Pimlico Plumbers decision means more gig economy workers have rights to paid holiday

The Supreme Court has added to the raft of cases concerning whether staff in the gig economy are workers or genuinely self-employed.

Why employers can be liable for discrimination via their agents

The Court of Appeal has considered the circumstances in which an employer will be held liable for acts of discrimination committed by their agents.

Taxing News

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Employment Law News

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Employers everywhere, sharpen your pencils and find your calculators. Tax on employment termination payments has changed and you will need to dust off your arithmetic. The objective of the new regime is said to be tax simplification but we’ll let you be the judge of whether that has been achieved.

What’s changing?

The change relates to taxation of notice periods. As is well-known, the previous law allowed payments in lieu of notice to be made tax free up to a maximum of £30,000, but only if there is no payment in lieu of notice (PILON) clause in the contract of employment.

This handy little loophole has long eased the situation of employees who’ve lost a job and also smoothed the path to settlement of employment disputes, by maximising the value of

a termination payment in the hands of the departed employee without increasing the cost to the employer. However, it seems that the view of HMRC is that loopholes are there to be closed and so this concession is being removed.

Which employment termination payments are caught by the new rules?

It appears from an HMRC statement that the new rules will only be applied where **BOTH** the termination date **AND** the payment are after 5 April 2018.

How do the new rules work?

The new rules will apply whenever an employee is receiving a payment on termination unless they work/remain employed for the entire duration of the notice period.

For terminations that are caught by the new rules, an amount of pay equivalent to base pay over any unexpired notice period ("Post-employment Notice Pay" or "PENP") will need to be taxed, irrespective of whether or not the employment contract contains a PILON clause.

Unfortunately, the precise mechanism for applying tax under these rules is a bit complex. There are two possible formulae to calculate the PENP and work out the amount of pay that is deemed to be taxable notice pay. In either case you will calculate the employee's basic pay for each day/month then multiply that by the remaining part of the notice period before netting off any taxable sums otherwise payable.

Which one of the formulae you need to use depends on whether the notice period is expressed in weeks or months and what the pay interval for the employees is. Unfortunately most cases will fall into the day-based calculation, which is slightly more complex and is likely to need to be done manually. It may also mean that the total amounts are affected by the number of days in the months over which the relevant time periods fall,

which may produce inconsistencies.

How to apply the new rules for employment termination payments?

There are a few tricky pitfalls to watch out for in applying the new rules, including:

- To calculate the PENP you need to use “basic pay” which is just the basic pay for the previous pay period and disregards overtime, bonuses, commission etc. However, you must include any amounts forfeited under salary sacrifice arrangements, such as for childcare vouchers.
- It is not yet clear how the rules work if you have a PILON clause. Probably the right interpretation is that you still have to calculate the PENP to assess how much tax is due but then deduct any taxable PILON payments, to avoid double-counting. This will hopefully be clarified in the guidance, when published.
- It is also unclear what the effect is if the employee has been terminated for gross misconduct and so arguably no notice of termination is due. Again the expectation, as yet unconfirmed, is that if a payment is made in these circumstances then an amount equivalent to the PENP is due to be taxed.
- What if some of the payment is paid into a pension scheme or is otherwise tax-sheltered? Current expectations are that the tax-sheltering will be effective and won’t be taxable even if this means that there is a shortfall in tax from the full PENP but, once again, clarification is awaited.

In reality it has taken many years of clarifying legal cases to reach the current position on taxing termination payments which, although complex, is relatively certain. The truth is that, even after guidance has been issued, it is likely to take a similarly long period to shake down the new rules and iron out the unclear wrinkles.

What should employers do now?

- Ensure that you update payroll staff who may process payments and HR personnel who may be providing illustrations of termination payment structures, to ensure that the rules are correctly communicated and applied.
- Update settlement agreement templates to split out the two payments (Termination Award and PENP) and update tax indemnity wording.
- Employers without PILON clauses in their employment contracts should now consider including them. The tax advantage of omitting these clauses historically has been thought to outweigh the disadvantages (which include the risk that termination without notice will not be accepted as validly ending employment). Given the change, there is now no real upside to excluding them.

