Cox Cooper Ltd
Solicitors

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Your quarterly bulletin on legal news and views from Cox Cooper Solicitors

Employment Law UPDATE

The Taxation of Termination Payments

The rules governing the taxation of termination payments are being tightened from 6 April 2018 by means of legislation to amend Chapter 3, Part 6 of the Income Tax (Earnings and Pensions) Act 2003.

Hitherto, where the employee's contract of employment contained an express payment in lieu of notice (PILON) clause, such payments were taxed at the appropriate rate. Where a PILON was not contractual, or the business making it did not routinely make such payments to departing staff, it could be regarded as compensation for breach of contract and paid free of tax up to a threshold of £30,000.

In order to ensure that the £30,000 exemption cannot be abused, the distinction between contractual and non-contractual PILONs has now been removed. The change applies to payments or benefits received on or after 6 April 2018, whether contractual or non-contractual, in circumstances where the employment also ended on or after 6 April 2018.

Employers are now required to calculate the amount of basic pay excluding bonuses, referred to as post-employment notice pay (PENP), the employee would have received had they worked their full notice period. This amount is taxable as earnings and subject to Class 1 National Insurance Contributions (NICs).

The first £30,000 of a termination payment that is not PENP will remain exempt from Income Tax, and any payment made to any employee that relates solely to the termination of their employment will continue to have an unlimited employee NICs exemption. The proposal to subject all termination payments above the £30,000 threshold to employer NICs, which was originally due to take effect at the same time, has been delayed until April 2019.

The legislation ensures that PENP calculations are not to be applied to statutory redundancy payments. These are always taxable as specific employment income and subject to the £30,000 exemption where appropriate.

Initial guidance on the new rules can be found in HM Revenue and Customs Employer Bulletin 70 at https://bit.ly/2FZsC6k. More detailed guidance will be published in the Employment Income Manual in due course.

A further change is that Foreign Service Relief in respect of termination payments is to be removed. This will not apply to seafarers, however.

In addition, the legislation clarifies that the exemption from tax for payments for injury and disability is not intended to apply to payments for injury to feelings, except where the injury amounts to a psychiatric injury or other recognised medical condition.

Employers are advised to include a PENP clause in employees' contracts of employment as the tax advantage of excluding such a clause no longer exists. If you would like assistance in reviewing your contracts of employment to ensure they are fully compliant with current legislation, please contact us.

Auto-Enrolment – Increase in Minimum Required Contribution Levels

Under the Pensions Act 2008, every employer in the UK has a duty to enrol certain staff into a pension scheme and contribute towards it.

Employers are reminded that the minimum required contribution levels to auto-enrolment pension schemes or qualifying workplace pension schemes (based on a worker's 'qualifying earnings') increase from 6 April 2018.

From that date, the employer minimum contribution rate is 2 per cent and the staff minimum contribution rate is 3 per cent.

There will be a further increase from 6 April 2019, when the employer minimum contribution rate will rise to 3 per cent and the staff minimum contribution rate will rise to 5 per cent.

The scheme rules or agreements will need to be amended to ensure it continues to meet the qualifying criteria.

If a pension scheme does not increase its minimum contribution levels in line with the statutory requirements, it will no longer be a qualifying scheme for existing members and cannot be used for automatic enrolment.

Pension scheme trustees and providers, employers and payroll and software providers should ensure they have done all that is necessary to comply.

Further information and detailed guidance for employers can be found on the website of the Pensions Regulator at https://bit.ly/2EbK4mq.

We can assist you in reviewing your pension scheme arrangements to ensure your statutory duties are met.

University Fined £300,000 Following Laboratory Accident

Workplace health and safety rules protect not just employees but also visitors or anyone else who may be affected by breaches. In one case, a university received a £300,000 fine after a research student was partially blinded during a laboratory experiment *(R v The University College London)*.

The student placed a sample in a lithium evaporation chamber and was tightening its securing bolts when the glass viewing port shattered. The pressure in the chamber had risen so high that the glass was unable to withstand it. Fragments of glass flew into the student's left eye, causing a hole in her retina. She was left partially sighted in the affected eye and also suffered some facial scarring and symptoms of post-traumatic stress disorder.

The university was fined after pleading guilty to an offence under Section 3(1) of the Health and Safety at Work etc. Act 1974. That provision requires employers to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment, but who may be affected by such undertakings, are not exposed to health and safety hazards.

In ruling on the university's challenge to the amount of the fine, the Court of Appeal noted that cost-cutting had played no part in the incident. Laboratory managers had simply overlooked the possibility of such an accident occurring.

Whilst it acknowledged that the university had taken a solicitous approach to the student's welfare following her injury, the Court dismissed its appeal. A young woman blamelessly going about her work had been seriously injured. The gravity of the harm caused merited a substantial financial penalty and the university's mitigation, guilty plea and charitable status had all been taken into account in fixing the fine. The penalty was neither wrong in principle nor manifestly excessive.

Please contact us for advice on any health and safety law matter.

New Rates of Statutory Pay for Parents

From 1 April 2018, the weekly rates for Statutory Maternity Pay (SMP), Statutory Paternity Pay (SPP), Statutory Shared Parental Pay (ShPP) and Statutory Adoption Pay (SAP) increased from £140.98 to £145.18.

Statutory Sick Pay

The weekly Statutory Sick Pay (SSP) rate for days of sickness absence increased from £89.35 to £92.05 with effect from 6 April 2018.

