

UK: Employment Update

Welcome to this month's Employment Update in which we consider: the preparatory steps employers should take in anticipation of the new data protection regime that is on the horizon, whether maternity leavers have the right to continue to receive benefits funded under salary sacrifice arrangements and some of the employment related items announced in the Budget.

Salary sacrifice schemes: what are maternity leavers entitled to?

Many employers operate salary sacrifice schemes which give employees the opportunity to give up a portion of their salary to fund a particular benefit, for example child care vouchers, the purchase of a car or health insurance. If the salary sacrifice scheme complies with the various statutory requirements the sacrificed salary is not subject to tax or national insurance contributions (both employers' and employees'). This favourable tax treatment has accordingly made such schemes very popular; this has caused the Government to consider restricting the nature of benefits that can be funded in this way (see Budget report below).

For some time an issue that has exercised employers is the nature of the employer's obligation when an employee participating in such a salary sacrifice scheme goes on maternity leave and receives only statutory maternity pay (SMP). An employer is not entitled to make deductions from SMP, therefore there is no salary from which a sacrifice can be made to fund the benefit, e.g. childcare vouchers. An employee on maternity leave is however entitled to receive all non remuneration benefits for the duration of maternity leave. HMRC classifies childcare vouchers as non cash benefits. On the face of it therefore it appeared that employers would have to fund the benefit itself to avoid breaching this entitlement. Indeed that has been the advice from both HMRC and BIS. In practice employers addressed this in a number of ways: some employers simply funded the benefit themselves, others included provisions in their sacrifice schemes that required employees to retrospectively fund the benefits where there was insufficient salary to sacrifice (whether this was because they were on maternity leave or otherwise) and others declined to permit employees on maternity leave to continue to, or, participate in their salary sacrifice schemes.

This last approach was scrutinised by the Employment Appeal Tribunal (EAT). P operated a salary sacrifice scheme under which childcare vouchers were provided. The terms and conditions of the scheme required pregnant employees to agree that during periods of maternity leave the entitlement to vouchers for which salary would be sacrificed would be suspended. C, a pregnant employee, refused to enter into the salary sacrifice scheme because of these terms. She then brought a claim of indirect sex discrimination and a claim of pregnancy and maternity discrimination under the Equality Act 2010 (EqA) and the Maternity and Parental Leave etc Regulations 1999 (MPL Regs). The Employment Tribunal upheld all of her claims.

The EAT disagreed with this decision. It considered that the essence of the claim turned upon whether the salary sacrifice scheme provided a "benefit" to which the MPL Regulations applied and what comes within the scope of "remuneration".

The EAT held that the salary sacrifice scheme was not a "sacrifice" but a diversion of salary which the employee had earned but which was redirected prior to it being placed within the employee's pay packet in order to purchase vouchers to the value of the salary utilised. Therefore, the vouchers should properly be regarded as part of remuneration. In the EAT's view, the fact that the vouchers are deemed to be a "non-cash" benefit by the taxing statutes for the purposes of personal taxation did not deprive it of that character.

The benefit of the scheme is not in the provision of vouchers as such, since the net value received by the employee in receipt of adjusted monthly salary, pension and childcare vouchers is the same as that of her

Key issues

- Salary sacrifice schemes: what are maternity leavers entitled to?
- New ICO Guidance: do you need to prepare for the new Data Protection Regulation?
- New 2016 unfair dismissal and redundancy award limits
- 2016 statutory maternity, paternity, adoption and sick pay rates
- 2016 Budget: employment items

unadjusted or "original salary". The benefit to the employee is payment of less tax upon the salary she does receive.

The EAT was also of the view that the 2014 HMRC Guidance on statutory maternity leave and salary sacrifice that provided that during any period of ordinary maternity leave any contractual non-cash benefits provided under a salary sacrifice scheme in lieu of sacrificed salary "must continue to be provided" irrespective of any salary sacrifice arrangement was wrong.

