

Minutes of Statutory Payments Consultation Group

Date: Wednesday 28 June 2017
Venue: 100PS, London
Time: 11:30 am

Attendees

Chris Tait (CT)	HMRC - Chair
Lisa Storey (LS)	HMRC
Sandie Andrews (SA)	HMRC
Peter Walker (PW)	HMRC (dialled in)
Melanie Thomas (MT)	BEIS
Debbi Jackson (DJ)	BEIS (dialled in)
Rebecca Lawther (RL)	DWP
Simon Parsons (SP)	IREEN
Linda Pullan (LP)	Payroll Alliance
Samantha Mann(SM)	CIPP

Apologies

Kate Upcraft	ICAEW
Jackie Pethebridge	FSB
Jane Edwards	DWP
Wendy Corbin	DWP
Marcia Bowen	Payroll Alliance
Claire Gregory	BEIS
Debbie Bullen	DWP
Alex Metcalf	Federation of Small Business

Introduction

CT Opened the meeting and thanked everyone for attending and gave apologies from those that were unable to attend.

Minutes of the last meeting – issued in January 2017 - were accepted as being a true record of events.

Update on SSP – Green Paper Proposal

RL thanked everyone for sharing the Improving Lives, The Work, Health and Disability Green Paper consultation with their networks. She confirmed that they had received a substantial response to the Green Paper consultation from a wide range of individuals with disabilities and long-term conditions and organisations with an interest, and are now considering all that has been heard before deciding how best to move forward. This may take a short while as DWP want to do justice to the breadth and depth of views that have been shared with them. There was a commitment given to building on the momentum of the work and health agenda, and to taking early action where it is right to do so.

It was also noted how much it had been appreciated by DWP that the group had provided quick responses by using its networks to access the more detailed SSP survey.

RL pointed out that DWP are committed to continuing to engage with a wide range of stakeholders and partners, all of whom have an important part to play in making the transformative changes required to support disabled people and people with long-term health conditions to get into and stay in work – and once there, to go as far as their talents will take them.

Going forward it was confirmed that they would be working with Ministers on the next steps.

Update on Salary Sacrifice – Peninsula case

DJ, MT and PW provided an update on the issue and plans for HMRC guidance on salary sacrifice schemes.

The issue is that the Employment Appeals Tribunal (EAT) decision in Peninsula Business Services Ltd v Donaldson had cast doubt on whether childcare vouchers provided under a salary sacrifice scheme should continue to be purchased by an employer when their employee is on Maternity Leave.

HMRC's current guidance on the treatment of salary sacrifice schemes which are used to purchase childcare vouchers includes advice on employment law to the effect that the provision of vouchers must continue whilst a woman is on Maternity Leave, because they constitute a benefit which is no longer 'remuneration' following the sacrifice of salary in order to obtain them. This is in the current guidance because the Maternity and Parental Leave etc. (MAPLE) Regulations 1999 provides that an employee's terms and conditions of employment, other than remuneration, must continue during the period that they are on Maternity Leave. This also includes terms and conditions which are not contractual (i.e. where the employer offers a service or benefit on the basis that it is not part of the employee's contract of employment and can therefore be withdrawn). 'Remuneration' is defined narrowly in this context as applying only to wages or salary. So the question arising from the Peninsula case is whether childcare vouchers (and other benefits) provided under a salary sacrifice scheme amount to 'remuneration'.

In the Peninsula case, the EAT ruled that the childcare voucher scheme which Peninsula offered amounted to a 'diversion of salary' rather than a 'sacrifice of salary'. As such, in this case, the childcare vouchers could be treated as 'remuneration' and the employer (Peninsula) was not obliged to provide the vouchers whilst Ms Donaldson was on Maternity Leave.

BEIS outlined the issue in more detail and said that there are two legal questions which are distinct:

(a) First, MAPLE 1999 says that 'terms and conditions of employment' must continue during Maternity Leave and this explicitly includes terms which are not contractual.

What is excluded is anything which is 'remuneration', which means in this context only 'wages or salary'. So the distinction is not contractual v non-contractual, but rather 'wages' v other benefits (like the use of a company car, gym membership, life insurance, medical insurance, pension contributions and childcare vouchers).

(b) BUT following the decision in the Peninsula case this distinction is tricky when benefits are provided by way of salary sacrifice scheme (the legal issues extend to all benefits provided in this way, not just childcare vouchers).

In the Peninsula case, it was said that the childcare voucher scheme was not truly a 'sacrifice' of salary, but more like an instruction to the employer to divert the employee's wages to a childcare provider to buy vouchers on their behalf. The vouchers were therefore simply something that the employee had agreed that the employer would buy using their wages. The 'benefit' was not the voucher, but the tax advantage. Therefore, this was still 'remuneration' and an employer was entitled to suspend payment of it (i.e. withdraw the vouchers) during Ms Donaldson's Maternity Leave.

The judgement in the Peninsula case did not contain a description of Peninsula's salary sacrifice scheme. So whilst we know that the EAT considered this particular scheme to amount to a 'diversion of salary', that does not mean that another scheme with different features would not still be considered to be a 'sacrifice of salary' in the true sense.

PW said that, as set out in HMRC's guidance a salary sacrifice scheme will fail to achieve the tax advantages and will be subject to tax and national insurance contributions if the employee retains the right to change their mind by giving up the benefit derived under the salary sacrifice scheme and reverting to their previous (higher) salary.

