Croner

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Childcare voucher ruling

Is discontinuing childcare vouchers during maternity leave discriminatory? That was the question in the recent case of *Peninsula Business Services Ltd (PBS) v Donaldson*.

The facts of the case

PBS ran a scheme which allowed employees to obtain vouchers to pay for childcare through a salary sacrifice arrangement (therefore paying no tax or NI on the value of the vouchers). As part of the conditions of entry into this scheme, the employee was required to agree that PBS would suspend the provision of these vouchers while the employee was on maternity leave as PBS only paid their employees statutory maternity pay.

Ms Donaldson was pregnant and wanted to enter into the scheme, however because she refused to agree to the suspension of the vouchers during maternity leave, she could not enter the scheme. Ms Donaldson considered this discriminatory under the Equality Act 2010 and in breach of the Maternity & Parental Leave Regulations 1999 and issued a claim against PBS in the Employment Tribunal.

Entitlement to benefits

Ms Donaldson was successful with her claim, as the Employment Tribunal considered that the Maternity & Parental Leave Regulations 1999 provided that women are entitled to receive non-pay benefits during maternity leave and requiring a woman to sacrifice this benefit while on maternity leave was discriminatory. The Employment Tribunal supported their judgment with guidance from HMRC, which stated that non-cash benefits provided under a salary sacrifice scheme must continue during periods of ordinary maternity leave.

PBS appealed the Employment Tribunal decision to the Employment Appeal Tribunal (EAT). The EAT examined the relevant legislation and could not find anywhere any basis for the HMRC guidance that non-cash benefits provided under a salary sacrifice scheme must continue during periods of ordinary maternity leave. The EAT considered that the fundamental issue was whether these childcare vouchers constituted 'remuneration', as if they did, then they would be excluded from the Maternity & Parental Leave Regulations 1999 in relation to having to be continued during maternity leave.

The EAT considered the correct interpretation of the childcare vouchers in that they represented part of the employee's salary which had been diverted prior to the employee receiving their pay.

Therefore these vouchers should be considered as 'remuneration' and therefore are not required to be continued during maternity leave as provided by the Maternity & Parental Leave Regulations 1999. They also considered that it could not constitute unfavourable treatment and therefore was also not in breach of the Equality Act 2010. Accordingly, the EAT allowed the appeal and substituted a decision that the claim should be dismissed.

Croner's view

This decision appears correct from a common sense point of view, as PBS only paid statutory maternity pay ("SMP") and therefore in any event this pay is not allowed to be salary sacrificed. Accordingly it would have to be suspended during the period when SMP was paid, unless a company wanted to provide an extra cash benefit to employees during maternity leave by the company effectively continuing to pay for the employee's childcare vouchers from their own purse.

If you have any questions on this, or any other aspect of pay, please contact our advisors on 0844892 3932.

"The EAT considered the correct interpretation of the childcare vouchers in that they represented part of the employee's salary which had been diverted prior to the employee receiving pay"

Human Resources

Tribunal fee challenge

The Supreme Court has given Unison permission to appeal the Court of Appeal's decision in its judicial review applications claiming that the fee charging system in the Employment Tribunal and Employment Appeal Tribunal (EAT) is unlawful.

What is Unison challenging?

The grounds of appeal are threefold: specifically, whether the Court of Appeal erred in its approach to the EU principle of effectiveness; whether it erred in its approach to indirect discrimination; and finally whether it erred in concluding that Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 was not indirectly discriminatory.

On 29 July 2013 fees became payable in the Employment tribunal and EAT under the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (the 'Fees Order'). Following the introduction of fees Unison have sought to challenge their lawfulness on the basis that they infringe the EU principle of effectiveness and that the fee scheme indirectly discriminates against women - Unison stress the prohibitively high fees to pursue Employment Tribunal claims will have a disproportionate adverse impact on women.

In February 2014 the High Court rejected Unison's first Judicial Review and in doing so commented that the proceedings were premature and indicated that future challenge may be possible when examples of women being affected could be given rather than a hypothetical statement. The second Judicial Review was heard in October 2014 again Unison was unsuccessful. The reliance on statistics rather than specific examples of individuals who had been affected by the fee regime was noted in the delivery of the judgement.

