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Civil Service and Cabinet Office Consultation on reforms to the Civil Service Compensation Scheme

Response from the Employment Lawyers Association

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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 or regulation, 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 consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a sub-committee under the chairmanship of Emma Burrows of Trowers & Hamlins LLP to consider and comment on the consultation paper from the Civil Service and Cabinet Office Consultation on reforms to the Civil Service Compensation Scheme. Its report is set out below. A list of the members of the sub-committee is at the of this paper.

Q1: Do you agree that these are the right principles for the reform of the scheme? If not, what should be the principles to be followed?

We agree that most of the principles are the right ones. From the ELA's experience of the private sector, the view might well be that exit payments should be available for true redundancies (whether compulsory or voluntary, arising out of restructuring or other employer business need) but that the Government should consider not making exit payments to employees who already want to leave, or who are bad performers. Limiting payments to redundancy situations may "create significant savings on the current cost of exits and ensure appropriate use of taxpayers' money".

Employees who want to leave are free to do so, without an exit payment, and bad performers should be performance managed.

We welcome the desire to align the CSCS with wider compensation reforms in the public sector as from ELA experience our view is that the current inconsistencies are confusing.

We suggest that it may be both opportune and desirable in terms of both cost saving, and public perception, that all public sector schemes including the CSCS should be more aligned with the private sector. Exit payments in the private sector are understood as compensation for the loss of the job security that the employee used to have; the opportunity should be taken to clarify the purpose of exit payments in the public sector, and to disentangle exit payments from payments related to an individual's future employability, or their early retirement (a flexibility which does not harmonise with the rising age of access to state pension), so far as it is possible to do so.

Q2: Should the tariff be reduced as part of the cost saving measures? If so, to what level should it be reduced: if not, what should be changed instead to produce comparable savings?

The current tariff can result in large payments. It seems inevitable that as a principle is to "create significant savings on the current cost of exits and ensure appropriate use of taxpayers' money" that it should be reduced.

The ELA's experience is that exit payments can be used inconsistently across the public sector and clear standardised criteria are required for the circumstances in which they are to be applied. It would be to the advantage of all if the circumstances in which payments are made are clear, and consistent with other parts of the public sector.

Q3 Should the cap on the multiple of salary be reduced? If so, to what level should it be reduced? If not, what should be changed instead to produce comparable savings?

The current cap can still result in large payments. It seems inevitable that as a principle is to "create significant savings on the current cost of exits and ensure appropriate use of taxpayers' money" that it should be reduced.

The ELA's experience is that exit payments can be used inconsistently across the public sector and clear standardised criteria are required for the circumstances in which they are to be applied. It would be to the advantage of all if the circumstances in which payments are made are clear, and consistent with other parts of the public sector.

The ELA advises that where the termination of an employee's employment is held to be unfair, an employee's compensation under the ERA 1996 is subject to a cap. A compensatory award which may be awarded for financial loss is essentially capped at a year's salary or sum prescribed by the secondary legislation [currently £78,962], whichever is the lesser sum. Other proposals anticipate a cap of £95,000 on all payments that comprise exit payments. We suggest that in order to achieve significant savings the CSCS adopts a cap in line with those already in use under the ERA 1996 or elsewhere in the public sector.

There is a legal risk in reducing the cap on total payments made which is that it could be claimed to discriminate against those who are longer service and hit the cap, and are therefore older. Reducing the cap will obviously affect more employees who may claim that the cap is discriminatory.

A system which discriminates based on age can however be lawful where it falls within a statutory exemption or is otherwise objectively justified.

Redundancy pay schemes which take age into account in determining entitlement, are potentially discriminatory under the Equality Act 2010. The EqA however contains specific exemptions for both the statutory scheme and enhanced redundancy schemes that are similar. Paragraph 13 of Schedule 9 of the EqA exempts enhanced redundancy payments from the prohibition against age discrimination where, albeit more generous, they follow the way the statutory scheme works (section 162 (1) to (3) of the Employment Rights Act 1996.

Where a proposal does not fall within the statutory exemption, non-exempt schemes must be objectively justified (cost can be taken into account but cannot on its own justify discrimination: Cross v British Airways Plc [2005] IRLR 726).

Kraft Foods UK Ltd. v Hastie UKEAT/0024/10: EAT held that a cap applied to payments under a redundancy scheme which had the intention of preventing employees from receiving more than they would have earned if they had remained until retirement age was a proportionate means of achieving a legitimate aim.

