EMPLOYMENT NEWS HEADLINES MAR-APR 2018 ISSUE 14

CHANGES TO TAXATION OF TERMINATION PAYMENTS

Regular readers will be aware we first highlighted this impending change in Issues 2 and 4 of Maxlaw Global Employment News. Under the old termination payment provisions, where a payment in lieu of notice (PILON) clause was not included in the employee's contract of employment, the payment of notice pay up front was treated as damages for breach of contract. It was, therefore, exempt by HMRC from income tax and national insurance contributions (NICs) as a payment falling outside of the contract.

This all changed from 6 April 2018 with the Government abolishing this practice, no doubt, to increase revenue for the Treasury. For terminations that take effect after 5 April 2018, any payments that represent notice pay will be taxable and subject to NICs regardless of whether or not there is a PILON clause in the contract of employment. The current regime of PILONs being taxable if a clause does exist in the contract of employment or the employer ordinarily has a practice of making PILONs remains unchanged.

This new regime impacts employers who do not have a PILON in their contracts as they will now be required to make a 'post-employment notice period' (PENP) payment calculation to determine what is taxable and subject to NICs.

- Where employees are paid monthly this will be quite straightforward as the number of months the employee would have worked out their notice will now be taxable regardless of how the payment is labelled or whether it forms a part of a larger ex-gratia termination sum;

- Where employees are paid weekly or work part of the notice period, the calculation will be more complex. A statutory formula will need to be applied based on the number of days in the notice period remaining and the last pay period before notice was served. This will, therefore, vary depending on the number of calendar days in both the unworked notice period and the last pay period in each individual case.

This taxation principle only applies to basic pay (excluding overtime, holiday pay, bonuses, benefits etc.,) but includes salary sacrifice. These will still need to be treated as normal under their own tax rules. Anything that does not fall under a taxable category will then form part of the £30,000 tax free allowance. For example, redundancy pay or compensation for loss of benefits.

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A further change that was planned for this year but has now been delayed until April 2019 is that, at present, there are no NICs payable on termination payments even where tax is due on payments over the first £30,000. From next year, employers NICs will be due on any balance over this threshold although employee NICs will still be exempt.

The practical effect of all this for employers is that termination costs will continue to rise as often termination packages are negotiated based on the net benefit to the exiting employee. It is also advisable for employers to include a PILON in their contracts in order to protect any post termination restrictions as there is no tax advantage for either party now in excluding it.

WHAT IS A 'QUALIFYING DISCLOSURE' IN WHISTLEBLOWING – PARSONS V AIRPLUS INTERNATIONAL LIMITED (EAT)

In Issue 10 of Maxlaw Global Employment News we reviewed the case of ***Chesterton v Nurmohamed***. This was a Court of Appeal case that provided some guidance to employers on where the line fell between a disclosure that may have an element of self-interest still being "protected" for whistleblowing purposes due to it also being in the wider public interest.

The case of ***Parson v Airplus International Limited*** found the opposite. This is a case where Ms Parsons was found, both at first instance and at the Employment Appeal Tribunal, to not have been dismissed due to a qualifying protected disclosure.

Ms Parsons was employed as a Legal and Compliance Officer with Airplus for a period of six weeks or so before being dismissed for her conduct and performance which in the tribunal was described as for being "cultural misfit"! Ms Parsons brought a claim for automatic unfair dismissal for making a "protected disclosure" under whistleblowing protection. On review of the case the courts found:

- Ms Parsons had been primarily concerned about an issue over a consumer credit licence due to her own self-interest and fears over her personal liability;
- She also received continuous negative feedback from management and colleagues about her attitude and manner during her short time with Airplus;
- She had raised concerns over the lack of a Money laundering officer also due to her own concerns about personal liability rather than any public interest concerns;
- Ms Parsons was found to be rude, disrespectful and confrontational.

For the above reasons, the EAT dismissed her appeal stating that Ms Parsons was solely motivated by her own self-interest and held no belief that her disclosure was made in the public interest. It also found that there was a genuine separation of the reasons for Ms Parsons termination and the compliance concerns she had raised. In reaching this conclusion the EAT noted that Airplus provided opportunities for improvement before moving to termination.

This case is a reminder that unless there is a genuine belief in protecting the public interest, an employee's disclosure will not always be protected. For employers its important to separate out any concerns an employee raises that may be protected from any reason for a fair dismissal by following a proper process.

