDD

PENSIONS COMMITTEE: 23 NOVEMBER 2020

REPORT OF CORPORATE DIRECTOR RESOURCES

AGENDA ITEM : 4

EXIT PAYMENT CAP

Reason for this Report

1. The Pension Committee Terms of Reference set out the Committee's responsibility for the strategic governance of the Cardiff & Vale of Glamorgan Pension Fund.

2. The Terms of Reference include determining policies and procedures for the overall management of the Fund.

Background

3. The Government announced plans to cap exit payments in the Public sector in 2015. The cap applies to the total amount payable when someone exits and so applies to the total of severance payments and any pension strain costs. On 10th April 2019, HM Treasury (HMT) launched a consultation on draft regulations, guidance and directions to implement the cap. HMT published its response to the consultation on 21st July 2020. The regulations came into effect from 4th November 2020.

4. The Ministry of Housing, Communities and Local Government (MHCLG) also launched a consultation on changes to the LGPS & Discretionary Compensation Regulations, which closed on 9th November 2020. It covered the required changes to implement both the £95k exit payment cap and the Public sector exit further reform proposals issued by HMT

5. We are now in a position where the Restriction of Public Sector Exit Payments Regulations 2020 (the Cap Regulations) are live but MHCLG Regs are not likely to be amended until early 2021. This leaves the possibility that members retiring under voluntary severance/redundancy are subject to a £95k cap for employer payments but retain the right under the existing LGPS regulations to an unreduced pension even if it's worth more than the £95k cap.

Issues

6. There is a conflict between the Cap Regulations and the LGPS regulations if the cap is breached when an LGPS member age 55 or over exits. The LGPS regulations still require the member to take payment of an unreduced pension, but the Cap Regulations prevent the employer from paying the full strain cost.

7. The Administering Authority will need to decide whether to pay an unreduced pension in line with regulation 30(7) or provide the option of either a deferred pension under regulation 6(1) or an immediate reduced pension under regulation 30(5) in line with the Government's recommendations.

8. In the last 12 months there have been 104 VS/Redundancies of which 10 exceeded the cap.

Risks

9. If the Fund decides to pay an unreduced pension, there is a risk the Fund could end up in the position of having to try and recover monies from the employer and/or the member.

10. The Fund will not be able to obtain the whole strain cost from the employer. The employer will be restricted to a maximum of £95k for all exit payments including the strain cost. If the employer has paid a cash alternative, they are unlikely to be able to pay the strain cost.

11. If the Fund cannot obtain a strain cost at the time of the exit, there is a serious risk that the Fund will not be able easily or quickly to make good the absence of the strain cost and alternatives will need to be looked at to ensure benefits are fully funded in the future.

12. The Fund may also be at risk of challenge under the doctrine of implied repeal which, if proven, would result in the Fund having to seek repayment of the overpaid element of the pension. The doctrine of implied repeal provides that where a piece of legislation conflicts with an earlier one, the later legislation takes precedence.

13. Offering a deferred or reduced pension also risks challenge, this time from the member seeking to enforce their rights under regulation 30(7). Regardless of the outcome of any challenge, this approach should result in the member receiving additional monies as:
    - An unreduced pension, or
    - A cash alternative payment to the member, or
    - A cash alternative paid to the Fund to provide additional pension under regulation 31 or waive reductions under regulation 30(8).

Other Considerations

14. Currently the strain cost for an early payment of pension is calculated 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 pension and therefore any differential in strain costs across funds would lead to different outcomes for scheme members.

15. The MHCLG consultation proposes that a standard methodology is to be used to calculate strain cost across all funds in respect of capped employers, but some flexibility will be available when calculating strain costs for non-capped employers. Use of the standard strain cost may have implications for employer contributions at the following valuation depending on its relationship to the actual liability impact on the particular employer as calculated by the fund actuary.

16. There are circumstances where the cap may be relaxed. For Welsh councils, consent for a waiver will come from Welsh ministers rather than Westminster. The Welsh Government have the ability to determine what elements are included in the £95k cap, the most important element being as to whether pension strain is included, as it is in England, or not as it is in Scotland. A significant amount of information has been provided from Cardiff Council (the Schemes largest employer) to the WLGA who are leading on the discussions with Welsh Government. A decision has yet to be made however if Welsh Government follow that of Scotland and exclude the pension strain cost the position will be simplified and remove the conflict in the regulations. Discussions with the Welsh Government are currently on-going and the latest advice received from Welsh Government Ministers is included as Appendix A

Legal Implications

17. The report notes an apparent conflict between 2 regulations; namely the Restriction of Public Sector Exit Payments Regulations 2020 (the Cap Regulations) and the Local Government Pension Scheme Regulations 2013 (the LGPS Regs).

18. The law in this area is developing and we understand that the Cap Regulations are subject to challenge. For this reason, a further report will be present to the Pensions Committee once the law in this area is more certain. In the interim detailed legal advice will be provided as regards the calculation of any benefits during this period.

General Legal Advice

19. Any decision must (a) be within the legal powers of the Council; (b) comply with any procedural requirement imposed by law; (c) be within the powers of the body or person exercising powers on behalf of the Council; (d) be undertaken in accordance with the procedural requirements imposed by the Council eg. standing orders and financial regulations; (e) be fully and properly informed; (f) be properly motivated; (g) be taken having regard to the

Council's fiduciary duty to its tax payers; and (h) be reasonable and proper in all the circumstances and comply with any equalities legislation.

20. The Council also has to satisfy its public sector duties under the Equality Act 2010 (including specific Welsh public sector duties). Pursuant to these legal duties, Councils must in making decisions have due regard to the need to (1) eliminate unlawful discrimination, (2) advance equality of opportunity and (3) foster good relations on the basis of protected characteristics. The Protected characteristics are: age, gender reassignment, sex, race – including ethnic or national origin, colour or nationality, disability, pregnancy and maternity, marriage and civil partnership, sexual orientation, religion or belief – including lack of belief.

21. The Well-Being of Future Generations (Wales) Act 2015 ("the Act") places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales – a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible.

22. In discharging its duties under the Act, the Council has set and published well-being objectives designed to maximise its contribution to achieving the national well-being goals. The well-being objectives are set out in Cardiff's Corporate Plan 2020-23: https://www.cardiff.gov.uk/ENG/Your-Council/Strategies-plans-and-policies/Corporate-Plan/Documents/Designed%20Corporate%20Plan%202020-23%20Final%20ENG.pdf

23. The well-being duty also requires the Council to act in accordance with 'sustainable development principle'. This principle requires the Council to act in a way, which seeks to ensure that the needs of the present are met without comprising the ability of future generations to meet their own needs. Put simply, this means that Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:

- Look to the long term
- Focus on prevention by understanding the root causes of problems
- Deliver an integrates approach to achieving the 7 national well-being goals
- Work in collaboration with others to find shared sustainable solutions
- Involve people from all sections of the community in the decisions which affect them

24. The decision maker must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible using the link below: http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en

25. The Council has to be mindful of the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards when making any policy decisions and consider the impact upon the Welsh language, the report and Equality Impact Assessment deals with all these obligations. The Council has to consider the Well-being of Future Guidance (Wales) Act 2015 and how this strategy may improve the social, economic, environmental and cultural well-being of Wales.

Recommendations

That the Committee notes:

a) The issues raised in this report. A further update report is to be provided, as relevant regulations are amended and/or further guidance issued.

b) The Corporate Director Resources, pursuant to his delegated authority (FS28), and following the taking of legal advice and consideration of guidance issued, will determine the level of benefits to be paid pending the resolution of the apparent discrepancies in the various regulations mentioned in this report.

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