

## Welcome to our January edition

Welcome to this month's employment newsletter. In this issue our Q&A looks at childcare support for working parents followed by our usual 'In Brief' section.

### Q & A

Many employers offer some form of childcare support for working parents. Options include on-site nurseries, reserving places with childcare providers and childcare vouchers. The latter is the focus of this month's e-alert.

#### **How do childcare vouchers work?**

Childcare vouchers are non-cash vouchers that are used to buy childcare services. Employers may provide the vouchers in a variety of ways – for example, under a flexible benefit plan or as an incentive for women returning from maternity leave. The most popular method is to provide them through salary sacrifice schemes.

#### **What is salary sacrifice?**

Salary sacrifice is not just limited to childcare vouchers; it applies to a number of schemes including pension schemes. Under such a scheme, employees 'sacrifice' a part of their gross salary in return for a non-cash benefit, in this case childcare vouchers, that equates to the amount 'sacrificed'. In order to successfully enter into a salary sacrifice agreement, the employee's contract of employment must be legally varied, usually by amending the terms and conditions relating to pay.

#### **What are the incentives for joining the childcare voucher scheme?**

The first £55 a week (or £243 a month) of childcare vouchers per employee is exempt from both income tax and National Insurance Contributions (NICs). Vouchers are typically provided up to that set amount each week, translating into an annual saving of up to £1,195 for a higher rate taxpayer.

The exemption is per employee and not per child. If the employee has two or more children receiving childcare they are only entitled to one exempt amount per week, however, if two employees have responsibility for the same child, each employee is entitled to the £55 exempt limit.

If the value of the childcare voucher exceeds the amount of the full tax exemption, the excess is liable to income tax and NICs as normal. For example, if an employer provides qualifying childcare vouchers of £75 a week, the employee's salary will be reduced by that amount. He or she will not pay any tax or NICs on the first £55, but the remaining £20 will be subject to both.

#### **What about incentives for the employer?**

Employers also make savings under the scheme as they do not have to pay employer NICs which they would otherwise have to pay on the 'sacrificed' part of the employee's salary. This amounts to a saving of up to £373 per employee a year. Administration costs for providing the vouchers are also tax deductible.

#### **Are there any conditions attached to qualifying for the tax exemption?**

To be eligible for the tax exemption, the following conditions must be met:

- The scheme must be open to all employees based at the location where the scheme operates;
- Vouchers are available in respect of a child up to the 1 September following his or her 15<sup>th</sup> birthday (16<sup>th</sup> birthday if the child is disabled). The child must be the natural issue or step-child of the employee or a child for whom the employee has parental responsibility; and

- Vouchers can only be used to pay for childcare that has been registered or approved. This would include registered childminders, nurseries, playschemes and out-of-hours clubs on school premises run by a school or local authority, and childcare schemes run by approved providers. Childcare by relatives can be qualifying childcare if the relative is a registered or approved childcare provider, the care is provided away from the child's own home, and the care is provided to non-related children in addition to the related child or children.

## **How is the scheme administered?**

The scheme is often administered by specialist suppliers in return for a fee from the employer, but employers retain overall responsibility for ensuring that the conditions for the exemptions are met and may be asked to provide proof of this. They should therefore keep records of the scheme, including details of eligibility, the child's date of birth, and who the childcare provider is. Employers also remain responsible for the correct deduction of tax and NICs.

## **What are the scheme's advantages?**

The main advantages, for employers and employees, are financial. Operating a childcare voucher scheme may also help employers improve relations with their employees.

## **Are there any drawbacks?**

The scheme is not without its disadvantages. Before committing to it, employees should carefully consider the implications that a reduction of their earnings, and consequently the NICs they pay, will have on their entitlement to benefits such as statutory sick pay, statutory maternity pay, and the State Pension. Similarly, joining the voucher scheme may adversely affect an employee's eligibility for tax credits, such as Working Tax Credit. The HMRC provides an online calculator on its website to help employees determine whether they will be better or worse off with childcare vouchers.