Loxley V BAE Land Systems (Munitions and Ordnance) Limited [2008] IRLR 853: EAT held that a contractual redundancy scheme was potentially justified, payments under the scheme were calculated by reference to age and length of service but tapered down from the age of 57 so those

over the age of 60 were entitled to nothing. (The age at which the scheme tapered reflected the pension age and the age at which pension could be accessed.

Q4: Are there any other significant cost saving measures that should be considered instead of or in addition to a reduction in the tariff and/or cap?

The ELA's suggestion is to ensure that cost savings measures are in line with those operational in other areas of the public sector to ensure transparency and consistency.

Q5: Should the Civil Service apply a different cap on the salary that qualifies for compensation payments?

This is done elsewhere in the public sector so there is a precedent.

There is a legal risk in reducing the salary which can be considered for the calculation of compensation payments, which is that such calculation could be claimed to discriminate against those who are longer service and hit the cap, and are therefore older. A system which discriminates based on age can however be lawful where it falls within a statutory exemption or is otherwise objectively justified.

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Q6: Should the requirement for at least one offer under voluntary terms (and for that to be a "good" one rather than a minimal one) before moving to compulsory redundancy be kept?

While there is no statutory requirement to offer voluntary redundancy before compulsory redundancy it is good practice. ACAS Guidance "Redundancy handling" states:

"If making compulsory redundancies is necessary then consider…

- *seeking applicants for early retirement or voluntary redundancy…"*

One acceptable method is for employees to volunteer to be considered for redundancy and for the employer to select from the list of volunteers those employees who are to be dismissed. This avoids the need for compulsion, with a less demoralising and disruptive effect on the workforce. It is not uncommon to offer enhanced redundancy payments as an incentive to attract people to leave. In situations where the number of volunteers exceeds requirements, employers should be alert to the potential reaction of some employees not selected and consider in advance how best to deal with this."

Other ACAS Guidance on collective and small scale redundancies makes the same point.

The advantages of offering at least one offer under voluntary terms are therefore:

1. Compliance with ACAS and general good practice

2. The reduction of challenges by employees as they agree to leave before being required to compulsorily.

3. The risk of subsequent litigation challenging selection for redundancy.

4. The reduction in need to undertake some redundancies, with consequent improvement on efficiency and morale.

Q7: If the requirements for a voluntary offer before redundancy is kept, should that offer be on the basis of a fixed "tariff"?

The ELA's experience in working in the private sector is that there is sense in keeping the voluntary offer flexible to encourage early exits before undertaking the cost and administration of a compulsory redundancy programme.

Having said that, the different treatment of staff can lead to claims that they have been treated in breach of the Equality Act 2010 which while often defensible can lead to confusion.

The ELA suggests that transparency and consistency with other parts of the public sector means that any voluntary offer should be at least within certain parameters if not on the basis of a fixed tariff.

Q8: Should Voluntary Exit allow for higher maximum payments than Voluntary Redundancy? If it should, by how much?

ELA's experience is that Voluntary Exits are currently envisaged where there are performance issues or a restructuring. If that is the case, it would be wise to consider addressing these in the ordinary course of business (which would more closely align with the private sector), for example redundancy payments (either VR or CR) where there is a restructuring of the business and performance management of those that are falling below the standards expected. Therefore, not allowing for higher Voluntary Exit payments would support the principles of this consultation.

Q9: Are there any other ways in which staff could be encouraged to be more pro-active in coming forwards when exit exercises are being run?

Employers could at their complete discretion, open a fixed period, or periods, during which employees could specify a future date two years later, at which they are going to take retirement, or leave voluntarily without exit compensation. In return for this commitment, the employer could consider how to compensate the employee, for example by offering increased annual leave.

The communication in relation to the compensation reforms could be clear that the tariff will be reduced in stages over a three year period. Employees will then be able to infer that the sooner they apply for Voluntary Redundancy, the better their terms will be.

An additional “bonus” payment could be considered for those that volunteer for redundancy rather than wait for compulsory redundancy which is commonly used in the private sector.

Q10: Should the employer funded early access to pension provision be removed from the scheme?

This will be an emotive subject for affected employees and their representatives and removal of these benefits completely is likely to receive strong opposition. Employees may have worked within the Civil Service for a number of years and made financial decisions on the basis that early retirement would be available to them from age 50 or 55.

