Employment Law Newsletter

September 2016

nplaw
Public Sector Legal Expertise
www.nplaw.co.uk

Taxation of termination payments

The current taxation rules on termination payments for loss of employment state that the first £30,000 can be paid free of income tax / national insurance although it should be noted that the law isn't straightforward in terms of deciding whether all forms of PILONs (Payments in lieu of notice) should attract tax and whether payments for personal injury should be included within this exemption.

The Government has just announced its response to the consultation on this and provided draft legislation which it hopes to implement by April 2018.

The main reforms are:

- The distinction between contractual and non-contractual PILONS is removed so that all PILONs will be treated as earnings subject to income tax, employer NICs and employee NICs) while retaining the general distinction between contractual and non-contractual termination payments.
- The current £30,000 threshold will be retained.
- Alignment of the rules for income tax and employers' NICs so that employers' NICs will be payable on payments above £30,000.
- It will be made clear that the current exemption for payments for injury will not include injury to feelings unless this amounts to a psychiatric injury or a recognised medical condition.

HR should note that there may be further amendments to these proposals given that the reforms won't be introduced until the 2017 Finance Bill and that the Government has invited further comments on its proposals.

Consultation on salary sacrifice

HMRC has recently announced a consultation on the use of salary sacrifice and indicated that it is considering restricting what can attract relief from income tax because it has become concerned about the amount of money that such schemes cost. These reforms should come into force in April 2017.

However, it has confirmed that employer pension contributions, employer-provided pension advice, employer-supported childcare, provision of workplace nurseries, cycles and cyclist's safety equipment provided under the cycle to work scheme, will remain unaffected by the proposals. Similarly, salary exchanged for flexible working, additional holiday entitlement and payroll giving will also be unaffected.

Public sector gender pay reporting

The Government's Equalities Office has published a consultation paper called "Closing the Public Sector Pay Gap" which will require public sector bodies that have 250 staff or more to produce annual statistics relating to pay by gender. Anyone interested can complete an online survey (www.gov.uk) .

It should be noted that this will be an addition duty on top of the Public Sector Equality Duty and the Equality Act 2010 (Specific Duties) Regulations 2011. We believe that it will be necessary to analyse the data that is generated and to review any equality plans in light of that data on an annual basis as a failure to do so could leave public sector organisations vulnerable to challenge if they do not.

No discrimination where an employee applies for a job for the sole purpose of bringing a claim

It is well-known that some individuals apply for jobs with no intention of actually trying to obtain a job but rather are seeking to make a potential claim if they do not get interviewed etc., notwithstanding the fact that they don't want the job. For example, tribunals had to deal with this issue when the age discrimination law was introduced when some individuals made hundreds of speculative job applications. The European Court has just ruled in a recent judgement that where an individual applies for a job only in order to seek compensation for discrimination, and not to obtain employment, they will be outside the scope of both the Equal Treatment Framework Directive (2000/78/EC) and the Equal Treatment Directive (2006/56/EC). This decision mirrors a 2009 UK employment appeal tribunal decision which gave a ruling on similar grounds. Of course, it is down to a tribunal to determine whether any claim is a sham but it should be welcomed as another weapon to deal with vexatious litigants.

Injury to feelings awards will be higher

A recent ruling in the Employment Appeal Tribunal has confirmed that employment tribunals do not have to wait for a higher court decision before it can make an increase in an injury to feelings award if it is merited because of inflation. It also confirmed that a ruling in the Court of Appeal back in 2013 that increased general damages by 10%, could be applied to injury to feelings awards, although it should be noted that there is a case pending which may affect this. It also stated that unless a judge's assessment was clearly excessive, an employment appeal tribunal would not be able to change an award.

Guidance on 'without prejudice' discussions under S111A of the Employment Rights Act

One of the major reforms of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) was to put on a statutory setting the ability of parties to have 'without prejudice' discussions in relation to unfair dismissal and breach of contract cases where they had an existing dispute between them.

The EAT ruled that S111A meant that the fact of negotiation, and not just the discussions, was protected from being disclosed. Any offers or discussions with a view to agreeing terms was inadmissible. Furthermore, the EAT held that section 111A must also extend to an employer's internal discussions, such as between different managers and Human Resources. It also held that under section 111A privilege could not be waived and the EAT noted that the statute did not allow for this.

It also stated that it did not necessarily follow that there had to be a definite offer for s111A to apply- it all depended on the nature of the discussion.

Under s111A, privilege is lost if the employer engages in 'improper behaviour' – the EAT felt that this should be given a wider interpretation although ultimately this is a question of fact.

The other key point to note is that, for other claims not covered by s111A, the existing case law still applies and it may be possible to lose privilege for those ones, even if it hasn't been lost for unfair dismissal or breach of contract because of s111A. In practice, much depends on whether there was a genuine dispute, the nature of the discussions, the behaviour of the employer and whether a genuine waiver of privilege has happened. Given the above complexities, if you have an issue, we would recommend that you take advice from us.

NEWS …..

We welcome Laura Macdonald to nplaw who has joined us as a trainee solicitor. She will spend 6 months with the Public Law team before moving on to gain experience in different teams.

Contact details If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: **andrew.brett@norfolk.gov.uk, 01603 223101**

Please follow us on Twitter: @NplawNorfolk