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HM Treasury Consultation on a Public Sector Exit Payment Cap

Response from the Employment Lawyers Association

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ELA Response to HM Treasury Consultation on a Public Sector Exit Payment Cap

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

This response to HM Treasury's consultation on a Public Sector Exit Payment Cap was drafted for ELA by Mark Greenburgh, Partner at Wragge Lawrence Graham & Co LLP.

Question 1: What other forms of exit costs do you think are relevant in this context?

The consultation is silent in respect of compensation for whistleblowing and discrimination claims.

Question 2: Do you agree that the government should introduce a cap on the value of public sector exit payments on the basis set out above?

Whilst there is understandable public concern at unmerited payments to public sector officials made on the termination of employment, the proposed cap may be counterproductive and have unintended consequences. For example, it will act as a further deterrent on the recruitment of talent into the public service, and may increase litigation for those claimants who might otherwise settle claims on a without prejudice basis. A better remedy would be to increase the standards of probity and governance as well as public scrutiny of settlement payments.

Further the ELA believes that there will be difficulties in interfering in individual contractual rights which may exist between public sector employers and individual employees. It is perhaps ironic that the most egregious payments reported in recent times were made by the BBC to departing senior executives, and yet the BBC is exempted from the proposed legislation.

Question 3: Do you agree that the payments listed above should be subject to a cap on exit payments under the terms set out above? If you believe certain payment types should be excluded please provide a rationale and examples.

Pension payments, or the costs associated with granting early access to accrued pension benefits should be excluded from the cap. If they are not, the costs associated with granting early access will dwarf those relating to contractual notice or severance payments.

Question 4: Are there further payments that the government should include?

There is some evidence to suggest a way of circumventing the cap would be to increase and backdate the base salary of an employee prior to termination. The government may wish to include avoidance measures to take this into account.

Question 5: Do you agree that a cap on exit payments should be set at £95,000? If you think an alternative level would be more appropriate, please provide evidence and analysis to support your proposal.

The sum of £95,000 seems to be entirely arbitrary and linked to the "price point" of 'six figure' compensation packages. Given that the average pay for a chief executive of a health trust or local authority/quango is well in excess of £95,000, we would suggest that if a broad measure is to be adopted a figure of twelve months compensation for loss of office would be more applicable and in line with the commensurate provisions in the private sector. An appropriate figure may be closer to £150,000, excluding pension costs.

Question 6: Are there other ways to ensure such arrangements are consistent with the cap on lump sum payments?

Lump sum payments are payable under pension scheme regulations and should not form part of the policy considerations for a cap on termination payments. They arise from different bases and in the case of pension payments, have been subject to contributions by the employee throughout their service.

Question 7: Do you agree with the proposed approach of limiting early retirement benefits with reference to the cost for the employer? What alternative approaches would you suggest and why?

The whole question of public service pensions and the balance between in service remuneration and "deferred remuneration" linked to pension rights is a complex balance. We have set out above concerns regarding the ability to recruit and retain the most talented candidates in the public service. Further erosion of pension rights will exacerbate these concerns. Removing the automatic qualifying provision relating to attaining the age of 50 in the health service or 55 in the local government would be a substantial help to employers in managing exits affecting senior executives approaching the relevant qualifying ages. It does seem iniquitous that an employee aged 54 and six months receives once basis of settlement which will exclude pension rights and therefore be substantially cheaper to the employer whereas the cost of somebody aged 55 years and one month can be entirely different. However, consideration of the alteration of pension benefits requires further careful consideration and consultation.

Question 8: Do you agree that the government has established the correct scope for the implementation of this policy?

It is hard to justify the exclusions proposed by government in particular with regard to the BBC and other broadcasters. The banks and other financial institutions mentioned have strong arguments for exclusion from the cap, but that could equally be applied to large hospitals or local authorities where the sums of money under their control and scope of services are equally if not more important.

Question 9: How do you think the government should approach the question of employees who are subject to different capping and recovery provisions under TUPE rules following a transfer to (or from) the private sector and whether there should be consistency with public sector employees in general?

We have concerns about the control and policing of this policy in general. Requiring a local authority or other arm's length body to obtain ministerial approval for a payment would seem incongruous with the control test for its own employees. An employee who had transferred from public service to the private sector under TUPE would plainly be subject to the control of their new employer. Transferees the other way, into the public service, would need to fall into whatever government arrangements that were applied to the policy in general.

Question 10: Do you agree with the proposed approach for waivers to the cap on exit payments?

In general we believe that any waivers to the cap should be decided by the individual employer, not by a government minister or official. Including "transparency" is probably a better way to control large payments on termination, similarly the disclosure of such payments as a pre-employment condition would perhaps limit the occurrence of "boomerang bosses". It is noted that the government itself has been one of the largest offenders in respect of such appointments.

Question 11: Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

As mentioned above, the consultation is silent in respect of compensation claims either arising from personal injury (for example, psychiatric injury brought on by the manner in which a member of staff is dealt with or detriments associated with whistleblowing or discrimination claims). These need to be considered carefully and employees should not be forced into litigation simply to circumvent the cap. Similarly, the impact of the ability to recruit and retain staff has not been fully explored. Finally, what is the position in respect of contractual arrangements already in existence? Local authorities are required to have a pay policy which is approved on an annual basis by full Council. Would it not be sufficient to simply introduce within that pay policy a cap above which any payments would require full Council approval? That could be applied by similar extension to the board of trusts or other NDPBs with the provisions regarding disclosure made clear.

Question 12: Are you able to provide information and data in relation to the impacts set out above?

No.