However, in view of the abolition of the default retirement age and increases in the state pension age, retaining provisions which enable employees to take an unreduced pension from as young as age 50 appears inconsistent with wider policy decisions being made by the government. It is also at significant cost to the tax payer. Removal of these provisions completely could be justified on these grounds.

Q11: Should the minimum age for early access to pension be increased to 55?

Retaining early retirement but increasing the age at which it will be available to employees may assist in balancing the conflicting positions of the employees affected and the cost to the tax payer. In view of the increasing state pension age, increasing the minimum age for early access to pension to 55 does not seem an unreasonable increase. Consideration could be given to increasing the minimum age for early access to pension in line with increases to the state pension age so that the gap between benefits of those with and without such private pension entitlements does not become more polarised.

Q12: Are there any other ways in which the key issue (the provision of a very expensive retirement benefit to staff unlikely to actually retire) could be resolved?

Other potential suggestions to resolve the key issue include:

- reducing compensation payments for those with early retirement benefits - but could potentially be age discriminatory;
- including pension augmentation costs within any cap on exit payments;
- calculating a ‘compensation fund’ for an employee and giving employees with the option of taking it as cash or investing it into their pension to increase benefits.

Q13: Do you agree that employers should have the flexibility to set a lower maximum cap than £95,000 in Voluntary Exit schemes? Is there any level below which a cap should not be set?

ELA's experience is that Voluntary Exits are currently envisaged where there are performance issues or a restructuring. If that is the case, it would be wise to consider addressing these in the ordinary course of business (which would more closely align with the private sector), for example redundancy

payments (either VR or CR) where there is a restructuring of the business and performance management of those that are falling below the standards expected. As such a lower maximum cap is sensible where there is no fair reason for the dismissal.

ELA advises that where the termination of an employee's employment is held to be unfair, an employee's compensation under the ERA 1996 is subject to a cap. Compensation which may be awarded for financial loss is essentially capped at a year's salary or sum prescribed by the secondary legislation [currently £78,962], whichever is the lesser sum.

If dismissals are unfair it would make sense that any cap set is not lower than compensation for unfair dismissal under the ERA 1996, or employees would be in a better position if they take action than if they do not. This situation may reduce the chances of exiting employees where there is insufficient reason to dismiss and may not improve efficiency. In addition, if exits do take place, employees may not agree to voluntary exits and bring claims in the employment tribunal, which increases litigation.

Q15: Is there another way in which the Government's aims of reducing costs and ensuring that the CSCS operates as desired could be met?

One of the less obvious routes to saving money on exit payments lies in bringing the paid notice periods into line with what is generally afforded to employees in the private sector. Notice periods in the public sector could extend to six months' notice, which is generous. Where public sector employees are not required to work their notice, and instead it is paid out as a cash payment, this could be onerous on the public purse, and employers could make efforts to increase the incidence of employees working their notice periods rather than being paid in lieu.

Employers could at their complete discretion, open a fixed period, or periods, during which employees could specify a future date two years later, at which they are going to take retirement, or leave voluntarily without exit compensation. In return for this commitment, for the first of the two years prior to retirement or resignation, the employee would receive one paid vacation day per week (assuming a regular full-time employee), and for the second of the two years, the (full-time) employee would receive two paid vacation days per week. The responses to the open period for nominating retirement or exit dates two years in advance would be expected to allow the employer to plan much more effectively the reallocation of employee activities and for natural wastage to occur.

With regard to the tariff reduction, rather than implement this in one "big-bang" approach, the tariff could be reduced in clearly specified stages at clearly specified points in time. For example, the communication to employees could be clear that the tariff will be reduced in stages over a three year period, so that the sooner the staff apply for VR, the better their terms will be.

Whilst looking to amend the terms of the current employees, the Government could consider setting new terms (which are more aligned with those in the private sector) for new employees. This could help to avoid making the issue any larger and reduce the number of people who need to be consulted about the change.

Q16: What should the tariff be for the reformed "inefficiency" terms?

Although the ELA cannot comment on what the tariff should be, the terms should be open and transparent.

Q17: Should the revised arrangements be called something different?

We suggest “Staff Productivity Arrangements”.

ELA Sub-committee

Chair: Emma Burrows, Trowers & Hamlins LLP

Gemma Ranson, CSC Computer Sciences Ltd

Dena Benzie, CSC Computer Sciences Ltd

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