For employers, the main drawback of the voucher scheme is the cost implication where the employee is on maternity leave. The issue of whether childcare vouchers have to be provided to employees on statutory maternity leave has caused consternation. The question centres over whether the childcare vouchers amount to a 'benefit' or 'remuneration'. If they are the former, the employer must continue to provide them to the employee throughout the maternity leave period. If they are to be regarded as part of the employee's 'remuneration', this right suspends on the commencement of maternity leave.

HMRC guidance takes the view that childcare vouchers are a non-cash benefit, even if they are provided as part of a salary sacrifice scheme. As a result, they must be provided during the full term of maternity leave. It is worth noting that HMRC guidance on this point is non-binding and this view has not been tested in the courts.

This is clearly an issue that employers must consider before commencing such a scheme. For further information visit the HMRC website at [www.hmrc.gov.uk/childcare](http://www.hmrc.gov.uk/childcare) or call Wilsons' Employment team.

## **In Brief**

### **Civil Partnerships v Religion or Belief**

The Court of Appeal has handed down its judgment in *Ladele v London Borough of Islington*. Ms Ladele, a civil partnership registrar, insisted that she was entitled not to have civil partnership duties assigned to her because of her belief that such unions were contrary to the will of God.

The Court of Appeal agreed with the Employment Appeal Tribunal that Ms Ladele was neither directly nor indirectly discriminated against, nor harassed contrary to the Religion or Belief Regulations by being designated a civil partnership registrar or by being required to officiate at civil partnerships. In short, there is nothing in the Religion or Belief Regulations that entitled Ms Ladele to make such a claim.

Interestingly, the Court of Appeal went on to consider the conflict of rights issue, namely whether the effect of the Sexual Orientation Regulations 2007 "trumps" the right to freedom of religion. It held that the prohibition of discrimination on grounds of sexual orientation took precedence over rights conferred on a person by virtue of their religious belief or faith, to practice discrimination on the ground of sexual orientation.

Following, the decision in *Ladele*, the Employment Appeal Tribunal (EAT) has handed down its decision in *McFarlane v Relate*, determining that it was not direct discrimination to dismiss a Christian relationship counsellor who equivocated about the requirement that he counsel same-sex couples about their sex lives. Moreover, indirect discrimination was justified since the employer had the legitimate aim of providing services equally to all users, achieved by requiring staff to participate in the provision of services, even if that conflicted with their with religious beliefs. Finally, this type of dismissal can be fair for conduct or "some other substantial reason".

## Harassment

In *Veakins v Keir Islington Ltd*, the Court of Appeal assessed whether conduct would constitute harassment under section 1 of the Harassment Act 1997. In determining this matter, the primary focus is whether the conduct is oppressive and unacceptable, albeit the court must also keep in mind that it must be of an order which would sustain criminal liability. Although there is nothing in the language of the Harassment Act to exclude workplace harassment, the court did not expect that many workplace cases will give rise to liability under the Harassment Act. The Employment Tribunal will more fittingly provide the remedy for the great majority of cases of high-handed and discriminatory conduct.

In the instant case, Ms Veakins, a trainee electrician, gave unchallenged evidence that she was a usually robust woman who had been victimised and demoralised by her supervisor and became clinically depressed. It was held that in this unusually one-sided case the proven conduct crossed the line into conduct which is oppressive and unacceptable, and which the Court considered would, in the event of a prosecution, be sufficient to establish criminal liability.

## Sleep-in payment counts towards National Minimum Wage

In *Smith v Oxfordshire Learning Disability NHS Trust*, Mr Smith worked part time at a residential care home for adults. He was contracted to work 15 hours a week and was occasionally required to 'sleep in' overnight (a period of just over 9 hours) in return for a flat-rate payment of £25. Mr Smith began to query this arrangement, taking the view that the Trust was failing to pay him the national minimum wage. He resigned and commenced tribunal proceedings.