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IS AN EMPLOYER VICARIOUSLY LIABLE FOR THE ACTIONS OF A ROGUE EMPLOYEE? - VARIOUS CLAIMANTS V MORRISONS SUPERMARKET PLC (QBD)

With the General Data Protection Regulations (GDPR) due to come into force on 25 May 2018, the current case is an important reminder to employers to ensure appropriate compliance and regulatory measures are in place to achieve the data protection principles set out in the original Data Protection Act 1998 (DPA) and enhanced under the GDPR.

In a landmark class action by some 5,000 plus employees, Morrisons Supermarket was found to be vicariously liable for a serious data breach by one of its employees.

The case relates to an IT internal auditor, Andrew Skelton, who was taken through a disciplinary process by his employer on an unrelated matter. The finding on investigation and appeal was that Mr Skelton would be given a disciplinary sanction of a formal verbal warning which would remain on his file for 6 months. Mr Skelton's malice and rage against his employer was such that he published the personal and payroll data of some 100,000 Morrisons' employees on a file sharing website. He later sent CDs to the press of the same data. The outcome for Mr Skelton did not end well and he was arrested, charged, tried and sentenced to eight years imprisonment under the DPA, Computer Misuse Act and the Fraud Act.

The claim against Morrisons by the large number of impacted employees was twofold:

1. They argued that Morrisons had primary liability for Mr Skelton's actions and had breached its statutory duty under the DPA. The Court rejected this, finding that Morrisons had not authorised the misappropriation or the misuse of the personal data and was not the actual true data controller *at the time* of the data breach. As a result, the judge ruled there was no primary liability and there was no breach of principle 7 of the DPA by Morrisons.

2. In claiming vicarious liability, the Courts found that Morrisons was liable as there was an "unbroken thread that linked Mr Skelton's work to the disclosure". The data had clearly been entrusted to Mr Skelton during the course of his employment and he did have the responsibility of working with that personal data. The Court rejected the argument by Morrisons that he had committed the unlawful act at home, using his own computer equipment and in out of office hours. It said these did not break the "sufficient link" with his employment and Morrisons was found to be vicariously liable.

Although Morrisons has been granted leave to appeal this point, this is a warning to employers that the actions of its employees in data breaches could have serious consequences for it. The GDPR also covers liability for data processors and it is critical for employers to review policies, processes and organisational and technical security measures (including restrictions on employee access to personal data, deletion mechanisms etc.,) to limit liability in such cases of data breach. In this case, the level of compensation for the employees is yet to be decided. We will keep you posted.

THE LATEST ON IR35 IN THE PRIVATE SECTOR – CHRISTA ACKROYD MEDIA LTD V HMRC (FTT)

A rare and successful outcome for HMRC at a recent First Tier Tax Tribunal is a reminder to those who work via a personal services company (PSC) that in the Government's attempt to recover as much income tax and NICs as possible the position for public sector workers has now change but this does not mean private sectors workers are immune from HMRC's reach.

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The case relates to Christa Ackroyd who worked as a journalist and presenter for the BBC via her PSC, for a period of 7 years on two fixed-term contracts. She paid herself via her PSC through PAYE and, as a shareholder, also took a dividend payment with a more favourable tax treatment.

The HMRC was successful in its argument before the tribunal in claiming that IR35 did apply to her arrangement with the BBC. In looking at whether Ms Ackroyd should have paid income tax and NICs on *all* her earnings not just the element paid through PAYE the Tribunal looked at the following:

- Had the PSC been removed from the equation would Ms Ackroyd's relationship with the BBC have been akin to an employment relationship i.e., the "hypothetical contract";
- What was the level of control and instruction by the BBC both in written terms and in practice;
- Was Ms Ackroyd taking any financial risk herself;
- Did she have the right of substitution in her role if she could not perform the service herself;
- The duration of the two contracts were lengthy and consecutive;
- She did not have other normal business elements such as a website, insurance, terms of business, logo and branding, an office, other substantial clients, an accountant etc.,

Overall, even with some autonomy and flexibility, taking the above aspects into account, the Tribunal found that Ms Ackroyd could not be fairly described as "being in business on her own account". She relied on her work with the BBC and IR35 did apply to the full amount she received from the BBC. Those working through a PSC would be well advised to review their arrangements to ensure they do not fall foul of IR35 as Ms Ackroyd did.

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