If you have queries on the above please contact Tom McLaughlin, Partner on TomMcLaughlin@bdbf.co.uk

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Morrisons held vicariously liable for its employee's

data protection breach

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Morrisons, the supermarket chain, has been held liable for a disgruntled employee's wilful breach of data protection legislation.

Mr Skelton was employed by Morrisons as a senior IT internal auditor. This role gave him access to sensitive personal data relating to the company's staff. He also sold a legal slimming drug on the internet in his spare time. In summer 2013, Morrisons subjected Mr Skelton to a disciplinary procedure on the basis that his use of the company's post room to send the slimming drug had caused alarm when fellow employees thought

it was an illicit substance. Mr Skelton remained in his role despite this.

In November 2013, Mr Skelton was asked to send sensitive payroll-related employee data to KPMG (Morrisons' external auditors). Mr Skelton downloaded the encrypted data on to his work computer before copying it on to a new USB stick for KPMG. He then made a copy for himself on a personal USB stick. In January 2014, using the files he had uploaded to his USB stick, he posted personal details of 100,000 Morrisons employees on to a file sharing website.

In March 2014, Mr Skelton was arrested and charged with fraud, computer misuse offences and data protection offences. He was convicted and sentenced to eight years' imprisonment.

A group claim was brought against Morrisons by a number of the workers whose personal data had been shared online by Mr Skelton. They argued that not only was Morrisons liable itself for the data breach, but it was also vicariously liable for Mr Skelton's breaches in its capacity as his employer.

The High Court held that Morrisons was not liable itself for breaches of data protection legislation, as it had not been the controller of the data once it left its servers. However, it held that Morrisons was vicariously liable for Mr Skelton's breaches despite his actions seemingly having been deliberate and motivated by spite. There was held to be a sufficient connection between Mr Skelton's actions and his employment with Morrisons, given that his access to the data was obtained through his job – indeed, Morrisons had entrusted him with the data as part of his role, and in doing so, it took the risk that he would misuse it. It was Mr Skelton's duty to disclose the data and he did so, albeit in an unauthorised way. Mr Skelton's motive was not relevant to the finding of vicarious liability.

This judgment appears to be heavily motivated by the policy

consideration of ensuring that victims of data protection breaches have a means of redress. Indeed, the High Court acknowledged that Morrisons had a number of appropriate measures in place to protect the data on its servers from misuse, but held it liable in any event.

Various claimants v WM Morrisons Supermarket plc [2017] EWHC 3113

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Holiday entitlements carry over indefinitely if employer refuses to offer holiday pay

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Workers’ entitlements to paid annual leave will carry over indefinitely in circumstances where the employer has refused to offer holiday pay. This means that the accumulated unpaid holiday pay earned throughout the working relationship becomes payable as a lump sum on termination.

Mr King was a salesman for the Sash Window Workshop. For 13 years, he worked on a commission-only basis and was never paid for periods of sickness absence or annual leave. He was at one stage offered an employment contract with the company, but he rejected it. The company terminated Mr King’s contract when he reached the age of 65; in response, he brought claims of age discrimination and unpaid holiday pay.

In relation to his holiday pay claim, Mr King alleged that he had not taken his annual leave entitlement each year because he had been told it would be unpaid.

It having been held that Mr King was a worker (and therefore eligible to receive holiday pay), the remaining question was whether Mr King was entitled to payment in respect of the proportion of annual leave which he had declined to take each year.

The European Court of Justice noted that a worker who is unsure as to whether they will be paid for annual leave (or knows they will not be paid) will not get the full benefit of

that annual leave as a period of relaxation, and may be discouraged from taking it altogether. Therefore, the question of whether Mr King had actually put in any holiday requests at any stage was not pertinent.

The ECJ held that, where a worker has not made use of their right to annual leave over a period of years because the employer wrongly denied holiday pay or indicated that it would, that holiday entitlement carries over until termination.

This case creates some potential exposure for employers for large holiday pay payments falling due on termination. Employers may wish to offer paid holiday in future, although in doing so they may risk undermining any claims that such staff are not ‘workers’ or ‘employees’ and not therefore entitled to paid holiday. In any event, offering paid holiday from now onwards would not remove the risk of claims in respect of untaken holiday in the past.

King v The Sash Window Workshop Ltd and another C-214/16

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