



# Employment law update for payroll professionals

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## Agenda

- PILONs after 6 April 2018
- Report on gender pay gap reporting
- Christa Ackroyd – IR35 bites ex-BBC presenter
- Holiday pay update
- Shared parental leave – update following *Ali* and *Hextall*

## PILONs

- Previously:
  - PILON clause in contract of employment = payment subject to income tax and NICs
  - No PILON clause in contract = possible to make payment tax free as “damages for breach of contract”
- HMRC missing out on income tax and NICs and so elected to “simplify” arrangements

## PILONs

- Relevant termination award
  - Payment or benefit received directly or indirectly in consideration of, in consequence of or otherwise in connection with the termination of a person's employment.
- Excluded payments
  - Statutory redundancy payment
  - Approved contractual pay
  - Up to £30,000

## PILONs

- Slice of relevant termination award must be treated as earnings (and subject to IT and NICs) is:
  - Entire award if post employment notice pay is equal to or more than the relevant termination award; or
  - The post employment notice pay if it is less than the relevant termination award

## PILONs

- Example
- A paid £3,000 per month and has a 3 month notice period
- A works one month of his notice period
- A is paid a relevant termination award of £10,000
- Post employment notice pay =  $£3,000 \times 2 = £6,000$
- $£6,000 < £10,000$  and so £6,000 treated as earnings
- £4,000 tax free

## Gender pay gap reporting

- Deadline to publish data was 4 April 2018
- Over 10,000 employers published data (more than 1,000 on the last day!)
- 1,557 missed the deadline
- 78% of reports show that men were paid more than women
- 14% of firms pay women more than men
- 8% reported no pay gap at all
- Median pay gap reported at 9.7% - significantly less than the 18.4% figure recorded by the ONS

## Gender pay gap reporting

- Highlights (Lowlights?):
  - Ryanair: 71.8% GPG
  - Karen Millen: 49% GPG
  - RBS: 36.5%
  - Benefit Cosmetics: 30.7% despite over 90% of employees being female!
  - Unite (“at the forefront of the trade union campaign to achieve equal pay”) female employees’ median hourly pay 29.6% lower than male



## Gender pay gap reporting

- Highlights:
  - Finance sector has the highest reported GPG at 35.6%
  - Accommodation and food services lowest at 1% (most employees on flat wage/NMW?)
  - Tesla Motors, Mamas and Papas and Richer Sounds reported negative GPGs

## IR35 bites

- Familiar practice that senior execs wish to provide services as a consultant through their service/limited company
- IR35 introduced in early 2000s to address this
- Where individual would be considered an employee of the client but for the existence of the intermediary company, IR35 applies
- Effect that any payments made to the individual by the intermediary must be made after deductions of tax and NICs

## IR35 and Christa Ackroyd

- Case reported widely in the news earlier this year
- CA provided presenting services to BBC through Christa Ackroyd Media Limited – encouraged if not required by the BBC
- Required to provide services for up to 225 days per year
- Fees received from the BBC made up 98% and 96.5% of CAML income in two years
- CA worked in the same way as individuals recognised as BBC employees
- Tax tribunal: IR35 applied, £400k tax bill (reportedly)

## IR35

- 2017 – public sector changes. Client now to consider whether IR35 applies and to make net payments if so
- 2018 consultation re introducing to the private sector
- If engage a number of contractors/consultants watch for updates

## Holiday pay

- *Lock v British Gas* – Supreme Court?
- *King v Sash Windows*
  - Mr K worked as a commission only salesman
  - Received no salary and not paid for holiday or sickness
  - SW terminated his engagement when he was 65 and Mr K brought claims for age discrimination and unpaid holiday pay
  - Age discrimination claim successful and not appealed
  - But further fuel on the holiday pay fire

## Holiday pay

- ET:
  - Mr K a worker
  - Awarded holiday pay for:
    - final year
    - leave requested and taken as unpaid in previous years and
    - leave accrued but untaken in previous years
  - SW appealed third point (not others)

## Holiday pay

- EAT:
  - Upheld SW appeal on point 3
  - Mr K had not been prevented from taking holiday by reasons beyond his control (e.g. sick pay or maternity leave) and so no entitlement to carry forward. Lost in accordance with the WTR
- CA:
  - Referred to the ECJ

## Holiday pay

- ECJ (in summary):
  - WTR splits right to holiday and right to holiday pay. Incompatible with the WTD – should be one right
  - Worker unsure of being paid for holiday will not benefit fully from it and likely to be dissuaded from taking it. Contrary to the WTD
  - Mr K not prevented from taking leave due to sickness. In those cases need to balance protection of worker against operational difficulty faced by employer. SW had benefited from Mr K not taking paid holiday



## Holiday pay

- Where worker not exercised their right to take holiday because employer failed to pay holiday pay, WTD required unlimited carry over of entitlement until termination
- Due to be heard/implemented by CA in November 2018. Likely to have to read more words into the WTR
- Potentially large liability for any business which engages a large number of “self-employed” contractors who might be workers and entitled to paid holiday. Think Uber and similar gig economy employers

## Shared parental leave

- 285,000 couples eligible each year
- Department for Business reports take-up as low as 2%
- 50% still unaware the option exists?
- Expect greater publicity
- Should SPP be equivalent to EMP?

## *Ali v Capita*

- Mr A wished to take SPL
- Eligible to receive SPP only
- Mother taking ML would receive full pay
- ET:
  - Direct discrimination because of sex
  - Appropriate comparator was mother on ML after 2 week compulsory ML. After that point, purpose of ML to care for child – same as SPL

## *Ali v Capita*

- EAT:
  - Primary purpose of ML not to care for child
  - ML and MP is for the health and wellbeing of the mother
  - Correct comparator for Mr A was a woman on SPL who would have received SPP
  - Even if ET comparator correct, special treatment afforded to woman in connection with pregnancy/childbirth to be disregarded
  - Not direct discrimination

## *Hextall v Leicestershire Police*

- Mr H was a serving police officer who took SPL and received SPP
- A female police officer taking ML would receive full pay
- ET:
  - No discrimination (direct or indirect)
  - Correct comparator is a woman taking SPL

## *Hextall v Leicestershire Police*

- EAT:
  - Comparator argument accepted in relation to direct discrimination, but not indirect
  - Relevant pool for comparison for indirect was police officers with a present or future interest in taking leave to care for a newborn child
  - Exercise different for indirect discrimination
  - Case remitted to a fresh ET
  - Door open for indirect discrimination – but could still justify

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Questions?



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