The Employment Tribunal dismissed Mr Smith's claim and, on appeal, the EAT upheld this decision stating that the £25 payment for sleeping in should be taken account of when calculating whether the Trust had paid him the national minimum wage. Although the pay was not consolidated into his standard pay, it did not amount to an 'allowance' under the national minimum wage legislation and therefore could not be disregarded when calculating national minimum wage.

## Notice Requirements – Maternity Leave

In *St Alphonsus RC Primary School v Blenkinsop*, the EAT held that although Ms Blenkinsop failed to comply with the notice requirements for statutory maternity leave by the end of the 15<sup>th</sup> week before her expected week of childbirth, her delay was excusable.

Although this case turns very much on its own peculiar facts, it illustrates the kind of circumstances in which failure to comply with notice requirements will be excused. Ms Blenkinsop, who was a teaching assistant at a primary school, commenced her maternity leave having given the school her MAT B1 form and having been informed, somewhat late, of her right to maternity leave. When she attempted to return early from maternity leave,

she was informed that she had failed to comply with the correct requirements on taking leave and that her job no longer existed since she had allegedly informed the school that she would not be returning at the end of her maternity leave. This latter fact flew in the face of discussions between herself and the school.

Ms Blenkinsop claimed that she had complied with the prevailing maternity legislation in giving notice as soon as it was reasonably practicable to do so. The EAT found that she had not complied with the necessary notice requirements for taking maternity leave however, it was held that she had an excuse as it was not reasonably practicable for her to notify the school and that she had done so as soon as reasonably practicable. The EAT held that as the school had failed to provide her with a written contract of employment or a copy of its maternity policy, and therefore her rights and obligations during her pregnancy, it had misled her as to her employment status. This therefore accounted for her ignorance as to her legal rights and, as the school was responsible for B's confusion, it could not benefit from the ensuing delay. Employers should be very aware that in assessing an employee's failure to comply with maternity leave notice requirements, the employer's actions will be scrutinised.

## **Disability Discrimination – Adverse Effect**

In *Chief Constable of Lothian and Borders Police v Cumming*, Ms Cummings was employed in a civilian post before being appointed as a Special Constable. She later applied to become a Regular Constable but was rejected following an occupational doctor's advice that she did not meet the eyesight standard laid down by statute for the appointment to the regular police force.

Ms Cummings complained she had been discriminated on the grounds of a disability and, accordingly, needed to show that her impairment had a substantial and long-term adverse effect in her ability to carry out day-to-day activities in order to satisfy the definition of 'disability' in the legislation. The police force accepted that her condition was an impairment that had an adverse effect on her day to day life, but disputed that the adverse effects were substantial. She suffered mild 'left-sided amblyopia' which restricted her ability to look up and left and the consequence was that she needed to take regular breaks when doing close reading work and had a mild squint and scarring in her left eye.

At first instance the Employment Tribunal considered that the fact that she had failed the eyesight test to become a Regular Police Constable in itself meant that it had a substantial effect on her day-to-day activities. On appeal, the EAT overturned the tribunal's decision clarifying that the tribunal had erred in placing such weight on this factor. It was held that the police force's rejection was not a physical effect and that if the tribunal's approach was correct, someone suffering no adverse effect from a physical impairment, such as a facial scar, would be rendered disabled for the purposes of the Disability Discrimination Act if their application was rejected by a potential employer on the grounds of this impairment. This could not have been the intention of the legislation.

## **Compromise Agreements**

The EAT has confirmed in the case of *Industrious Ltd v Vincent* that the Employment Tribunal has jurisdiction to determine whether a compromise agreement which complies with the provisions of section 203(3) of the Employment Rights Act is nevertheless unenforceable because of misrepresentation. This case remedies conflicting authorities concerning whether the Employment Tribunal has any jurisdiction to set aside such a compromise agreement.

## **Other news**

For the first time ever, the annual review of compensation limits has resulted in a reduction to the maximum compensatory award limit. From 1st February 2010, the maximum compensatory award for unfair dismissal drops from £66,200 to £65,300. A week's pay (for basic award and redundancy pay purposes) remains the same at £380.