TECHNICAL BULLETIN

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SEISS – HIGHER TAX CHARGE WARNING

Clients with larger SEISS claims and higher base profits might face increased tax bills this year due to an unusual interaction of the rules. This is most likely for Scottish taxpayers with profits over about £30,000 and accounting dates early in the 2020-21 tax year, such as 30 April 2020.

SEISS taxed in 2020-21 tax year

Schedule 16 FA 2020 para 3 (3) requires SEISS grants 1-3 to be taxed in the tax year 2020-21, irrespective of accounting treatment. This anomalous treatment - whereby SEISS received in the tax year is added to the basis period trading profits - appears to have been brought in as an aid to HMRC compliance activity. (Note the different treatment which can apply to partnerships as outlined in the next article).

It means that the amount shown on the tax return as SEISS income in 2020-21 should match HMRC's records exactly for the amount recorded by HMRC as paid out.

But, unless the trading income basis period is 31 March (or 5 April) then, on an accruals basis, the figures do not match and the tax payable can be higher than expected. This is because trading profits for a year largely unaffected by coronavirus can, under the statutory rules, be matched with SEISS grants relating to a different (later) accounting period.

The situation can be particularly significant where the basis period ends early in 2020-21, such as the year to 30 April 2020.

Example

Profits to 30 April 2020 £40,000

Profits to 30 April 2021 £30,000 (down due to coronavirus)

SEISS claimed 1-3 £10,000 (est. for illustration)

Result? All square as SEISS compensates for the lost profit, but watch the tax! Taxable in 2020-21 is

£40,000 profit + £10,000 SEISS = £50,000

But the Scottish Higher rate starts at £43,430, and the Scottish Income Tax higher rate is 41%, but until

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income reaches £50,000, National Insurance is still charged at UK rates, giving a marginal rate of 50%

So, £6,570 of SEISS taxed at effective rate of 50%, whereas the taxpayer has historically been a Scottish intermediate taxpayer, with a marginal rate 30% (21% SIT plus 9% NICs)

Just for completeness, in 2021/22 the taxable amount would be the £30,000 trading profit plus whatever monies were received under SEISS 4 and 5.

SEISS – PARTNERSHIPS

As mentioned above, the tax treatment of SEISS for partnerships can be different in some cases from the normal self-employed rule outlined above. Where the SEISS grant claimed by one partner is 'distributed to all partners' rather than being retained in full by the partner who claimed it, per schedule 16 FA 2020 para 3 (4), the SEISS grant is taxed according to the partnership basis period.

This approach is outlined in the SA 850 partnership return notes though unfortunately HMRC guidance does not mirror the exact wording of the legislation, which does not use the phrase 'was required by the partners to account' for SEISS to the partnership. In this scenario, the issue of 'doubling up' does not arise as SEISS will be taxed in the accounting basis period of receipt and included as part of the partnership trading profit.

Compliance issues – partnerships and SEISS

However, this route, where SEISS is included in partnership profits, is not trouble free as it is likely to prompt HMRC intervention. This is because the SEISS box on the individual partner's tax return will be empty, yet HMRC's records will show the full amount of SEISS paid to that individual.

ICAS is working with HMRC on a possible solution but, as yet, the only option appears to be to include a note in the tax return white space outlining the approach taken. But be aware that HMRC may well 'correct' the individual partner's tax return without reading the white space note.

It would then need intervention by the agent to avoid a double tax charge on the SEISS gran - once as part of the partnership profit share for each partner, and again on the individual partner, if HMRC 'corrects' the partner's individual return.

SEISS – TAX RETURN COMPLIANCE & PENALTIES

Responsibility for tax return data

While agents have not been directly involved in the claims process for SEISS, they will be involved in including SEISS claimed by the client on the tax return. This means that, in line with Professional Conduct in Relation to Tax, agents should take care that items included on the return are not misleading.

Considering the tax return for 2020-21, the agents duty in terms of tax submissions are covered in the Professional Conduct in Relation to Tax help sheet Submission of tax information.

This says, at paragraphs 12 and 13:

12 A member should act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular, the member should take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client.

13.Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. However, a member should take care not to be associated with the presentation of facts they know or believe to be incorrect or misleading, and not to assert tax positions in a tax filing which they consider to have no sustainable basis.

SEISS on tax returns

SEISS grants for phases 1-3 are taxed in 2020-21 tax year, per FA 2020 sch 16 para 3 (3). The amount to include is the amount received in the tax year. SEISS is entered in a separate box on the tax return, which for HMRC compliance purposes, can be matched against the amount HMRC has paid out.

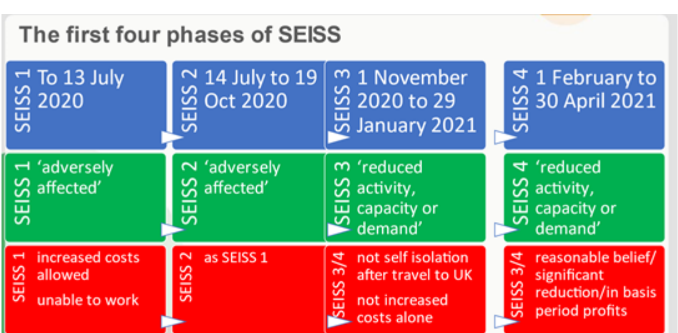
This approach applies ‘irrespective of its treatment for accounting purposes’, except for a partnership in the circumstances where ‘the amount is distributed amongst the partners’ para 3 (4) sch 16 FA 2020. In this exceptional case, follow the procedure outlines in Partnership notes SA 850 notes 2021 (see note above).

So which boxes should you use? For a sole trader enter the SEISS amount received in the tax year on SA 103f self-employment - long form, or self-employment short form box 27.1 on SA103s 2021. For a partner retaining all SEISS grant, use box 9.1 of SA 104f.

Compliance activity

HMRC compliance activity on SEISS is likely to intensify following submission of the 2020-21 return. For a 2020-21 return there would normally be a 12-month enquiry window from submission of the return. The client needs to be sure that they can show HMRC sufficient evidence that their claim was justifiable at the time it was made.

In this regard, it may be worth highlighting the changes in the requirements over time. In particular, the more stringent requirements from SEISS 3 onwards.



Looking forward, it may be worth highlighting that the eligibility conditions for SEISS 4 and 5 are more stringent, particularly the turnover test for SEISS 5 and the need in SEISS 4, as for SEISS 3, for a reasonable expectation that the impact will follow through into reported results in a tax return in due course.

Penalties and paying back SEISS claimed in error

The penalty position for SEISS is made more serious by the provisions in FA 2020 schedule 16, especially paragraphs 13 and 14, which could result in automatic ‘deliberate and concealed’ penalties of up to 100% being applied where an individual claimed SEISS when they were not entitled.