DJ and MT said that it is likely that such an arrangement would be considered to amount to a 'diversion of salary' and that, conversely, where the employee has no (or very limited) rights to change their mind and must permanently accept a lower salary in return for the benefit provided under a salary sacrifice scheme this is likely to be a true 'sacrifice' of salary. But because features such as this were not discussed in the Peninsula case we do not know what significance the courts will place on such features – this is merely BEIS' opinion.

MT confirmed that this meant that the question of whether an individual employer's scheme amounts to a 'diversion of salary' or not is likely to turn on the individual facts of the case (i.e. the details of the particular scheme operated by individual employers) and we would, therefore, strongly advise individual employers to take independent legal advice on the nature of their scheme before suspending childcare vouchers and other benefits provided under a salary sacrifice scheme.

DJ acknowledged that this approach was not particularly helpful to individual employers but said that, in the absence of a detailed discussion about why the Peninsula scheme amounted to a 'diversion of salary' there was very little that BEIS could say in terms of

advice on this point. She added that in these circumstances it is for the courts, not Government officials, to interpret the law (i.e. the judgement in Peninsula) and said that the Government would normally wait to see how the courts approached this going forward. She added that the risk attached to putting out definitive guidance is that BEIS' view may not be shared by the courts and the guidance would therefore be incorrect.

DJ suggested that HMRC's Tax Manual was not the best place for advice on employment law and equality law – although she could see why the link had been made and acknowledged that the guidance had been approved by BEIS prior to issue. She thought the current approach was no longer appropriate given the uncertainty around the employment law position and suggested that a possible way forward was for HMRC to reissue their guidance but limit this to advice on the tax position following the Peninsula case. It was agreed that it would be helpful to divorce the tax advice from the other advice.

SP said it would be helpful if HMRC could revisit its tax guidance as there were a couple of issues with this.

PW and CT said they would investigate these issues.

DJ said that BEIS will not rule out providing a contribution to HMRC's guidance but the concern is that this would need to be so anodyne that it would be of little or no use to employers – who would still need to take advice on their particular scheme.

Action PW to liaise with relevant people to review guidance taking into consideration the Peninsula Judgement.

ShPP extension

At this time BEIS are still exploring all options but it was accepted that there are competing governmental priorities. BEIS committed to involve all stakeholders with any proposed policy change in this area"

SM asked if there was a review of ShPP in 2018

DJ said the 3 year evaluation of policy was due to start in 2018 and the Government will consider whether any changes to scheme are needed following this but given the current political environment, and in particular the amount of legislation required as a result of the UK exiting the EU and the pressure that this will place on parliamentary time, it is unlikely that changes to domestic legislation which are not urgent will be taken forward at this time.

Calculators

SA advised that there was a problem with the calculators at the moment and advised that manual calculations should be done to calculate average weekly wage and entitlement until the problem is resolved. SA went on to say she had put an advisory message on the Agents update and would also put one on the employer bulletin.

SM asked if a caveat can be put on the calculator informing users as we were too late for this employer bulletin. SA said she would take this forward.

SA advised she was still working with Gov.UK regarding mistimed payments but any work on this was suspended until the other issues were resolved.

LP raised an issue with the tables on Gov.UK being too small to read clearly. SA said she would look into this but advised it wasn't normally within HMRC's remit to be able to change this, and any amendments to information on Gov.UK had to be agreed by them, and usually they were only implemented if there was evidence of large numbers of issues raised.

Action SA to ask Gov.Uk to put a caveat on Calculators.

Updated - Calculators are now working as they should so this is not required.

Action SA to ask Gov.UK if anything can be done about spacing between the lines on the SMP tables.

Updated - An email has been sent to Gov.UK on 19/07/2017 asking if it is possible to do this. This is now with the developers and awaiting publication.

SMP tables have been amended and any future tables will be done in the new format.

Pensions on Maternity Leave

This issue was raised by SP at the previous meeting. Legislation dictates that pension contributions must continue to be paid during maternity leave. This was easy to calculate for regular incomes but was becoming more of an issue due to irregular hours contracts and zero hour contracts and LS had advised that BEIS had provided information which indicated that there was no legislation to determine how to calculate pension entitlement of such contracts.

LS asked on behalf of BEIS if attendees would ask employers what they were doing now to calculate pension contributions in these circumstances. BEIS would look at the response to see if they would help to support legislative amendments to take account of irregular/zero hours contracts.

Action - All external attendees to ask employees how they are calculating pension contributions for irregular/zero hour contracts and report back to the group to help shape discussions.

AOB

General Data Protection Registration (GDPR)

SP informed the group that EU had upheld rights of individuals and other bodies not retaining data e.g. a right not to be known. This raised issues regarding what information had to be retained and what had to be destroyed. LS informed the group that HMRC already have clear policies in place regarding data protection that HMRC have a project team in place that will be looking at the impact of any new legislation and how to implement any subsequent changes required. HMRC will keep the group updated with any relevant information they receive on the matter.

DWP confirmed by email they are in the process of getting a project together. Ahead of that they are already in discussion with OED about how to change the 'implied consent' processes for 3rd party representatives and others. They are also looking at other new rights that people will have and what processes need to be adjusted/changed to satisfy them. DWP also said they do not expect this to impact Statutory Payments however they would be interested if HMRC (or any stakeholders) feel otherwise.

Next meeting to be arranged.