In the EAT's opinion, if the salary sacrifice scheme was construed to be a benefit that would give employees a windfall and would seriously discourage employers entering into such schemes which would otherwise be of benefit to them and their employees and that could not have been the legislative policy.

On the facts, C had refused to enter the salary sacrifice scheme because of its terms, however, had she done so, the term which provided for the suspension of the voucher scheme during periods when she was receiving SMP was a revision about remuneration. It related directly to the sums paid to C by way of salary. Accordingly, if C had participated in the scheme, the MPL Regulations would be entirely satisfied since C would have the benefit of all the terms and conditions of employment which would have applied if she had not been absent except for the reduction in pay which comes with maternity leave but that is specifically permitted by the legislation.

It should be noted that the EAT did distinguish between sacrifice schemes where the voucher (or other benefit) is solely funded by the employee and schemes where employers provide vouchers as a benefit additional to salary. In such cases the MPL Regulations do require such benefits to be continued during maternity leave.

It should be noted that the EAT stated that it had come to its conclusions "somewhat tentatively" as it was not entirely confident that all the relevant legislation had been drawn to its attention. It is unknown at the time of writing whether this case will be appealed. In the meantime employers should consider taking advice if they are considering withholding salary sacrifice funded benefits from maternity leavers (or indeed employees on shared parental leave) as there may be scope for challenging this interpretation of the legislation.

[Peninsula Services v Donaldson]

New ICO Guidance: do you need to prepare for the new Data Protection Regulation?

After several years in the pipeline it is anticipated that the new General Data Protection Regulation (the 'Regulation') that will supersede the Data Protection Directive (from which our Data Protection Act 1998 is derived) will be published this July (if not earlier). It will come into force two years after publication and will have direct effect without the need for domestic legislation. Employers therefore have a two year transition period to put in place new measures to ensure compliance with the new data protection regime.

Although many of the principles and rules in the Regulation are similar to, or the same as, those in the Data Protection Act, there are new rules which will require some changes in approach by data controllers, including employers. The Information Commissioner's Office (the "ICO") will provide guidance and other tools to help organisations prepare for the new data protection regime. The first of such guidance has recently been published, this Preparatory Guidance contains a 12 step action list for data controllers.

From an employer's perspective some of the key provisions of the Regulation that they should be aware of are set out below:

- **Legal basis for processing personal data:** organisations will be required to explain the legal basis for processing personal data in their privacy notices and in response to a subject access request.
- **Consent:** if 'consent' is relied upon as the basis for processing personal data the Regulation requires this to be freely given, specific, informed and unambiguous. Data controllers must be able to demonstrate that consent was given; clear audit trails will be required. The ICO Preparatory Guidance states that consent has to be a positive indication of agreement and an employer will not be able to infer consent from silence, a pre-ticked box or inactivity.
- **Subject access requests ("SARs"):** at present an employer has 40 days to respond to a SAR. The Regulation reduces the response period to one month. There will be different grounds for refusing to comply – manifestly unfounded or excessive requests can be charged for or refused. Initial indications from the ICO are that whether an SAR will be regarded as manifestly unfounded or excessive will depend on how often the individual makes a SAR and the frequency with which the data is changed as well as whether the SAR is being made in order to antagonise or irritate.
- **Data protection officer:** public authorities, organisations whose activities will involve processing of sensitive personal data on a large scale, or, which by virtue of the nature of their activities will regularly monitor data

subjects on a large scale will be required to appoint a data protection officer ("DPO"). The DPO will have the right not to be dismissed or subject to a detriment for performing their role.

- *Penalties for breach:* at present the ICO can impose a financial penalty of up to £500,000 for breach of the Data Protection Act. In practice few fines have been close to this upper limit. The Regulation provides for fines for breach of the Regulation to be up to the higher of 20,000,000 Euros or 4% of the total worldwide turnover for the preceding financial year. Indications from the ICO at present are that it will continue to levy fines on the existing basis and has no intention of imposing large fines simply because of the higher threshold under the Regulation. However under the new regime there will be a new EU Data Protection Board that can bind national data protection authorities so it may be that the approach to fines for breach will evolve depending on the approach that the Board adopts to the principle that the penalties should be effective, proportionate and dissuasive.