The factsheet Penalties for not telling HMRC about Self-Employment Income Support Scheme grant overpayments - CC/FS47, provides more details.

Grants claimed in error need to be notified to HMRC within 90 days of making the claim, or of a change in circumstances, such as an amendment to a tax return, which leads to reduced or no entitlement.

While it is possible to repay SEISS claimed in error via a box on the SA 100 tax return, this is something of a last resort (e.g. to be used in January 2022, if filing 2020-21 return just before the deadline). It would be more usual to repay the amount directly to HMRC before submitting the return. The process is outlined on the page Paying back SEISS claimed in error.

Possible response to clients

It is up to the professional judgement of each member, having a knowledge of the client and full circumstances, to make a balanced decision. It would seem sensible to alert clients to the possibility of compliance checks and penalties, and the need for evidence to support the reasonableness of any SEISS claim.

Agents could review the claim for obvious errors and compliance risk – for example, if profit and turnover reported on the tax return show no evidence of the adverse impact of coronavirus, or exceed figures from the previous year, then this may prompt HMRC enquiries. The client would need to have an appropriate explanation. The claim may still be valid as the Treasury direction, even for the more stringent SEISS 3 and 4, requires only that:

Per para 4.2:

(a) the business of which has suffered reduced activity, capacity, or demand in that period from that which could reasonably have been expected but for the adverse effect [underlining added] on the business of coronavirus or coronavirus disease, and

(b) which the claimant reasonably believes will suffer a significant reduction in trading profits for a relevant basis period from that which would otherwise have reasonably been expected as a result of that reduced activity, capacity, or demand.

Note that a comparison with the previous year may not be the most appropriate if there were specific factors (such as long-term illness unconnected with coronavirus) affecting the previous year’s results.

In may also be appropriate to highlight to the client the need to have evidence of the impact of coronavirus for the correct time period and in accordance with the rules for the appropriate phase of SEISS. This might be achieved by directing them to the National Archives version of the SEISS guidance applicable at the time.

The following links may be useful to confirm the position:

Treasury directions SEISS 1 direction; SEISS 2 direction; SEISS 3 direction;

HMRC archived guidance SEISS 1 24 April 2020; 22 July 2020; SEISS 2 1 Oct 2020 adversely affected (30 Sept 2021

Check if you can claim SEISS – due to be updated to include link to previous guidance

PROPOSALS FOR MANDATORY CLIMATE CHANGE REPORTING IN THE UK

The UK Government recently consulted on mandatory climate-related financial disclosures by publicly quoted companies, large private companies, and LLPs.

The consultation proposals build on the expectation, set out in the government's 2019 Green Finance Strategy, that all listed companies and large asset owners should disclose in line with the Task Force on Climate-related Financial Disclosure (TCFD) recommendations by 2022.

If adopted, the proposals will contribute towards the UK's intention to become the first G20 country to make TCFD-aligned disclosures mandatory across the economy, as set out by the Chancellor on 9 November 2020. The proposals come at a crucial time in the UK Government's commitment to fight climate change as host nation of this year's climate change conference, COP 26.

Consultation objectives

The UK Government recognises the recommendations of the TCFD as one of the most effective frameworks for companies to analyse, understand, and ultimately against which to disclose, climate-related financial information. Accordingly, the government proposes to use the TCFD's four pillar framework of: Governance; Strategy; Risk Management; and Metrics and Targets as the basis of disclosure requirements, with adjustments made where necessary to make requirements coherent within UK company law.

The government's stated objectives are to increase the quantity and quality of climate-related financial disclosures in a proportionate manner. This is both to ensure market participants have better information to adequately understand climate-related financial risks and opportunities to support the transition to net zero, but also to help companies think about what they need to do to address climate change as an important risk and opportunity for their organisation, operations, and people.

The means by which the government intends to achieve these objectives are set out in detail in the consultation document, with key questions set out under each section and on page 31 of the consultation.

Summary of proposals

The proposals can be summarised in a series of key themes as listed below.

Scope

The following entities will fall within the scope for the proposed disclosure requirements:

- All UK companies that are currently required to produce a non-financial information statement, being UK companies that have more than 500 employees and have transferable securities admitted to trading on a UK regulated market, banking companies, or insurance companies (Relevant Public Interest Entities (PIEs)).
- UK registered companies with securities admitted to the AIM with more than 500 employees;
- UK registered companies which are not included in the categories above, which have more than 500 employees and a turnover of more than £500m.
- LLPs which have more than 500 employees and a turnover of more than £500m.

Mechanism

The proposed changes will be implemented through a Statutory Instrument, using powers under the Companies Act 2006, and powers under the Limited Liability Partnerships Act 2000.

Location of disclosures

Companies will be required to report climate-related financial information in the non-financial information statement which forms part of the Strategic Report. LLPs will be required to report climate-related financial information in either the non-financial information statement which forms part of their Strategic Report or the Energy and Carbon Report which forms part of their Annual Report.

Disclosure requirements on companies and LLPs

To require companies and LLPs to disclose climate-related financial information in line with the four overarching pillars of the TCFD recommendations on a mandatory basis (Governance, Strategy, Risk Management, Metrics & Targets).

Timing

Regulations are to be made by the end of 2021, with regulations coming into force on the Common Commencement Date of 6 April 2022, and to be applicable for accounting periods starting on or after that date.

Guidance

Non-binding Q&A will be produced to support companies in their application of these requirements.

DOMESTIC REVERSE CHARGE FOR THE CONSTRUCTION INDUSTRY

We are eventually into the throes of dealing with the new Domestic Reverse Charge (DRC) for the construction industry with its delayed introduction on 1 March 2021.

These new rules apply to Construction Industry Scheme (CIS) and VAT registered contractors and subcontractors. It has been referred to as an extension to the CIS.

When a VAT registered subcontractor sells construction services reportable under CIS to a contractor, the subcontractor will no longer charge VAT. Instead, it will be the contractor's responsibility to declare both the output VAT and input VAT on their VAT return.

This reverse charge does not apply to end users where they tell their supplier or building contractor in writing that they are an end user. End users are consumers and final customers which include businesses that are VAT and CIS registered but do not make onward supplies of the building and construction services supplied to them.

The reverse charge also does not apply to intermediary suppliers which are VAT and CIS registered businesses that are connected or linked to end users. If intermediary suppliers buy construction services and re-supply them to a connected or linked end user, without making material alterations to the supplies, they are all treated as if they are end users.

Many subcontractors may now find that the reverse charge means their business will now make net repayment claims to HMRC, as they no longer receive VAT on their sales. If this is the case, it may be advisable to move to monthly VAT returns to improve cash flow.