Unison went on to unsuccessfully appeal both Judicial Reviews. The Court of Appeal upheld the decisions of the High Court that the introduction of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 in that they did not breach the principle of effectiveness, were not indirectly discriminatory and did not involve a breach of the public sector equality duty.

Watch this space

No date has been announced as of yet for when the Supreme Court will hear the appeal. In the meantime the fees regime will remain in place and fees will be payable subject to the Supreme Court's ruling on this latest Unison appeal and the Government's decision in relation to its own review carried out into the tribunal fees system in place in England and Wales. It is understood that the Government review was concluded in February 2016 and submitted to Ministers so this is definitely an area where we can expect to see more news in the not too distant future.

Did you know?

Tribunal Claims - From 6 April 2016 the compensation limits for employment tribunal claims increased. The new maximum amount of a week's pay has gone from £475 to £479. The higher maximum for unfair dismissal compensatory awards increased to £78,962 (from £78,335).

Zero Hours Contracts - Workers are now entitled to bring a claim for detriment, and an employee is now entitled to bring a claim for automatic unfair dismissal, where the reason for the detriment or dismissal is that the worker/employee has breached an unenforceable exclusivity term in a zero hours contract.

Redundancy Pay - When calculating a week's pay for the purpose of redundancy, you must calculate a 12-week average for an employee without normal working hours. You should include basic pay and any variable payments for example commission and bonuses, plus any sick pay or other family-related pay. However, if there are any weeks where no remuneration was payable, you should include previous weeks into the calculation.

New Wage Rates - The Government has announced that the following wage rates from 1 October 2016: National Minimum Wage (21-24 year olds) will increase from £6.70 to £6.95, the Youth Development Rate (18- 20 year olds), will increase from £5.30 to £5.55 and the rate for 16-17 year-olds will increase from £3.87 to £4.00.

Health and safety

HSE launches new strategy

The Health & Safety Executive (HSE) has launched its new strategy 'Helping Great Britain work well'. Here Stephen Thomas outlines the six themes.

1. Acting together.

The first strategic theme is about the broader ownership of risk management. Often a single employee or team is given the task of 'doing' health and safety for an organisation. In order to evolve and improve an organisation's (and by extension Great Britain's) standards of health and safety, the responsibility should be an integral part of everyone's role from the top, down.

The focus on increased ownership down through the management chain is a strategy that not only HSE are promoting but other stakeholders such as the British Standards Institution (BSI) through their imminent ISO 45001 standard (which is expected in October 2016), along with other key business standards such as ISO 9001:2015 and ISO 14001:2015. Getting behind this theme is a great way to help build good risk management into your organisation.

2. Tackling ill health

The 'health' in health and safety is often overlooked. Sudden injuries are more dramatic, emotional and even newsworthy - compare the coverage of the Alton Towers Smiler accident in 2015 against the ongoing burden of ill health encountered every day in Great Britain; most of us know somebody who has been made ill, or a condition worsened, through work.

With this theme the HSE is promoting long-term and co-ordinated action on ill health across all sectors, focusing directly on early prevention and thereby negating the greater costs associated with those suffering from serious illness. HSE recognise that in order to stimulate change a substantial behaviour shift and awareness programmes are required, with additional partners such as the National Health Service (NHS) playing a part.

3. Managing risk well

The business benefits from implementing sensible and proportionate risk management strategies are well known: reduced sickness absence, increased efficiency, improved morale, good business reputation, more successful tendering and lower costs. Promoting these benefits is essential to improving standards. This can be achieved by sharing examples of good practice so that everyone knows what sensible risk management 'looks like'. This should be backed up by targeted, relevant advice and information. Getting this right builds trust with stakeholders; that health and safety improves business rather than burdens it.

4. Supporting small employers

This theme is about organisations helping micro and small businesses to work smarter. There is already a lot of free information and guidance for SMEs but they may not be seeking it out or implementing it.

Larger organisations should do more to help small employers by working with and supporting them through the supply chain and other working relationships. Key influencers for SMEs should be identified and relationships grown which raise awareness and help compliance with key health and safety issues.

