SUMMARY

2016/23 Are employers obliged to provide childcare vouchers during maternity leave? (UK)

<p>An employee challenged whether her employer's refusal to provide childcare vouchers during maternity leave was discriminatory. The Employment Appeal Tribunal (EAT) determined, somewhat tentatively, that where childcare vouchers are provided through a salary sacrifice scheme, it is not discriminatory for employers to cease to provide childcare vouchers during maternity leave.</p>

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Background

Employees who are pregnant or on maternity leave are protected against discrimination on the grounds of their pregnancy. Specifically, employers are obliged to maintain an employee's terms and conditions during maternity leave, however, remuneration is expressly excluded from this obligation. Employers are not obliged to continue remuneration during maternity leave but are obliged to continue all other contractual benefits and entitlements.

Facts

Ms Donaldson's employer, Peninsula Business Services Ltd (Peninsula), operated a salary sacrifice scheme which provided childcare vouchers to employees. Salary sacrifice is an

arrangement where an employee agrees to give up part of their salary in exchange for a non-cash benefit. Salary sacrifice schemes allow employees to benefit from a full or partial exemption from tax and/or national insurance (social insurance) contributions in respect of the benefit. Employers also receive the benefit of an exemption from national insurance contributions.

It was a pre-condition of entry to the scheme operated by Peninsula that employees agreed that the provision of childcare vouchers was suspended during maternity leave, paternity leave, parental leave or sick leave. Ms Donaldson, who was pregnant at the time she wished to enter the scheme, argued this was discriminatory on the grounds of sex and was unfavourable treatment because of the right to maternity leave. The Employment Tribunal agreed that the vouchers were benefits, not remuneration, and that Peninsula had acted unlawfully in refusing to provide them during maternity leave. Peninsula appealed the decision to the EAT.

Judgment

The EAT agreed with Peninsula and overturned the Tribunal's findings. It found that the salary sacrifice scheme was a diversion of part of an employee's salary to purchase childcare vouchers to the value of the salary in a tax efficient way and therefore childcare vouchers provided in this way should be classified as remuneration not as a benefit. Accordingly, Peninsula was not obliged to provide childcare vouchers to employees on maternity leave.

Commentary

This decision caused some surprise as it runs contrary to the approach taken by many employers. Until now, most employers treated childcare vouchers provided through a salary sacrifice as a non-cash benefit. The tax guidance from the British tax authority, HMRC, also advises that childcare vouchers provided in this way are benefits in kind rather than earnings and should continue to be provided to employees during maternity leave. The EAT, recognising this conflict, specifically noted that the HMRC guidance had no legislative force.

This area of law is undoubtedly complex and technical. Ms Donaldson was not represented and did not appear at the EAT hearing. The EAT was required to rely on her written submissions, while Peninsula was represented by counsel. The EAT analysed salary sacrifice not as a 'perk of the job' but rather as vouchers paid for by employees out of their salaries – a diversion of salary and therefore remuneration. At first blush this seems like a sensible description of salary sacrifice, but further scrutiny reveals a few problems with this reasoning.

Unfortunately, the judgment did not consider what constitutes remuneration in other circumstances. In particular, it might have been helpful for the EAT to examine the impact of

the salary sacrifice on the calculation of statutory maternity pay (SMP) and contractual enhanced maternity pay. SMP is payable for the first six weeks of maternity leave at 90% of the employee's average earnings (the remaining period of SMP is payable at a statutory fixed rate). The salary sacrifice element or 'remuneration' as described by the EAT, is not considered to be part of the employee's salary for the purposes of calculating SMP. Contractual enhanced maternity pay is also usually calculated on the basis of the reduced salary. Statutory redundancy pay and employer pension contributions under pension auto-enrolment are also calculated based on the reduced salary. This would clearly suggest that childcare vouchers provided under a salary sacrifice scheme are more akin to a benefit rather than remuneration.

The judgment also appears to ignore the fact that salary sacrifice is a permanent reduction to an employee's salary in return for a benefit. On that analysis, it is difficult to say that salary has been "diverted" and should be treated as remuneration. At the point in time the salary is 'sacrificed' there is no remuneration to divert – it has not been paid to the employee. The employee is paid only the balance. The employer however has a contractual obligation to provide a non-cash benefit to the employee – which is the same as if childcare vouchers had been provided directly to the employee (i.e. not through a salary sacrifice scheme). The EAT appeared to accept that vouchers in that situation must be provided during maternity leave– because it is a benefit not remuneration.

The EAT unusually stated that it remained "apprehensive" that it may not have considered all of the relevant law and expressed its conclusions "somewhat tentatively". Any employer considering changing their approach should proceed with caution – particularly employers providing vouchers to employees on maternity leave as these employees may have an expectation of receiving the vouchers. It is also worth considering whether some employees have a contractual entitlement to the vouchers during maternity leave. Given the analysis above, it remains to be seen whether the law is settled on this matter. It is possible that the judgment may yet be appealed to the Court of Appeal or another EAT could reach a different outcome.

Comments from other jurisdictions:

Germany (Jana Hunkemöller, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the situation is comparable. During parental leave, the main obligations of the employment relationship are suspended. Therefore, an employee, who is on parental leave, is not entitled to any kind of remuneration to be paid by the employer. The employee will receive so called parental benefits from the state for up to twelve months [in case both parents take parental leave in accordance with the German Parental Leave and Parental Benefit Act

(Bundeselterngeld- und Elternzeitgesetz – BEEG)], they will jointly be entitled to a payment for up to 14 months). This means, if part of the salary is converted in a benefit in kind, the employer is not obliged to grant this benefit during times of parental leave. Only if the benefit does not depend on work provided, such will have to be paid during those times.

In contrast to this, during times of maternity protection periods according to Sec. 3, 6 Maternity Protection Act (Mutterschutzgesetz – MuschG) (mainly during six weeks before and eight weeks after giving birth), benefits in kind will have to be paid or converted. Those costs are covered by a combined system of payments of the health insurance and the employer. However, the employer will be refunded by the health insurance per so called "U2-apportionment procedure" [Sec. 1 Expenditure Compensation Act (Aufwendungsausgleichsgesetz – AAG)].

Subject: Maternity leave

Parties: Peninsula Business Services Ltd – v – Donaldson

Court: Employment Appeal Tribunal

Date: 9 March 2016

Case number: UKEAT/0249/15/DM

Creator: Employment Appeal Tribunal
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