Most accounting software providers have made provision for this new reverse charge adjustment in the UK VAT return, therefore the accounting for this change is likely to be relatively straight forward. What appears to be causing more of an issue is the identification of instances where the DRC will apply, and the effect on supply chains and lines of communication between contractors and subcontractors, who are finding these new rules confusing.

HMRC has therefore specifically noted that “it is understood that implementing the reverse charge may cause some difficulties and we will apply a light touch in dealing with any errors made in the first 6 months of the new legislation, as long as you are trying to comply with the new legislation and have acted in good faith.

Any errors should be corrected as soon as possible, as the longer under declared or overcharged sums remain outstanding, the more difficult it may be to correct or recover them. HMRC officers may assess for errors during the light touch period, but penalties will only be considered if you are deliberately taking advantage of the measure by not accounting for it correctly.”

EMPLOYMENT STATUS – THE RETURN OF MAN BITES DOG

In the recent first tier tribunal case of Phillips (2021 TC 08074) the tribunal upheld HMRC's ruling that the terms of an engagement amounted to self-employment. Mr Phillips argued that he had been employed. Normally, individuals and "employers" argue that the individual is self-employed, while HMRC argue that the individual should be taxed as an employee.

City General Direct (UK) Ltd ("C&G") wished to contract with and agree terms with insurers to underwrite a new product. It did not have the contacts nor expertise to do this and therefore engaged Mr Phillips services to agree terms on its behalf with the insurers.

Mr Phillips provided his services over a three-year period until May 2013 but thereafter, took an appeal to the Employment Tribunal in respect of unfair dismissal. This failed before the employment tribunal in December 2013, and it held that he was not an employee.

For several years, Mr Phillips had also corresponded with HMRC as he was trying to obtain a P60 from C&G, and in December 2015, an Inspector confirmed his status as self-employed. Mr Phillips appealed to the FTT.

The tribunal found the following facts:

1. C&G provided Mr Phillips with a laptop computer, printer, company credit card to meet expenses, a company email address, and business cards which described him as "sales director", although he was not actually a director of the company.
2. There was no contract of employment. Discussions had taken place as to whether (a) Mr Phillips should be employed on a fixed salary; (b) his services obtained on a commission basis only or; (c) he should work via the medium of limited company of which he would be a shareholder and director. The position was not however formally agreed, albeit it appeared that he agreed to be remunerated by commission only. He argued before the FTT that he had agreed to a commission arrangement as part of the terms of his employment. This is one of several instances where the FTT did not think that he was a credible witness.
3. As he was receiving commissions only, he was paid advances which he said before the tribunal were salary. The amounts were however variable and paid at irregular intervals. The FTT found that the payments were indeed advances, but which were offset against commission subsequently earned. The tribunal again thought that he was not a credible witness.
4. Mr Phillips did not have any contractual rights to holiday pay, pension, or other benefits normally associated with an employment.
5. He was able to work the hours which he chose and to decide where he carried out his duties. He arranged his own appointments at times to suit him, and had full control over how to conduct negotiations.
6. He did not have to report to C&G on a regular basis, albeit he said that he did this by telephone or email. The tribunal found him not to be a credible witness in this regard, as he was unable to produce copies of his emails to C&G nor anything else to substantiate his assertion. The only financial risk to Mr Phillips was that if he was not able to make a sale, he earned no commission. Any costs he incurred were met by the company credit card.
7. He retained the intellectual property rights to the new product as it was being developed. He said that this was to be able to make modifications in the future, but the tribunal found that he did not need to retain the IP rights to do this, and disagreed with Mr Phillips explanation for retaining the IP rights.
8. He argued that it was a Financial Services Authority requirement to be an employee in order for him to carry out his work, but he had in fact, previously carried out a similar function on a self-employed basis for another company.

In its judgement, the tribunal held that there was not an intention on the part of Mr Phillips nor C&G for him to be an employee, and that he had been offered an employment but had not accepted this, nor indeed any of the other alternatives. The tribunal considered the judgement in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance where it was held that a contract of service, necessary for an employment exists where three requirements are

satisfied. Despite this being a 1968 case, a couple of fairly archaic terms are used:

1. The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
2. He agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in sufficient degree to make that other master.
3. The other provisions of the contract are consistent with its being a contract of service.

Neither Mr Phillips nor HMRC had argued the point as to whether he had to perform his work personally, but the tribunal found that C&G's control over Mr Phillips was minimal.

The fact that C&G had provided equipment and a credit card was accepted by the tribunal on the basis that C&G understood Mr Phillips was unable to finance these costs from his own resources.

While the title of sales director was suggestive of employment, the FTT accepted that title was only given to try to avoid a situation where an agreement negotiated by Mr Phillips with an insurer gave it the right to cancel were he to cease as a director or employee of C&G.

Mr Phillips only worked for C&G during the period of the three-year engagement with them, which is suggestive of employment, as is the fact that there was little financial risk to him.

However, on balance, the FTT dismissed Mr Phillips' appeal, considering the evidence supported his status as self-employed.

As ever, the decision in this case rested upon its own facts, probably the most important one being the lack of control, both in terms of C&G not having Mr Phillips expertise and also that he had free reign to arrange his meetings and carry out the negotiations with insurers.

SUBSTANTIAL SHAREHOLDINGS EXEMPTION – THE SPLITTING OF THE HAIR

The title for this article is drawn from one of William Shakespeare's comedies and the work of John Cockcroft and Ernest Walton. Sadly, however the content of this article covers something much more mundane.

Paragraph 15A(3), Schedule 7AC, TCGA 1992 was welcomed as it allows substantial shareholdings exemption to apply to the shares of a (usually specially formed) subsidiary, whose shares have not been owned by its parent for the requisite twelve months.

A typical situation occurs where a company wishes to dispose of a trading division consisting of various assets such as business property, plant and machinery, goodwill, and stock, and both parties agree that it would be more expedient for the purchaser to acquire shares in a company.

The vendor company therefore incorporates a wholly owned subsidiary to which it transfers the trade and assets to be sold. After a short period of perhaps a month, the shares in the subsidiary are sold. Were it not for the above provision, substantial shareholding exemption would not be available as the shares in a subsidiary would not have been owned for twelve months. Paragraph 15A allows substantial shareholding exemption where the trade has been carried on for at least twelve months by a combination of the parent and the subsidiary for the requisite twelve-month period.

All very practical and useful in facilitating a disposal in the above circumstances, without having to delay matters for twelve months.

Paragraph 15A(3) states that "the investing company is to be treated as having held the substantial shareholding at any time during the final twelve-month period when the asset was used as mentioned in sub-paragraph (2)(d)…".