5. Keeping pace with change

Social, economic and technological change commonly present new health and safety challenges and Great Britain's extensive knowledge and expertise allows it to play a leading role in managing those challenges.

The HSE envisions that we must anticipate the workplace challenges of tomorrow and resolve them in ways that enable innovation and the use of new technologies.

The work of the Health and Safety Laboratory, an agency of the HSE, demonstrates that Great Britain can lead the world in horizon-scanning research on risk management issues.

6. Sharing our success

Finally, the last theme focuses on sharing Great Britain's health and safety innovation and successes with the world, influencing H&S systems worldwide and making it easier for British organisations to do businesses overseas.

Conclusion

The HSE will continue to provide both enforcement and guidance but, to see real change for the better, it is the duty of every stakeholder in the system to actively implement and promote sensible, pragmatic and business-focused risk management.

Human Resources

The test for vicarious liability

Vicarious liability is the circumstance where someone is held responsible for the acts or omissions of another person. In the workplace, an employer can be liable for the acts and omissions of its workers in certain circumstances. It is the circumstances where vicarious liability arises in employment and employment-like circumstances which have recently been examined by the Supreme Court in *Cox v Ministry of Justice* and *Mohamud v Morrison's Supermarkets plc*.

Cox v Ministry of Justice

Ms Cox worked for the Prison Service as a catering manager in the kitchen of a prison, alongside prisoners. Ms Cox was injured by one of the prisoners as they accidently dropped a large bag of rice onto Ms Cox's back. Ms Cox sued the Ministry of Justice (MoJ) for personal injury on the basis that they were vicariously liable for the prisoner's negligence. At first instance at the County Court, the court rejected that the MoJ was vicariously liable for the prisoner. However, Ms Cox appealed to the Court of Appeal and they overturned the County Court's decision and held the MoJ was vicariously liable for the prisoner, as the relationship between the prisoner and the MoJ was equivalent to employment. However, the MoJ appealed to the Supreme Court.

Mohamud v Morrison's Supermarkets plc

In the case of Mohamud, he was assaulted and verbally abused by an employee of Morrison's on the premises of the supermarket's petrol station, which is where the employee worked. Mr Mohamed sued Morrison's for personal injury, claiming that they were vicariously liable for their employee's actions. However, the Judge held that the employee's actions were too far removed from his employment and therefore Morrison's was not liable for his actions. This decision was upheld by the Court of Appeal and therefore Mr Mohamud appealed to the Supreme Court.

Supreme Court decisions

In the Cox case, the Supreme Court dismissed the MoJ's appeal and applied the elements of vicarious liability outlined in the case of Various Claimants v Catholic Child Welfare Society, in that a) is the harm wrongfully done by a person who carries out activities as a fundamental part of the business activities of the Defendant and for its benefit; and b) the risk of the wrongful act happening arose because the Defendant gave responsibility to the wrongdoer.

If these factors are present, then vicarious liability is able to occur, which they considered it was in this case. The Supreme Court accepted that it extended the scope of vicarious liability beyond that of employee-employer relationship, however it outlined that it was not imposing a liability when the wrongdoer's actions were wholly attributable to an independent business of their own or a third party.

In the Mohamud case, the Supreme Court endorsed the "close connection" test for vicarious liability between the employee-employer. This was first outlined in the case of Lister v Hesley Hall Ltd, in that the essence of the job entrusted to the employee must be considered generally and the court must consider whether there was an adequate connection between the wrongful act and the employee's position to make it right under social justice to impose vicarious liability onto the employer.

Applying this to the Mohamud case, the Supreme Court found that this test had been satisfied and vicarious liability should be attributed to Morrison's.

The employee's job was to attend and serve customers at the petrol station, the employee was trying to exit Mr Mohamud from Morrison's petrol station and reinforcing this by violence, notwithstanding it being an extreme abuse of his position, the employee was in effect, acting on behalf of Morrison's business and therefore was in connection with the business and Morrison's should be held responsible for the employee's actions.

Both these cases provide helpful insight to the tests and factors the courts will apply when deciding whether vicarious liability applies to employment and 'employment-like' relationships.