As the Regulation permits Member States to implement 'more specific rules' in relation to the processing of employee data it is possible that new domestic legislation could be implemented although there has been no indication, at this stage, of any intention to do so.

Action points

- Keep an eye out for further guidance and advice from the ICO office at www.ico.org.uk.
- Appoint an individual or group to be responsible for undertaking a review and update initiative in terms of the company's policies and procedures in relation to data protection.
- Audit employment contracts, staff handbooks and other policies and procedures to assess whether privacy notice wording needs to be revised.
- Consider whether 'consent' is the appropriate basis for processing data or whether an alternative would be more appropriate. If consent is to be relied upon does the consent mechanism need to be revised?
- Review policies and response procedures in relation to subject access requests to ensure that the new one month timeframe can be met.
- Consider how personal data can be readily accessed and removed where data subjects have withdrawn their consent to its processing or the business interests for which it was processed has ceased.
- Assess whether a data protection officer has to be appointed, or if not, whether it is nevertheless a good idea to do so.

The ICO 12 Step Action Plan can be found [here](#).

New 2016 unfair dismissal and redundancy award limits

	2015	2016
Maximum amount of a week's pay*	£475	£479
Maximum statutory redundancy/basic award	£14,250	£14,370
Maximum unfair dismissal compensation award	£78,335	£78,962
Maximum combined compensation for unfair dismissal	£92,585	£93,332

* For the purposes of calculating a statutory redundancy award or unfair dismissal basic award.

2016 statutory maternity, paternity, adoption and sick pay rates

	2015	2016
Standard rate maternity/paternity/adoption/shared parental leave pay	£139.58	£139.58 (no change)
Statutory sick pay	£88.45	£88.45 (no change)

2016 Budget: employment items

Proposals outlined in the Budget that that may be of interest to employers and employees alike include the following:

- *Termination payments:* at present payments received in/directly in connection with the termination of employment may be paid free of tax and national insurance contributions (NICs) upto £30,000. The balance

over £30,000 is subject to tax but is not NIC'able because compensation payments are not 'earnings' for NIC purposes.

The Government has formed the view that employers are currently incentivised to and do manipulate the rules and structure of termination arrangements to include payments that are ordinarily taxable such as notice and bonuses to minimise the tax and NICs due. So with effect from April 2018 the rules will be amended so that employer NICs will be due on termination payments above £30,000. No employee NIC's will be due. The Government has stated that it does not propose to alter its tax treatment of the first £30,000 of termination payments.

- **Employee shareholders:** under a scheme that came into effect in 2013 employees could assume the status of an employee shareholder which required them to give up certain statutory employment rights including the right to claim unfair dismissal or to receive a statutory redundancy payment. In exchange for giving up these rights the employee received a minimum of £2,000 of shares of which upto £50,000 are exempt from capital gains tax (CGT).

In the Budget it was announced that employees who become employee shareholders on/after 17 March 2016 will be subject to a lifetime limit of £100,000 on gains eligible for the CGT exemption.

- **Salary sacrifice schemes:** as recently examined by the EAT salary sacrifice schemes allow employees to give up some salary in return for receiving benefits in kind and by doing so avoid paying tax and NIC contributions on that portion of the salary that has been sacrificed. The nature of the benefits that are provided under such schemes has expanded in recent years ranging from childcare vouchers, to cars amongst other items. Childcare voucher schemes will however be closed to new entrants from April 2018.

In the Budget the Government indicated that it was considering limiting the range of benefits that attract tax and NIC advantages when provided via salary sacrifice arrangements. However, it intends to retain this advantageous tax treatment for pension saving, childcare and health related benefits such as cycle to work schemes.

- **Shared grandparent leave:** it was also announced that the first consultation on the proposals to allow working grandparents to take leave to care for their grandchildren will be launched in May.

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