Sub-paragraph 2 contains four conditions which are:

a. That, immediately before the disposal, the investing company holds a substantial shareholding in the investee company.
b. That an asset which, at the time of the disposal, is being used for the purposes of a trade carried on by the company invested in was transferred to it by the investing company …
c. That, at the time of the transfer of the asset, the company invested in, the investing company … were members of the same group, and
d. That the asset was previously used by a member of the group (other than the company invested in,

for the purposes of a trade carried on by that member at a time when it was such a member.

All seemed clear thus far. However, HMRC identified a possible narrow interpretation of this legislation and, in a decision released on 12 March 2021, won the first-tier Tribunal case in M Group Holdings Ltd (2021) TC08054. The basis was that a group had not been in existence for a twelve-month period before the share sale took place. As described above, a common situation is for a singleton company to create a subsidiary, hive down the trade and assets to the newly formed company and dispose of its shares to a third party.

On HMRC's interpretation of paragraph 15(A), substantial shareholdings exemption was not available as a group had not existed for a twelve-month period. Had the parent company held shares in a dormant subsidiary for at least twelve months then substantial shareholdings exemption would have been available on the sale of the newly formed subsidiary. The extension of the twelve-month period to include the period during which the trade was carried on by the parent could not be taken into account as the relevant asset was not used by the parent as a member of a group until it created the subsidiary which it later sold.

The Tribunal considered that the purpose and context of paragraph 15A was not sufficiently clear from the legislation itself, nor from the Finance Bill explanatory notes and the consultation document which preceded it.

This is yet another trap for the unwary, and it may be wise for singleton companies to create dormant subsidiaries just in case there ever will be an occasion in the future where it is desired to hive down a trade to either the dormant subsidiary or a new subsidiary created for the purpose, with a view to a disposal to a third party.

Was the outcome in M Group Holdings Ltd the intention of Parliament or was there an error in the drafting? If the former, what is the policy objective? If the latter, what motivated HMRC to take such an obtuse point which achieves nothing other than making commercial business more difficult?

If only it was a Shakespearean comedy or alternatively an advance such as that achieved by John Cockcroft and Ernest Walton was the result.

BUSINESS CONTINUITY PLANS

Written by Lugo Limited, ICAS IT Partner

This month we share more insights from the recent Lugo and ICAS studies, and look at the Importance of a Robust Business Continuity Plan

Over the last year, firms have had to quickly adapt to be able to keep delivering accountancy services to clients. This has been a smoother process for some than for others. For example, did your phone system continue as normal, or did you have to stop accepting inbound calls? Regrettably, not every firm has been able to offer the same level of service as normal. During these unprecedented times, our expectation on the standard of service we receive has probably slipped too. As restrictions begin to ease, maybe now is a good time to reflect on where your firm can become more resilient to ensure business continuity no matter what challenges you face.

Even if it's not something as disruptive as coronavirus, natural or human-made disasters come in all forms, from a power outage or hurricane to plain old human error. Here are some of the main areas to consider when planning for your firm's business continuity.

People

Staff are a critical resource to your business and their welfare is paramount. With 85% of those surveyed by Lugo seeing themselves and their colleagues working from home more going forward, you may have to rethink working practices, by looking at who can work from home, who needs to be in the office, who must be client facing, and how they can achieve that.

To ensure continuity of client service, have more than one person able to do certain tasks, and avoid 'key man dependency'. With the risk of contracting coronavirus still reasonably high, people suffering from long COVID, or even people having side-effects from the vaccine, plans need to be in place when staff members fall ill.

In the real world, great technology and technical capabilities may still not make for a great response if the right people, with appropriate skills, are not in place. Human error is one of the highest risks to business continuity. Continual training and support helps employees to be confident that they are acting in line with company policies and procedures.

Policies

Your business continuity plan will refer to policies, plans of action, and methods for informing staff and clients of serious issues. When surveyed, 75% of firms said they have a communication plan in place if they encountered business critical situation.

Build a detailed emergency process with predetermined actions for communication and coordination, designated roles for employees, and emergency action plans that involve staff, clients, and suppliers.

It is good practice to build a business continuity team who are all aware of your:

- Disaster Recovery Plan, which we look at in more detail below
- Incident Response Plan, including communicating with clients
- Crisis Management Plan, how you respond to a critical situation

A well planned and executed response will help to minimise the damage caused by an incident or disaster. This could mean anything from cutting the amount of data lost, to minimising public fall out or lost clients.

You should work with your legal advisor to understand what it will mean if, for example, you cannot supply services to clients, as you may have to put an additional section in your terms of engagement. If you cannot meet your obligations, a clear understanding of your contractual terms will allow you to plan and prioritise your response.

It is worth noting that preparation and mitigation for data breaches are both explicitly required by the ICO, as part of your GDPR-related measures. They state that you should, 'Have well-defined and tested incident management processes in place in case of personal data breaches.'

IT Strategy

The pandemic may have challenged your IT to adapt and change the way you functioned in response to circumstances beyond your control. Over half (55%) of surveyed accountants said their IT strategy has changed since the impact of COVID-19, according to Lugo's research. We probably all wish we had bought some shares in Zoom a few years ago!

To ensure business continuity, it is important to choose an IT support provider who has worked with and understands your industry. As ICAS IT Partner, Lugo knows how important data security and flexible working is to firms.

Businesses in every industry have been put under pressure to switch from more traditional business models to digital-friendly ones running in the cloud. It is important not to rush IT strategy decisions, but to be able to have informed discussions about when and how to move to the cloud, at a time that is right for you.

Data Backup, Cyber Threats and Disaster Recovery

Lugo's research found 90% of firms surveyed do have a disaster recovery plan in place. Some key considerations are:

- Who is responsible?
- The five Functions of the Cybersecurity Framework. What is backed up?
- How quickly can you get back up and running?

As the UK emerges from the COVID-19 pandemic, organisations might also consider what more they can do to manage cyber security risks in a 'blended' working environment.

According to the UK Government's Cyber Security Breaches Survey 2021, three in ten businesses (31%) have a business continuity plan that covers cyber security.

The U.S. Department of Commerce's National Institute of Standards and Technology (NIST) has a Cyber Security Framework. They identify the five key pillars of a successful and wholistic cyber security program, being: Identify, Protect, Detect, Respond, Recover. This is a good place to start to decide where and how to focus your efforts.

If you have a robust, well tested, system in place and you can get all your vital business data from backup quickly, you cannot be blackmailed by a ransomware attack.

Payroll Processing

One of your systems with the highest impact is payroll - when people do not get paid, there is no place to hide! That is why payroll processing continuity is so important.

