Workforce, Pay & Pensions Team,
HM Treasury,
1 Horse Guards Road,
London
SW1A 2HQ

28th June 2019

Sent via: ExitPaymentCap@hmtreasury.gov.uk

Dear Sir or Madam,

RE: RESTRICTING EXIT PAYMENTS IN THE PUBLIC SECTOR CONSULTATION

Please find enclosed the response of the Transport Salaried Staffs' Association (TSSA) to the above consultation.

TSSA welcomes the opportunity to contribute to the Exit Payment's consultation. We are an independent trade union with approximately 18,000 members throughout the United Kingdom and Republic of Ireland. Most of our members work in the UK rail industry in management, technical, professional, supervisory, retail and administration functions, including in public sector organisations such as Network Rail, Transport for London, British Transport Police and Direct Rail Services.

TSSA policy is determined by our Annual Conference that comprises delegates from the Branches that represent our membership. Given the potential for this consultation to affect many of our members, we have also invited individual contributions through online submissions.

Yours sincerely

Frank Ward
Assistant General Secretary

TSSA RESPONSE TO HM TREASURY'S CONSULTATION ON RESTRICTING EXIT PAYMENTS IN THE PUBLIC SECTOR

Introduction

TSSA is opposed to the capping of exit payments for public sector workers, especially through a blunt tool like a blanket application and the intrusion of the government's expectation "that employment contracts, compensation schemes and pension schemes will be amended to reflect the introduction of the cap."

The government's political desire to cut costs as part of its austerity agenda and because of the exit sums reportedly paid out to short term, highly paid, employees seems to be misplaced through a blanket arrangement. That arrangement could impact on the employment terms of loyal members of staff who have spent considerable periods of time, measured in years, earning entitlements via long service and steady progression only to see them withdrawn or undermined. Not every person who may be caught by this legislation is a high flyer, intent on milking the public sector for all its worth when they leave.

In addition, some railway workers made redundant between the ages of 55 and 60 have an entitlement to additional payments (known as a SERP – Special Early Retirement Pension) to make up for the fact that upon their redundancy, should they decide to take their pension, they will incur an early retirement actuarial reduction that penalises them. This could apply to workers whatever their salary level – including those at the lower end of the salary scale paid below the £29574 (quoted in the consultation material as the average annual public sector worker's salary). Under the draft legislation, whatever they may receive through the SERP arrangement, this will be counted towards the £95,000 cap because it is paid by the employer and not the pension scheme.

Similarly, in our experience of how railway companies operate redundancy schemes, it is not uncommon that many will require employees to accept payment in lieu of notice which would again draw workers of all levels of salary, including lower paid people, into danger of being affected by the capping arrangement. That danger is particularly acute when several payments, including redundancy pay under a contractual arrangement, are added together and in total exceed the cap.

We also note that the Executive Summary of the consultation cites staff receiving over £100,000 making up £0.2bn of the £1.2bn paid out to staff exiting the public sector in 2016-17. On that basis, why has the cap been set at the lower figure of £95,000 as it will affect more people?

For these – and other reasons elaborated on in our response, we urge the government to review the draft legislation because of the potential for (hopefully) unintended consequences

Question 1
Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.

We have no comment here.

Question 2
Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

No. Our reasoning is provided in answer to Question 7.

Question 3
Do you agree with the exemptions outlined? If not, please provide evidence.

We would query why in draft Regulation 7(g) the proposed exemption of "a payment in lieu of notice due under a contract of employment that does not exceed one quarter of the relevant person's salary" has been pitched at this level? What is it based upon – the statutory maximum 12 weeks' notice pay (recognising that this isn't the same thing as a quarter of an annual salary)?

We would also question how Regulation 7(g) will be applied in practice. For instance, it is easy to see how someone receiving a contractual PILON payment that equates to no more than one quarter of their salary would not have any of it counted as contributing towards the capped amount. What isn't clear is how this would be applied to someone whose contractual notice period was based on a longer period, such as five months; would only the amount over the equivalent of a quarter be counted as contributing to the total capped pay? Or would a mean spirited approach be adopted and the exemption withheld altogether?

We would also query why injury to feelings has been specifically exempted from the exemption in draft Regulation 7(b)? There does not appear to be any justification provided for this aspect.

Question 4
Does the guidance adequately support employers and individuals to apply the draft regulations as they stand? If not, please provide information on how the guidance could be enhanced.

The Guidance document appears to adequately support application of the draft regulations but only really after being studied a number of times. Employers having to regularly use the guidance will become used to how it works but an individual employee coming to it for the first time could be left asking questions because of a lack of experience in these matters.

