

Special Severance Payments

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However, it is clear that the number and level of exit payments within the public sector is still causing the Government considerable concern and, at the end of May 2021 (albeit with very little fanfare), guidance on public sector exit payments – and specifically Special Severance Payments (SSPs) – was issued.

Restrictions on SSPs are not new – Annex 4.13 of Managing Public Money addresses them and provides that they will “only be approved where they provide value for money for the Exchequer as a whole, rather than simply for the body concerned.” However, the new guidance does go further than before.

What are SSPs?

SSPs are any payments on termination of employment which do not correspond to an established contractual, statutory or other right. Where an employer disputes the employee's right to the payment, it must be treated as a SSP.

Payments likely to constitute SSPs:

- Any payments under a settlement agreement
- The value of any employee benefits or allowance which continues to run beyond the employee's agreed exit date;
- Write-offs of any outstanding loans or overpayments;
- Special leave such as gardening leave;
- Any honorarium payments or gifts;
- Hardship payments;
- Payments to employees for retraining related to their termination of employment;
- Compensation in lieu of notice;
- Payments agreed as part of a judicial or non-judicial mediation.

Payments which may constitute SSPs depending on the individual's contract, terms and conditions and relevant statutory provisions:

- Payments in lieu of notice;
- Pension strain payments.

Payments which do not constitute SSPs:

- Statutory redundancy payments;

- Contractual redundancy payments whether due to voluntary or compulsory redundancy and whether agreed by collective agreement or otherwise;
- Payment for untaken annual leave;
- Payments (e.g. for compensation) ordered by a court or Tribunal.

Approval process

Government departments are required to get Treasury approval for any SSPs before any offers are made. Ministerial approval is required where the amount of the offer exceeds £100,000 and/or where the employee earns more than £150,000. The guidance states that departments should allow for a minimum of 20 working days for this approval process, and a specific proforma needs to be used, which includes consideration of a number of separate criteria.

SSPs should not be used to avoid management action, disciplinary processes, unwelcome publicity or reputational damage.

The guidance makes it clear that the Government's default approach is not to settle. SSPs in settlement agreements will only be considered if:

- Attempts to settle dispute(s) without SSPs have been made; and either
- Legal advice has been sought and clearly recommends settling the claim; or
- Where legal advice is finely balanced, there is a clearly evidenced value for money case not to adopt the Government's default approach and settling is clearly the best course of action.

Reporting and transparency

Employers will need to continue to follow existing relevant guidance on reporting exit payments and SSPs. This includes disclosing exit payments and SSPs in their annual accounts.

Breaches

The Accounting Officer is responsible for ensuring a SSP represents value for money and has the necessary approvals in place. Breaching the guidance (for example, by proceeding to settle a claim without prior authorisation) may result in sanctions by HM Treasury, a deduction from the departmental budget and/or an increase in spending controls. Financial sanctions for breaching the process set out in the guidance are at the discretion of the Chief Secretary of the Treasury. The maximum penalty is the highest out of five times the amount of the SSP or £10,000. Repeat offenders are likely to see an increase in the sanctions applied.

Best Value Bodies

On 2 July 2021, the Ministry of Housing, Communities and Local Government issued a consultation on [New Best Value Statutory Guidance: Special Severance Payments](#). This is running from 2 July to 13 August 2021. The draft guidance is, perhaps unsurprising, very similar in tone to the wider public sector guidance and will apply to a wide range of bodies in England including local authorities, National Park authorities and fire and rescue authorities.

The examples of what are likely or unlikely to amount to a SSP are largely similar but there are some differences within the draft Best Value guidance:

- Compensation in lieu of notice is moved from the "likely" list to the "may constitute" list.
- Payments agreed as part of a judicial or non-judicial mediation move from the "likely" list to the "do not" list. (There would appear to be no obvious reasons why these payments should be treated differently by local government compared to central government; hopefully both sets of guidance will be aligned moving forwards to avoid confusion.)
- Additional payments on the "do not" list include redundancy payments made in line with the requirements of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 and payments made to compensate for ill-health, injury or death of the worker.

Accountability

The draft guidance adopts a similar approach to the wider public sector guidance as to when SSPs may be appropriate and when they should not be used. SSPs are stressed as being "exceptional" and are required to be "value for money". However, the draft guidance also

makes clear that even where there are cost-benefits of settling a “frivolous” claim, it may still be appropriate to proceed to litigate the matter to deter future frivolous claims.

Within local government, the Government expects that any SSPs should be personally approved and signed off by the Chief Executive Officer, with a clear record of the Leader’s approval and that of any others who have signed off the payment. However, as part of their duties, an authority’s s151 Officer, and where appropriate, the Monitoring Officer, should take a close interest in and be able to justify any SSPs that are made by that authority and in particular any payments made that are not consistent with the content of the draft guidance. (Clearly, however, if any of the senior officers mentioned here are to be the recipient of the SSP, they should not play any part in the decision-making process).

The draft guidance includes a reminder of the disclosure obligations that local authorities have in respect of exit payments and requires SSPs (along with certain other payments) to be disclosed (on an anonymised basis) in annual accounts.

Comments

Whilst explicit caps on payments may be out, it’s clear that limits on non-contractual and non-statutory payments are very much still in place. Both the wider public sector guidance and the draft Best Value guidance treat such payments as being exceptional, with high thresholds to be met to justify the use of any public money on “ex gratia” settlements.

The tightening of purse strings, and the increased focus on transparency reinforce the importance of tackling employee relations issues early to avoid matters escalating to a dispute, to which the only resolution might be costly and disruptive litigation.

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