When Lugo asked, in terms of your Payroll Bureau specifically, what continuity do you have in place, accountants' responses were varied. They included external backups, off-site data replication, running payroll from home, BACS being cloud based, and a virtual server in Microsoft Azure. Some, worryingly, did not have any continuity in place.

When considering desktop payroll software, it is fundamental to have a clear process in place to ensure

payroll continuity. Remediate the weak links and document the steps you would take, keeping security front and centre. Ask yourself, how long can you afford to be down for, and work back from there. If your payroll data is continually replicated to the cloud or another device, in a worst-case scenario, you could re-install the payroll program on a different device and get it back up and running, for at least one person, in a matter of a few hours.

You can use cloud technology to help achieve business continuity. There are some SaaS payroll offerings (software as a service) allowing you to process from wherever you have an internet connection. Some organisations go as far as to keep copies of all SaaS data locally, in case of any access issues. Do you know how to extract a copy of your data stored in SaaS solutions? Maybe now's the time to find out.

Build for a stronger tomorrow

With robust business continuity plans in place, we can mitigate many of these risks to help you sleep sound at night.

We have all worked hard during the pandemic to continue in business, despite the challenges we have faced. Now's the time to pause, recollect and learn from what the last year has taught us.

Your team have adapted and supported your clients through tough times. Your systems have withstood unplanned home working. By reviewing and improving your business continuity plan, you can emerge stronger and be ready for whatever is to come.

Lugo are always here to ensure your accountancy firm is running smoothly, supporting you with #LugoLove. For more information visit LugoIT.co.uk or email Liz Smith at the email below

Look out for more insight into the key themes from Lugo's research in future ICAS Technical Bulletins.

If you would like to discuss any element of this research or enhance your own cyber resilience, please email Liz.Smith@LugoIT.co.uk

THE FRC IS SEEKING VIEWS TO INFORM THE PERIODIC REVIEW OF FRS102

UK and Ireland accounting standards are subject to periodic reviews, at least every five years, to ensure they remain up-to-date and continue to require high-quality and cost-effective financial reporting from entities within their scope.

The UK Financial Reporting Council (FRC) is starting the next periodic review of FRS 102, along with other UK and Ireland accounting standards.

Part of this process is seeking views from stakeholders on areas that might be considered as part of the review. This might include new issues/transactions that should be addressed, or comments or suggestions in relation to the current requirements. In addition to stakeholder feedback, the review will consider recent developments in financial reporting (such as changes in IFRS) and relevant developments in the wider reporting framework.

Any changes to accounting standards that are proposed as a result of the periodic review will be subject to public consultation at a later date, not expected to be before 2022. The effective date for any amendments is currently expected to be 1 January 2024.

The last periodic review, the Triennial review 2017, started with a request for feedback in March 2016.

The final amendments were issued in December 2017, with an effective date of 1 January 2019. Those amendments responded to stakeholder feedback and considered recent improvements in financial reporting. They aimed to balance improvements in the quality of

financial reporting with maintaining stability, improving the usability and the cost-effectiveness of FRS 102.

UK and Ireland accounting standards comprise:

- FRS 100 Application of Financial Reporting Requirements;
- FRS 101 Reduced Disclosure Framework;
- FRS 102 The Financial Reporting Standard applicable in the UK and Republic of Ireland;
- FRS 103 Insurance Contracts; and
- FRS 105 The Financial Reporting Standard applicable to the Micro-entities Regime.

How to respond

If you would like to contribute to the ICAS response to the FRC request, please contact Anne Adrain at aadrain@icas.com

Alternatively, stakeholders can provide comments directly on any aspect of the standards to ukfrsperiodicreview@frc.org.uk by 31 October 2021.

The FRC also expects to hold roundtable events for stakeholders to provide their views. Further details will be provided in due course.

IR35: ARE YOUR CLIENTS TAKING REASONABLE CARE WITH THEIR STATUS DETERMINATION STATEMENTS?

Written by David Harmer - Associate Director Evolve Partner Markel Tax – Contractor Solutions

On 6 April 2021, Chapter 10 ITEPA (2003), the off payroll working rules legislation reforming the practical application of IR35 in the private sector came into force. It moved the responsibility for determining IR35 away from the contractor to the client (the entity in receipt of the services) and transferred the burden of administering the correct tax treatment onto the "fee payer" (being the party making payment to the contractor's company).

Chapter 10 only applies where the client is not a small company within the definition of s382(2) of the Companies Act 2006. Where the client is a small business, the IR35 responsibilities remain with the contractor under Chapter 8.

The main legislative responsibility for the client is to determine whether the off payroll working rules (IR35) apply and to issue a Status Determination Statement (SDS) confirming its decision. The SDS is the most important aspect of the legislation. S61 confirms that the client must pass the SDS onto the individual contractor and the party directly below it in the contractual chain (where the contractor is not engaged directly). Until a valid SDS has been passed to both parties, the client retains responsibility and potential liability as the fee payer. In complex chains with multiple agencies, fee payer responsibilities remain with the party in receipt of the SDS, unless or until, it is passed to the party which contracts directly with the contractor's company.

What is the SDS?

It is a statement issued by the client, confirming the IR35 status of an engagement and the reasoning behind that decision.

Section 61NA ITEPA 2003 places three requirements on an SDS:

- It must conclude whether the off payroll working rules apply
- It must provide reasoning for this decision
- Is only valid if the client has taken 'reasonable care' in coming to the conclusion

The legislation provides no guidance on the layout of an SDS, how to determine IR35 or what constitutes reasonable care.

However, HMRC guidance at ESM10013 does clarify what constitutes a valid SDS and ESM-10014 what constitutes reasonable care.

The guidance clarifies that clients must assess both the written terms and working practices and apply the relevant status case law tests when making a determination. HMRC specifically caution that subcontracting the decision-making process to a third party does not satisfy reasonable care if the client has not checked that the decision is accurate. Clients must take an active role in the decision-making process,

and someone within the client's business must have a working knowledge of the services provided by the contractor.

HMRC view reasonable care as being subjective, depending on the complexity of the client's business, expecting "a higher degree of care to be taken by a large multi-national company with its own internal finance function than of a much smaller entity."

ESM10014 also provides examples of what constitutes reasonable care, such as maintaining accurate records of status and seeking professional advice; whereas making blanket decisions do not. HMRC deem use of its online Check of Employment Status for Tax (CEST) tool as a positive indicator of reasonable care, which explains why many clients utilise CEST for their decision-making.

CEST is given further credibility by HMRC's statement that "If the answers provided to CEST are accurate and in line with HMRC guidance … HMRC will stand by the outcome, provided this outcome is followed".