We would suggest that there should be a simple list of what counts towards the £95,000 cap and what is outside it. For instance, the document refers to pensions and appears to adopt a simple principle of:

> "The exit payment cap only applies where there is an extra cost to the employer in relation to that exit."

The wording of the following paragraph then requires careful reading to establish that a pension and AVC that the employee has been paying into with contributions from the employer is outside the cap but pension strain payments are not. A list may assist the individual to clearly see what is counted and what is not.

One other point we would raise is in relation to the authority of the guidance in the event of a legal challenge or public sector employers seeking to go further than the law proposed.

Question 5
Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the regulations, especially in the case of whistleblowers?

In the mandatory HM Treasury directions document available with the consultation material, there is a section about the mandatory exercise of a discretionary power. In particular, it says:

> "The Decision Maker must exercise the power to relax restrictions imposed by the Regulations on payments of a type described in regulation 6(1) of the Regulations and which are made in respect of a relevant public sector exit in the following circumstances…"

Amongst the circumstances described are, for instance, "the obligation to make a payment that arises as a result of the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006/246)."

Whilst it is welcome that a discretion should be exercised that would relax the restrictions, the wording of the mandatory obligation to exercise a discretion suggests that in practice the discretion to relax the restrictions must be exercised in areas such as TUPE. This then leads to the logic that if a discretion must be exercised in particular areas, it should be incorporated in Regulation 7, "Payments exempt from restriction," thus aiding clarity.

This interpretation is also repeated in Section 5.3 Mandatory Relaxation of Annex C: Restriction of public sector exit payments: guidance on the 2019 regulations.

Question 6
Is there further information or explanation of how the regulations should be applied which you consider should be included in the guidance? If so, please provide details.

TSSA would question what happens when bodies within the scope of the cap are privatised/outsourced. For instance, Directly Operated Railways is within scope but the government's stated intention is to re-privatise the LNER franchise in 2020. In the event that that happens, the question not answered by the consultation is whether the staff who transfer to a private sector franchised train operator will be released from the capping arrangement? Similarly, will organisations taken into the public sector have the cap imposed at the time of the transfer?

Question 7
Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

There are several other impacts that we think have not been covered:

1. TSSA believes that the proposal is misguided in relation to certain bodies that may have to compete for staff with private sector organisations.

   Network Rail, for instance, attempts to recruit highly experienced and very talented engineers and managers for its extensive programme of rail upgrades that are largely sponsored by the tax payer. However, Network Rail may have difficulty in attracting potential employees if the government's desire "to amend employment contracts, compensation schemes and pension schemes" leads to worsened pay and conditions that are seen to be inferior to private sector comparators. Some of those private sector firms may even be contractors for Network Rail but they will not be affected by the introduction of the cap.

2. Transport for London is another organisation affected by the above at a time when the company is having to downsize because of the government's decision to cut the operating grant. As a result, pay increases have been held back and pay and grading systems supressed to pay lower salaries. The effect of the suppression activities already makes it hard to attract staff both within the company and from outside, but now, with the addition of the exit payment capping arrangement, this situation is likely to get far worse.

3. The inability to attract appropriate staff will undermine the status of the public sector which will find itself losing skills among its employees, either because suitably qualified staff can't be attracted to take up a job or existing employees leave to use their skills in the private sector where they can be recognised for their talent. The effect is that the public sector will increasingly be left unable to deal with challenges from outside organisations that are prepared to pay for the necessary expertise. Costs will then rise in the public sector as the need to hire private contractors becomes necessary, something that will have the detrimental effect of introducing significant additional cost for organisations already enduring tight budgets. It also goes against the rationale of the exit payment capping plan, that of an attempt to save public money.

   It should also be recognised that in many parts of the country the public sector is a large employer so the effects of what we describe in general terms could have far reaching consequences. We are left asking why this impact has not been recognised already?

4. There is also another element to the capping arrangement and that is how it affects staff within the public sector progressing within their organisation.

Using the Network Rail example again, where the company is in the process of yet another major re-organisation, the introduction of a cap will potentially disincentivise existing employees from applying for promotional opportunities if they think that in the event of their redundancy, they will not collect all of their redundancy entitlements.

In Network Rail there already is an issue about people in supervisory and team leader positions not applying for manager roles because of the loss of certain terms and conditions; the capping arrangement could make that worse.

Question 8
Are you able to provide information and data in relation to the impacts set out above?

Yes.