



EMPLOYMENT  
LAWYERS  
ASSOCIATION

P.O. BOX 353  
UXBRIDGE UB10 0UN  
TELEPHONE/FAX 01895  
256972  
E-MAIL [ela@elaweb.org.uk](mailto:ela@elaweb.org.uk)  
WEBSITE [www.elaweb.org.uk](http://www.elaweb.org.uk)

**HMRC Consultation:  
Salary Sacrifice for the Provision of Benefits-in-Kind**

**Response from the Employment Lawyers Association**

**19 October 2016**

**Employment Lawyers Association response to  
HMRC Consultation on Salary Sacrifice  
for the Provision of Benefits-in-Kind**

**19 October 2016**

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee ("the L&P Committee") and the working party set up to respond to this particular consultation are made up of both Barristers and Solicitors, working in private practice and in-house, who act for both Claimants and Respondents. The L&P Committee meets regularly for a number of purposes including to consider and respond to proposed new legislation.

## **Introduction**

As employment lawyers, we consider that we are competent to comment on some of the consultation questions and have restricted our response to the points where we believe we are well placed to contribute. The working party was chaired by James Davies of Lewis Silkin. The working party members are listed at the end of this document.

## **Chapter 1 : Introduction, paragraph 1.6**

### **Childcare vouchers and salary sacrifice schemes**

The Foreword makes clear that the reason for this consultation exercise is the Government's concern about the 'rising costs of salary sacrifice'. While recognising that concern, it is crucial to underpin addressing the problem and its possible solutions by accurate joined-up analysis of the legal position. We suggest that this consultation represents an opportunity to address a particular practical issue which has arisen with childcare vouchers and salary sacrifice schemes

Examination of the childcare vouchers salary sacrifice scheme suggests that the option of confining the tax and NI benefits to specified 'exempt amounts' could provide a sensible way forward.

At §1.6, the consultation document suggests that: *"some employees are unaware that use of salary sacrifice can reduce the level of contributory benefits such as statutory maternity pay....."*

It is not the fact that employees are necessarily unaware but that they do not understand properly the intricacies of salary sacrifice schemes or what a variation of contract actually means in relation to changing their employment terms and conditions. Any variation (subject to agreed exceptions) affects other future benefits while the salary sacrifice terms take effect.

This may affect pension, redundancy payments, voluntary early retirement and maternity pay. Indeed if employees are not earning enough while on maternity leave (and career breaks and other forms of leave may also come into this category) the terms on which they signed up to a salary sacrifice might come to an end as they have no or greatly reduced disposable income. The employee may be required to pay an early termination penalty or source finances elsewhere to keep membership of the scheme alive (just at the point they have restricted earnings).

Salary sacrifice may have some benefits for the employee but it also benefits the employer (in tax savings) and the third party provider of the benefit. A simpler way around the problem identified at §1.6 is to require the employer to provide standardised information about the proposed salary sacrifice scheme. Any perceived disadvantages to employees need to be very clearly spelt out. As a potential safeguard when agreeing to varying a contract (akin to that for settlement agreements), the provision of independent legal advice on the effect of the salary sacrifice on other payments, benefits, sickness, maternity and career breaks etc should be considered. At the very least should be a recommendation to obtain independent legal advice on the potential effect of the scheme.

Further, as well as just noting that employees are unaware about the effects of a salary sacrifice scheme on other matters, it would be helpful to understand why that is the case and ensure that the original parliamentary intention was achieved, taking account of all relevant maternity pay and leave legislative provisions.

In the case of SMP, it is understood that childcare vouchers were disregarded as income when calculating SMP on the basis that the vouchers would continue during maternity leave – as suggested in 2014 HMRC Guidance.

In respect of childcare vouchers purchased in a salary sacrifice scheme, up to the defined 'exempt amount' is excluded or disregarded as earnings – see SMPG Regs reg 20(2)(a) which defines earnings as including 'any remuneration or profit ...' and refers to the Social Security (Contributions) Regulations 2001/1004 reg 25 and Sch 3 paras 6B, 7 and 7A.

Thus an amount withheld under a salary sacrifice scheme does not count towards earnings when calculating SMP. Statutory Maternity Pay itself cannot be sacrificed and must be paid in full. The object was that the childcare vouchers would continue during maternity leave, so there would be no shortfall below the level of SMP.

Difficulty arises because of the decision of Mr Justice Langstaff in ***Peninsula Business Services Ltd v Donaldson [2016] ICR 565***.

The EAT in **Donaldson** was dealing with a complaint that the terms on which a salary sacrifice scheme was provided was discriminatory contrary to s18 Eq A (unfavourable treatment because of asserting a right to maternity leave and to s19 Eq A (indirect discrimination) and was not contrary to reg 9 of the Maternity and Parental Leave etc Regulations 1999 (MPL).

**Donaldson** decided that despite MPL Regs reg 9(3) confining 'remuneration' to 'sums payable by way of wages or salary', a salary sacrifice voucher was nevertheless 'remuneration' and so was excluded by s.71(5)(b) Equality Act 2010 from continuing during maternity leave and deprived an employment tribunal of jurisdiction to hear an indirect sex discrimination claim.

Crucially the EAT was not referred to the relevant SMP and Contributions regulations. Nor despite consideration of the relevant HMRC guidance did HMRC become involved (it is not known if HMRC were invited to make submissions). Nor was the EAT referred to **North Yorkshire Police Authority v Revenue and Customs Commissioners & Wade [2011] I.R.L.R. 393**.

In **Wade** the Upper Tribunal accepted that the maternity pay and leave provisions could be expected to work harmoniously, or at least not be inconsistent with each other. **Donaldson** arguably achieves the latter result. Had the EAT considered the SMPG Regs it would not have overlooked the need for harmony between MPL Regs reg 9(3) with ERA s.71(5)(b) and SMPG Regs reg 20(2)(a) with CBA s.171(4).