However, a word of caution - within the same ESM, HMRC confirms that providing inaccurate information to CEST does not constitute reasonable care; accompanying guidance on using CEST spans 35 separate sections (ESM11005 – 11170) so expect HMRC to challenge a CEST result where this guidance has not been fully considered. Indeed, in RALC Consulting HMRC sought to dismiss the CEST result as evidence at Tribunal.

Nevertheless, it is advisable not to place sole reliance in CEST due to its limited usefulness in respect of real-world contracting. CEST is not intuitive and does not lend itself well to complex contractual chains or methods of working. We have found that our clients are having to 'bend' or 'stretch' responses to fit with the pre-set CEST answers, thereby undermining the accuracy of the result.

There is no substitute for a considered opinion, and if reasonable care has not been taken fee-payer liability remains with the Client. Clients should invest time and resource into understanding the fundamentals of IR35, what case law states, and examine both written terms and working practices (by following an open-ended questionnaire and discussion) to reach a more rounded, and, above all, accurate decision.

Markel Tax has been advising and defending clients against IR35 challenges since the introduction of the legislation 20 years ago.

We offer a complete package of due diligence services including contract reviews (which include the whole supply chain from the end client through to the agency and contractor), support in drafting an SDS, as well as training and on-going support from our tax experts.

Find out more by speaking to our team today on 0333 920 1589 or click here for more information.

NATIONAL MINIMUM WAGE – ELIGIBLE WORK DEFINED

The *decision in the double case of Royal Mencap Society (Respondent) v Tomlinson-Blake (Appellant) and Shannon (Appellant) v Rampersad and another (T/A Clifton House Residential Home) (Respondents) [2021] UKSC 8 was handed down on 19 March 2021, having been heard at the Supreme Court in February 2020. Justine Riccomini analyses this decision, which was delayed in part due to the death on 1 December 2020 of the presiding judge, Lord Kerr of Tonaghmore. The judiciary was deemed to be quorate under section 43(2) of the Constitutional Reform Act 2005, so the decision was then handed down by the four remaining judges, led by Lady Arden. Both appeals were dismissed.*

Background

This is a decision based on two cases involving similar disputes. In *Royal Mencap Society (Respondent) v Tomlinson-Blake (Appellant),* Mrs Tomlinson-Blake, a care worker who worked for Mencap for thirteen years between 2004 and 2017 provided care to two individuals in their own home. As well as providing care during the daytime, Mrs Tomlinson-Blake also carried out a sleep-in shift. She was paid a fixed salary for the former and a fixed allowance payment plus an hour's pay for the latter.

Mrs Tomlinson-Blake was allowed to sleep during the sleep-in shift on the proviso she attended to emergencies if they arose. Over a 16-month period,

she had in fact attended to around 6 such incidents. Any additional time worked was paid at normal pay rates. Mrs Tomlinson-Blake's claim was made on the basis that during her sleep-in shift, she should also be entitled to National Minimum Wage (NMW), and the matter was to be decided using the definitions set out in the 2015 NMW Regulations.

In Shannon (Appellant) v Rampersad and another (T/A Clifton House Residential Home) (Respondents) Mr Shannon worked at a residential care home as a nightshift care worker. As part of his role, he was provided with free living accommodation which included all utilities. In addition to this he was paid £50 per week initially which rose over time to £90 per week. Mr Shannon was contracted to be present in the living accommodation from 10pm to 7am and he was allowed to sleep during those hours. As with Mrs Tomlinson-Blake, he was hardly ever called out to assist during the night. Mr Shannon was dismissed from his role in 2014 and at that point, claimed that he should have been entitled to receive NMW throughout his time there because he was "on call". He considered that the arrears of pay due to him amounted to almost £240,000. This matter was to be decided using the 1999 Regulations.

In both cases, the question was how sleep-in shift time should be calculated in accordance with the two sets of NMW Regulations.

Why this case is important for employment tax purposes

As one would expect, the level at which employees earn determines the amount of Income Tax (PAYE) they pay under section 62 ITEPA 2003 and the amount of NICs due (where their pay falls between the Lower and Upper NIC thresholds).

The NICs legislation is located in section 4 of the Social Security Contributions and Benefits Act 1992 as well as the Regulations at SI 2001/1004. The NICs legislation also provides for the employer's liability to secondary NICs, for which there is no Upper Earnings Threshold.

It follows therefore, that the more an employee earns, the more the employer has to pay in employer's NICs (currently 13.8%). In addition, the employer must pay pension contributions on employee earnings between £6,240 and £50,270 (2021/22) and if the employer has a 'paybill' of more than £3m they must also pay Apprenticeship Levy at 0.5% of that 'paybill' (which is defined as the total value of employee earnings deemed to be subject to secondary NICs).

There are numerous examples of payroll issues affecting calculations of the NMW; these can inadvertently create arrears of pay claims, or cause an employer to be "named and shamed" following an NMW compliance review by HMRC. Examples include workplace benefits such as pension and other types of salary sacrifice. The provision of living accommodation (temporary or permanent) and the provision of clothing or the setting out of dress code protocols are also problem areas, as highlighted in the ongoing *Iceland* debacle, as is the provision of certain types of "savings clubs" (see the 14 February 2019 article in Taxation by Steven Porter and Catherine Robins).

It is therefore vital for employment taxation practitioners (and others who are advising clients or who are themselves attempting to comply with NMW legislation) to understand how NMW legislation is configured and how it can potentially impact the tax cost to a business – in particular, where HMRC NMW officers, or the courts, award arrears of pay to claimants – which notably, did not happen here. Had the courts found in favour of the claimants, the care sector, which the current Government promised to reform, would potentially have been decimated by the additional costs which an award of arrears of pay would have brought about – estimated at around £400m.

In this case, Lady Arden stated at the outset that, despite her dismissing the claimants' appeals, there was no doubt as to the value which is placed on this kind of work. Many would probably sympathise with the low wage plight of those working in the care profession as a whole, but on the basis of this case it appears that the judiciary's hands are tied by the legislation, the Low Pay Commission reports which have been accepted by the Government, and various iterations of the guidance as issued by BEIS.

What was the Supreme Court asked to do?

Lady Arden summed up the task in hand neatly in her opening overview statement: "…the key question with which these appeals are concerned: how is the number of hours in their case to be calculated for the purposes of the National Minimum Wage?"

Lady Arden set out her summary of the reasons she dismissed both appeals. Upholding the findings of the Court of Appeal in the case of Mrs Tomlinson-Blake, she examined the definition of "time work" as set out at Reg. 32 of the NMW Regs 2015, finding the definition could not apply to periods when the employee was asleep. Thus, the NMW Regs are only valid and

applicable when the employee is awake and actually deemed to be executing a qualifying form of work.