In addition, the lower earnings limit applying to National Insurance Contributions, below which employees are not entitled to SMP, SPP, ShPP, SAP or SSP, increased from £113 to £116 per week for the tax year 2018/2019.

Is Stand-By Time Working Time?

In *Ville de Nivelles v Matzak*, the Court of Justice of the European Union (CJEU) was called upon to answer questions referred to it by the Higher Labour Court in Brussels regarding the remuneration of firefighters working in the Belgian town of Nivelles when on stand-by. The case is of importance for employers who require workers to be available to attend work at short notice.

Mr Matzak worked as a volunteer firefighter at the Nivelles fire station. He was required to live in a place that was no more than eight minutes' travelling time from the station and, during the one week in four when he was on stand-by duty, remain available to make the journey within that time, making sure that he was in a position to take any calls from his employer as soon as they were made and leave for work immediately. He worked alongside professional firefighters and both types of worker were paid an annual allowance in respect of stand-by time. Mr Matzak claimed that the amount paid was insufficient for the time worked.

One of the questions referred to the CJEU was whether the EU Working Time Directive prevents home-based on-call time from being regarded as working time when the worker is under constraints that very significantly restrict their opportunities to undertake other activities.

Under the Directive, 'working time' means any period during which the worker is working, at the employer's disposal and carrying out their activity or duties. A 'rest period' is any period that is not working time. Earlier judgments of the CJEU have specified that the concepts of working time and of rest periods are mutually exclusive, so stand-by time must be classified as one or the other.

The CJEU ruled that the obligation for Mr Matzak to remain physically present at a place determined by his employer and the geographical and time constraints put upon him because he was required to reach his place of work within eight minutes were such as to limit his ability to devote himself to his personal and social interests. The time he was on stand-by was therefore working time.

In reaching its decision, the CJEU disagreed with the opinion of the Advocate General that it is the quality of the time spent by the worker when on stand-by duty rather than the precise degree of required proximity to the place of work that is of overriding importance in this context. The intensity of the work carried out and the worker's output are not the salient issues.

Furthermore, Mr Matzak's situation was different from that of a worker on stand-by who is required to be permanently contactable by their employer without the need to be present at their place of work. In that situation, the worker can manage their time with fewer constraints and pursue their own interests.

The question of whether or not Mr Matzak had been correctly remunerated for his time on stand-by was referred back to the Belgian Court for determination.

Please contact us if you have workers on stand-by and would like assistance reviewing their contractual arrangements.

Government Consults on Aspects of the Parental Bereavement Bill

The Parental Bereavement (Leave and Pay) Bill began life as a Private Members' Bill in July 2017. The Bill is being supported by the Government and is now wending its way through Parliament.

The aim of the Bill is to give parents who are employed and have suffered the death of a child under 18 the right to two weeks' Bereavement Leave in order to give them time to grieve. Employees with 26 weeks' continuous service will also be entitled to Bereavement Pay.

The Government has published a consultation document seeking views on options for regulations to fulfil certain provisions contained in the Bill, specifically on:

- the definition of 'bereaved parent';
- how and when two weeks of Bereavement Leave and Pay can be taken; and
- the notice and evidence required to take Bereavement Leave and Pay.

The consultation, which can be found at https://bit.ly/2GTdI2D, closes on 8 June 2018.

Small Family Company Overturns Pregnancy Discrimination Finding

Quite apart from any breach of sex discrimination law which might occur, it is automatically unfair dismissal if an employer dismisses a female employee for reasons connected with her pregnancy or the birth of her child.

In determining whether or not a dismissal is pregnancy related, an Employment Tribunal (ET), as with all judicial bodies, has to act with an open mind and give equal consideration to both sides of the dispute. That regrettably did not happen in one case in which a small family-owned car sales company was accused of discriminating against a telesales operative due to her pregnancy *(Really Easy Car Credit Limited v Thompson)*.

The car sales company sells second-hand cars, advertising heavily online. The woman, who had previous telesales experience, was employed to work alongside two other employees. Her employment was subject to the completion of a three-month probationary period, during which time her contract could be terminated by either side on one week's notice.

The woman was still within her probationary period when the company decided to terminate her employment owing to her alleged emotional volatility and failure to fit in with the business's work ethic. Only after that decision was taken did the company's management discover that she was pregnant. The decision was nevertheless implemented and her employment was terminated.

In upholding her claims of pregnancy discrimination and automatic unfair dismissal, an ET found that the company should have reviewed the dismissal decision after learning of her pregnancy. It must at that stage have been obvious that the emotional behaviour that the company considered to have been the last straw was related to her pregnancy. Those findings were sufficient to reverse the burden of proof against the company and the ET found that it had failed to show that the woman's dismissal had nothing whatever to do with her pregnancy.

In upholding the company's challenge to that ruling, the Employment Appeal Tribunal found that the ET had, in effectively finding the company liable by omission, applied the wrong legal test. What the ET had failed to do was determine whether the woman's pregnancy was the reason, or principal reason, for her dismissal. It had also failed to consider the company's explanations, or otherwise engage with its case, before proceeding directly from the finding that the burden of proof was reversed to a finding that liability was established. The woman's case was remitted to a differently constituted ET for fresh consideration.

Contact us if you would like advice on any of the issues raised in this bulletin or on any other employment law matter.

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