The current position is that childcare vouchers, up to the exempt amount, are not remuneration when calculating SMP. But when looking at maternity leave and Equality Act provisions the vouchers count as remuneration and so cannot continue during maternity leave. The EAT suggest continuation of vouchers would be a 'windfall'. However, rather than avoiding a 'windfall', as the EAT suggest, women will be underpaid by the amount of the vouchers during the 6 weeks of 90% pay (and thereafter for those paid less than the standard rate of SMP). Given the definition of 'maternity related pay' in [EqA s.73\(9\)](#) the shortfall cannot be recovered via inserting a Maternity Equality Clause. Nor does SMPG Regs reg 21 enable normal weekly earnings to be recalculated to reflect the lost vouchers.

## Question 2

*What are the likely impacts on employers and employees of limiting the scope of BiKs that can obtain tax advantages when offered through salary sacrifice arrangements?*

## Lower Paid Employees

Whilst this is already something noted within the consultation document, we do agree that the proposals could be important in addressing an inequality which currently exists between employees with earnings at or near the National Minimum Wage or the National Living Wage and those who earn more than this since these lower paid employees cannot benefit from such a scheme where it would

reduce their earnings to below the relevant threshold yet they are the employees who would arguably most benefit and have the greater need for such tax breaks. To a much lesser extent this inequality in terms of the actual benefit received could also be said to exist between basic, higher and additional rate tax payers. As such, the government's proposals seem sensible in this regard, particularly if some of the savings might be focussed into other initiatives which might allow lower paid employees to receive benefits.

## **Health and Gyms**

The consultation mentions that cycle to work schemes etc. will remain unaffected and reference is made to workplace gyms and health screenings. However, certain employers offer a salary sacrifice scheme whereby a payment may be made directly to a gym in relation to gym membership, pre-tax. This may be something that the government also wishes to consider in the context of health benefits.

## **Question 5**

*Do you think that the government needs to take any steps to mitigate any negative consequences of this change for employees and employers, such as those who may be locked into salary sacrifice arrangements? If responding, it would be helpful to understand specific examples and factors the government should take into consideration.*

## **New vs existing employees**

As noted in the consultation document, the Government only wishes to capture salary sacrifice where an employee is able to trade BiKs for cash pay, it does not wish to capture arrangements where employees have no option to reduce their cash pay in exchange for BiKs.

This has the potential to develop differences between existing employees who may have been in a salary sacrifice scheme (and whose arrangements will be captured by this proposal) and new employees who, prior to their employment commencing, will have the opportunity to negotiate a basket of benefits in addition or in exchange for part of their cash remuneration.

This could lead to a situation where two employees may receive the same combination of benefits and cash remuneration but they will be treated quite differently from a tax perspective. While this is in accordance with the proposal (as the intention is to capture those employees who are able to trade BiKs for cash pay) it may lead to differentials in employer's workforces with new employee's receiving much more beneficial tax treatment than those employees who receive these benefits via a salary sacrifice. Employers may be able to deal with this issue through offering existing employees, who have salary sacrifice arrangements in place, the option to permanently vary their terms and conditions and fix the benefits they receive i.e. that they are no longer tradeable for cash. However, employers may be reluctant to commit to such arrangements as they will be required to absorb future increases

in the costs of providing these benefits – albeit this would also be the case for new employees.

A similar issue arises where employers have sufficient flexibility in their remuneration structures to allow for complete renegotiation of benefit packages. In these instances, where there is no reference to a cash equivalent these employees can achieve the same result as a salary sacrifice.

### **Question 7**

*Are there any consequences that the government has not considered in proposing to legislate in this way?*

#### **Low Carbon Cars**

The consultation document states that certain benefits (pension saving, employer-supported childcare and the cycle to work schemes) will continue to benefit from income tax and NICs relief when provided through salary sacrifice arrangements. The rationale for this is that these are benefits that the Government specifically wants to encourage employers to provide.

Given the Government's aim of encouraging a move to cleaner and lower carbon vehicles, the Government may want to consider the effect this proposal could have on the uptake of these vehicles as a result of the potential increased tax payable.

A potential disincentive will arise from the proposed changes to how the value of the benefit provided to the employee, and therefore the tax charge, is calculated. Currently when a car is provided to an employee through the use of a salary sacrifice the value of the benefit, upon which tax is calculated, is determined by using a prescribed "appropriate percentage" of the manufacturers list price which decreases the more efficient the vehicle is. This results in an incentive, from a tax perspective, for employees to choose a cleaner and lower carbon vehicle.

The consultation proposes that the value of the benefit provided to the employee is now instead calculated based upon the amount of salary sacrificed. This will likely result in increased tax costs for cleaner and lower carbon vehicles, due to:

- the value of the benefit being calculated based upon the amount of salary sacrificed – cleaner and lower carbon vehicles tend to be more expensive and require more salary to be sacrificed; and
- there no longer being any account taken of the efficiency of the vehicle when determining the amount of tax that employees, who receive cars through salary sacrifice, pay.

It is a policy decision for the Government in terms of what benefits it wishes to continue to benefit from

income tax and NICs relief when provided through salary sacrifice arrangements and ELA does not comment upon that policy decision. However, we do wish to draw the above potential unintended consequence to the attention of the Government as it could have the potential to discourage the uptake of low carbon vehicles.

October 2016

**Members of the ELA Working Party:**

James Davies, Lewis Silkin LLP (Chair)

Nick Logan, Ernst & Young LLP

Özlem Mehmet, Fox Williams LLP

Emma Naughton, Dentons UKMEA LLP

Clare Primett, NHS Wales

Sally Robertson, Cloisters