In Mr Shannon's case, the 1999 Regulations also prevented the court from applying the definition of "salaried hours work" to his situation whilst he was not awake and actively working. Lady Arden also specifically referred to the First Report of the Low Pay Commission report of 1998, thought to be the bedrock upon which the NMW now stands, as highlighted in Walton v Independent Living Organisation Ltd [2003] EWCA Civ. 199.

Interestingly, Lady Arden also sat on the *Walton* case and although at that time the legislation did not cover "sleep-in shifts", her conclusion was the same. The claimant was not required to "stand and wait" (during the 24 hour shifts she carried out at the client's home): that is to say she was awake, but not necessarily for the *specific purpose* of working, and because she was free to entertain herself or to sleep, she was not classified as working for the purposes of NMW.

The arguments presented

Mrs Tomlinson-Blake argued that by being physically present at the employer's premises (i.e. the client's home) under Reg.32, she was "working" and not simply "available" for work when she was asleep, because she had left her home to go to the home of one of her clients, and was therefore fulfilling the contractual arrangements between Mencap and the local authority. However, the judiciary considered that, whilst the fulfilment of contractual obligations was essential, this did not mean that Mrs Tomlinson-Blake was working in accordance with the original intention of the Low Pay Commission 1998 report, which sets out that sleep-in workers should receive an allowance and not the NMW unless they are *awake for the purposes of working.* A similar premise was also argued, and dismissed, on the same grounds, in Mr Shannon's arguments.

Mrs Tomlinson-Blake supplied a document to the court entitled: "National Minimum Wage - Calculating the Minimum Wage" issued by the Department for Business, Innovation and Skills in February 2015. Within that document at page 31, it clearly sets out an example, as follows: "*A person works in a care home and is required to work overnight shifts where they sleep on the premises. The person's employer is required by statute to have someone on premises for health and safety purposes. The person would be disciplined if they left the premises at any stage during the night. It is likely that the person would be considered to be 'working' for the whole of the overnight shift even when they are sleeping.*"

Despite this guidance being available for employers and employees alike to research and formulate an understanding from, Lady Arden did not consider it to be a reliable piece of information – stating that it was likely merely to have been an illustration of the non-legislative opinion of BEIS at the time of writing (based on recently decided cases). As it had been published prior to the 2015 Regulations, it was deemed unreliable.

Analysis of the Supreme Court's approach

The meaning of the terms "work", "time work" and "salaried work" was crucial to the outcome of these cases. A key statement by Lady Arden was: "…It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work…It follows that not all activity which restricts the worker's ability to act as he pleases is work for the purposes of the NMW but that does not mean that it may not be work for some other purpose".

On examination of the evolution of the Regulations governing NMW over the years, it was acknowledged that there had indeed been subtle changes to the wording (which is of course not helpful to employers and advisers who are trying to get it right).

An examination of Reg.32 of the 2015 NMW Regulations tells the reader what "time work" is for the purposes of the NMW, and crucially, Regulation 17 sets out that hours of work are defined as "those which are *worked or treated as worked*". This is the Regulation which, in the event, fails to support the claimants' arguments in *Mencap* - because it allows for discretion by the employer to badge different parts of the time spent differently – i.e. *treated as* worked - or *not treated* as worked - depending on what ensues once the employee arrives at the workplace. Not only is the employee not deemed to be working if they are asleep – they can be awake, but not deemed to be *awake for the specific purpose of working*.

Lady Arden considered that as the Low Pay Commission's First Report opinion on sleep-in shifts was accepted by the Government of the day, and there was no contrary interpretation in existence, this must be the correct way to interpret the purpose of the legislation. In addition, she concluded that when interpreting the Regulations, it was necessary to read

them together "so that the rules produce a harmonious whole" and this general approach should also be taken when interpreting phrases such as 'the expression "awake for the purpose of working"…"awake" is not to be read on its own'.

Lady Arden clarifies the purposive approach taken by the Supreme Court in Mencap by referring to the fact that in the Court of Appeal "…Underhill LJ considered that it was logically possible for a sleep-in worker to work even though asleep but that it would not be a natural use of language to say that a person who was expected to sleep during a night shift was working throughout his shift. He went further later in his judgment when he held that to say a person was working during a night shift when he was also sleeping was inconsistent with the regulations."

Although the Court of Appeal's decision in *Mencap* was upheld by the Supreme Court, the judiciary nevertheless felt it necessary to point out that the Court of Appeal decision had not been flawless. One notable flaw had been that it had not queried the Employment Appeals Tribunal (EAT) conclusion that the employees were "working, and not merely available for work, throughout their nightshifts even during the periods when they were expected to be sleeping and calls which they had to answer were infrequent."

Lady Arden nevertheless agreed with Underhill LJ "…at paras 40 and 56 of his judgment that not every worker who is permitted to take a nap between tasks is a sleep-in worker, and that a person may, depending on the facts, be working, as opposed to being merely available for work, even if his work is only intermittent. These points may have particular resonance during a situation such as may arise in a pandemic, when employees are required to work at home when they can".

Readers will now no doubt appreciate that it is crucial to be familiar enough with the NMW terminology to be able to draw a distinction between *actually working* and *being available for work* when advising clients. The matter is not to be left to the subjectivity of either employer or employee – it is a question of fact.

For those who have concerns about the potential for abuse of night shift 'sleep-in' workers' pay arrangements, Lady Arden noted that the Second Report of the Low Pay Commission dated February 2000 made some additional comments about why it was important for sleep-in allowances to be agreed in advance between employers and employees, even though they cannot count as pay for NMW purposes.

The Low Pay Commission went on to recommend that the government should produce guidance on what appropriate allowances should look like, and distinguish between the different types of sleep-in arrangements, to avoid abuse by exploitative employers. The Low Pay Commission has in fact repeated its recommendation on guidance in the years since then.

Two key cases - overruled

British Nursing Association v Inland Revenue was a key case in *Mencap* because the claimants were partially relying on it to help them convince the judiciary that they were entitled to NMW even whilst sleeping or while awake, but not actually working. The 2002 case concerned itself with bank nurses who worked shifts on a 24 hour public service based at home, and the meaning of the term "time work" for the purposes of the NMW Regulations at Regulation 3 and 15. In his decision, Buxton LJ opined that the logic that the NMW Regulations specifically excluded time when the employees were "available for work" (including when asleep but on call) "…effectively make[s] a mockery of the whole system of the minimum wage".

The four justices in the *Mencap* case each had something to say on *British Nursing,* but from different perspectives. However, the overall conclusion was that the Court of Appeal's decision in *British Nursing* should no longer be considered authoritative in terms of National Minimum Wage, and it was overruled.

