

Maternity leave and childcare vouchers

What's the deal?

The legal position on whether women on maternity leave are entitled to receive benefits such as childcare vouchers has been unclear for many years, due to uncertainty surrounding whether such vouchers constitute remuneration. The Employment Appeal Tribunal (EAT) has held in the recent case of [Peninsula Business Services v Donaldson UKEAT/0249/15/DM](#) that childcare vouchers paid by way of salary sacrifice amount to remuneration. Therefore employers are not obliged to provide them during maternity leave.

Legal recap on remuneration during maternity leave

Employees are entitled to 52 weeks of maternity leave; 26 weeks of Ordinary Maternity Leave (OML) and 26 weeks Additional Maternity Leave (AML). While on maternity leave, a woman is entitled to all usual terms and conditions except from her 'remuneration'. During maternity leave, remuneration, which is defined for these purposes as 'sums payable to an employee by way of wages or salary¹', is usually replaced by statutory maternity pay (provided that the employee meets the necessary [qualifying criteria](#)) and any enhanced maternity pay the employer chooses to pay. Fewer than [50%](#) of employers provide enhanced contractual maternity pay. Statutory maternity pay is payable for the first 39 weeks of maternity leave, with the first 6 weeks paid at 90% of an employee's average weekly earnings before tax and the remaining 33 weeks paid at: (i) a rate which is currently £139.58; or (ii) 90% of the employee's average weekly earnings.

According to HMRC's guidance entitled 'Statutory Maternity Leave – salary sacrifice and non-cash benefits', childcare vouchers are treated as a non-cash benefit, rather than remuneration, even though they are usually provided by way of salary sacrifice. Consequently, based on HMRC's view, the advice typically given to employers has been that childcare vouchers need to be maintained during any period of maternity leave.

The judgment

In the *Donaldson* case, Ms Donaldson sought to enter into her employer's childcare vouchers scheme while pregnant but her employer refused to allow her to do so because the scheme's rules stipulated that the vouchers would be suspended during any period of maternity leave. She brought claims against her employer on the grounds of indirect sex discrimination, pregnancy-related detriment and maternity/pregnancy discrimination, all of which were upheld by an Employment Tribunal.

At appeal, Ms Donaldson's claims were dismissed. The EAT held that HMRC's guidance did not have any legislative force. It decided that, even though HMRC treats childcare vouchers provided under a salary sacrifice scheme as a non-cash benefit, they should be properly viewed as a 'diversion of salary' and therefore constitute remuneration. In arriving at this decision, the EAT took into account policy reasons such as that, at the time the legislation had been drafted, childcare vouchers had not been contemplated or in consideration. The EAT was also concerned that, if vouchers were treated as non-cash benefits, the cost of

¹ Ss. [71](#) and [73](#) Employment Rights Act 1996 and [Regulation 9 of the Maternity and Parental Leave Regulations etc., 1999](#),

employers providing them would be likely to discourage them from providing access to such voluntary schemes.

Practical advice for employers

- Bear in mind, before discontinuing childcare vouchers for those on maternity leave, that this decision may be appealed. This is particularly true as the EAT unusually stated in its decision that it was not certain that it had been directed to all of the relevant legislative provisions pertaining to this matter. Further, the new [tax-free childcare voucher scheme](#) is due to come into force in 2017.
- Review how your organisation's vouchers are provided and what is stated in your maternity, adoption and parental leave policies (which should mirror each other in this respect). If vouchers are provided outside of a salary sacrifice scheme it is likely that these vouchers will still be classed as a non-cash benefit and therefore the safest course of action would be to continue to provide them during maternity leave.
- The safest course of action, for those employers who wish to be certain of avoiding litigation, will be to continue to provide childcare vouchers during maternity leave. Nevertheless, employers may want to consider whether to stop providing childcare vouchers to those on maternity, adoption or parental leave.

Further implications of this case

This judgment leaves one to question whether pension contributions paid by way of salary sacrifice will be treated in a similar fashion. We will have to wait and see how this area of the law develops.

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