Health and safety

Increased cost recovery fees

The Health and Safety Executive (HSE) has increased its cost recovery fees, with new rates applying for its Fee for Intervention (FFI) system, as well as the Control of Major Hazards (COMAH) and offshore safety regimes.

The fees for the HSE's FFI cost recovery scheme will increase from £124 to £129 per hour. A change has also been made to allow the HSE to recover costs of legal advice in relation to disputes under its FFI regime.

The hourly charge for a visit by a COMAH inspector will rise from £155 to £161. Offshore safety inspections will now be £266 per hour (which is an increase of £10).

The FFI scheme has attracted widespread criticism, but the Government has argued that FFI has been effective in achieving the overarching policy aim of shifting the cost of health and safety regulation from the public purse to those businesses that break health and safety laws.
The HSE has also defended the increase in fees by stating that "…the many businesses that comply with their legal obligations will continue to pay nothing."

Your questions answered

Q: We have suspended an employee while an investigation is completed into some quite serious allegations in breach of our disciplinary code of conduct. Do I have to pay the employee during the suspension given that he will not be attending work during that period?

A: Suspension is used as a protective measure for the employee while the employer investigates allegations of serious misconduct and they should be provided with full pay and benefit entitlements during the process. If you were to withhold pay and benefits the suspension will likely be viewed as a disciplinary sanction in itself which would have been levied prior to the completion of the disciplinary process.

Q: I have an employee who has started wearing a rather large hoop earring in a piercing above one of his eyebrows and a small stud in a piercing above his other eyebrow. Do I have the right to tell him to remove the piercings during working hours?

A: Employers can stipulate their employees dress in a certain way, i.e. business dress and employees do not have the right to dress in any given way or wear certain jewelry - although this is subject to discrimination legislation.

If you have a dress code which includes that jewelry (and facial piercings) is not allowed to be worn in working hours and it has been communicated to all employees, then this dress code should also have a procedure or refer to a procedure which will be followed in the event of a breach of the code. Accordingly, this procedure should then be followed.

As an employer, you should also always consider whether there is any possible discrimination issues in relation to enforcing a dress code policy and further advice on this issue should be sought before any enforcement action is taken. Similarly, if you do not have a dress code or a dress code that covers facial piercings, further advice should be sought before enforcement is initiated.

Q: We provide all our full time employees with the Working Time Regulations minimum holiday entitled of 5.6 weeks per annum. I have a full time employee who has been on long-term sick for all of last year. She has come back to work recently and told me that she is entitled to carry over her 5.6 weeks holiday from last year into this – is that right?

A: There has been recent case law which has outlined that employees on long term sick leave are only able to automatically carry over the 'basic' four weeks annual leave and not the Working Time Regulations minimum entitlement of 5.6 weeks, unless this is provided for in a relevant agreement between the employer and employee. Therefore, unless you have an agreement already in place with this employee which states she can carry over 5.6 weeks holiday to the next year, then she will only be entitled to carry over four weeks holiday.

Croner Reward

Pay awards and forecasts

In March 84% of the organisations surveyed by Croner Reward reported that they were not freezing pay, which is the lowest this figure has been since December 2015.

Average settlements and forecast figures - excluding a pay freeze
(This represents the averages for those companies that have given a pay award rather than a freeze)

	Settlements	Forecasts
	April 2015 – March 2016 Average	April 2016 – March 2017 Average
ALL	2.3%	2.4%
Management	2.3%	2.4%

As you can see, the average settlement for the year stands at 2.3%, a 0.1% decrease on last month. The average forecast for the next 12 months is 2.4% which is the same as the last two months.

Average settlements and forecast figures – including pay freeze

	Settlements	Forecasts
	April 2015 – March 2016 Average	April 2016 – March 2017 Average
ALL	2.3%	2.4%
Management	2.3%	2.4%

For those organisations including a pay freeze, the average settlement figure for the year stands at 2.3%, which remains the same as last month. For the six month running, the average forecast for the coming year is 2.4%.

Earnings movement

- The annual earnings movement for March 2016 stood at 3.0% for basic pay, an improvement from the 1.1% we saw in October and November last year.
- Total pay for March 2016 was 3.3%, also an improvement from 1.0% figures in October/November 2015.