It was clear that the judgement in *British Nursing* was detrimentally affected by the fact that the judges had not had sight of the First Report of the Low Pay Commission which has proved to be so influential in *Mencap*. For the same reason, therefore, the judges found it necessary to overrule Scottbridge Construction Ltd v Wright [2003] IRLR which was based on similar circumstances, but featuring a night watchman rather than care assistants, and in which the justices had also not been provided with a copy of the First Report of the Low Pay Commission.

How this decision impacts the care sector

A reduction in employee engagement may become apparent following the release of this judgement, when some workers who have been applauded during the pandemic are reminded of the fact that a proportion of their earnings does not even qualify for the NMW rate of pay.

One of the difficulties with sleep-in shifts has to be that a great deal of reliance must be placed on the worker

to make an honest and accurate distinction in their timesheet and on the client's care records as to when they are and are not working. The temptation will surely be for some of the less scrupulous care workers to claim they were "actively working" for more hours than they were "not actively working or sleeping" whilst on the premises. No doubt there is an inconsistency between the levels of record keeping, 'working time' v 'work completed' audits and supervision on this complex area in different establishments throughout the UK.

Those employers who keep a keen eye on costs are probably more likely to challenge the hours worked as, per my earlier comments, if this results in a higher level of pay for the worker, it also results in a higher level of employer's NICs costs as well as pension costs (and possibly apprenticeship levy costs) for the business.

Other sectors such as the hotel and hospitality, IT and security sectors may also be impacted by the decision – as will any other sectors who are providing staff for night shift work where their role permits them to sleep on the premises and attend to customer and workplace issues as they arise.

Conclusion

Many may have a degree of sympathy with the claimants in terms of the level of their earnings. But this judgement highlights some clear discrepancies in the legislation which provide "get outs" for employers under the umbrella of the Low Pay Commission reports and the definitions within the NMW legislation and guidance – especially since the 2015 iteration.

Those who have studied this and other related cases over the last decade will have learned that, rather than all workers within the UK earning at least the basic level of NMW, there is actually some work which does not qualify for NMW and can be paid at a lower rate as an allowance at the discretion of the employer – this may come as a surprise to some. Even the CEO of Royal Mencap Society, Edel Harris, has labelled the legislation which covers sleep-in payments to be "out of date and unfair", and that she finds it "disappointing that there is still no plan for social care reform". I note that Mencap do actually top up the sleep-in allowance payment to make it a little more equitable for their care workers.

Perhaps a fairer way forward for the care industry and other similar sectors would be for every UK employed earner to have a principal basic entitlement to receive no less than NMW, such as in the case of the sleep-in shift, with any other work over and above that designated as requiring a higher degree of skill and ability and therefore paid at a higher rate per hour, which, in the vast majority of cases will require additional Local Authority funding. These remedies would however require the definition of "work", "time work" and "salaried work" to be changed. This would also require an interaction with the Interpretation Act 1978 which is the place to find definitions of words and terms where none are prescribed in a piece of legislation. One hopes that the Government will reform the care sector, making the pay levels fit the roles of those we now know are key workers - and serving to attract, retain and adequately reward those people who choose to look after the elderly and vulnerable.

TAXI FOR UBER!

The decision in the case of Uber BV and others (Appellants) v Aslam and others [2021] UKSC 5 was handed down on 19 February 2021, having been heard at the Supreme Court in July 2020. Justine Riccomini analyses this decision, which has wide-ranging implications for how employers, as well as employment and tax tribunals looking at employment status disputes will need to approach and assess the category of "Worker" going forward.

Background

In October 2016, Uber drivers James Farrar and Yaseen Aslam were selected as test claimants by the Employment Tribunal from a pool of around 1,000 claimants who brought claims against Uber under s.230 (1) Employment Rights Act 1996 ("ERA 1996") for:

the act of making unlawful deductions from wages (this was linked to minimum wage requirements), and

the failure to pay annual leave.

There were three Uber companies involved in the appeal – Uber BV and two UK subsidiaries Uber London Limited and Uber Britannia Limited - and in this article references are generally to 'Uber' to refer to all three companies.

The drivers considered that they were not in fact "self-employed", as their contractual terms would appear to imply, but that the relationship with Uber imposed sufficient controls over them and their work to constitute more of an employment relationship. The Employment Tribunal (ET) upheld their claim.

Uber appealed to the Employment Appeal Tribunal (EAT), which upheld the findings of the ET in November 2017. Uber then appealed to the Court of Appeal where once again, the findings of both the EAT and ET were upheld in December 2018.

Uber was nevertheless given leave to appeal to the Supreme Court, which it duly did and following a hearing over two days in July 2020, the unanimous decision of the Supreme Court was handed down by Lord Leggatt, dismissing the appeal.

What was the Supreme Court asked to do?

The main issue upon which the Supreme Court hearing was to decide was whether the drivers were "Workers" – in other words falling under Limb (b) of the statutory definition of a "Worker's contract". Lord Leggatt considered in paragraph 42 of the decision that … "The critical issue is whether, for the purposes of the statutory definition, the claimants are to be regarded as working under contracts with Uber London whereby they undertook to perform services for Uber London; or whether, as Uber contends, they are to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London."

At paragraph 38 of the decision Lord Leggatt cites with approval the observations of Baroness Hale of Richmond in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32 that "employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights…….apply to all 'workers'."

The Supreme Court was also asked to decide whether the drivers were working whenever they were logged in to the Uber Application ("App") or whether they were only working whilst carrying passengers.

The arguments presented

The drivers' case centred around the contractual terms, the reality of the day to day working arrangements, and the difference between the two.

Before being able to sign in and use the Uber App for the first time, the drivers were asked to sign a "Partner Registration Form" stating that they agreed to be bound by and comply with various terms and conditions, described as "Partner Terms" (these were later replaced by a similar 'Services Agreement'). According to the terms of the service agreement, Uber agreed to provide electronic services to the drivers (including the Uber App and payment services) and the drivers agreed to provide transportation services to passengers; the agreement also specifically stated that Uber did not provide these transportation services and that the transaction via the Uber App created a legal and direct business relationship between passenger and driver, to which Uber was not a party. Once this process was complete, the drivers were granted access to the App and could start accepting work from paying customers.

At paragraph 44 of the decision, we learn that Uber considered that the approach adopted by the employment tribunals and the Court of Appeal was wrong in law because it disregarded the clear terms of the written agreements to which the drivers were a party.

The argument maintained by Uber throughout this process has been that it exists as a discrete, virtual business model which consists only of the provision of a technological "platform" to its subsidiary businesses (in this particular case, the subsidiary is Uber London Ltd.). Uber London then provided a booking service to its passengers to use via an App which can be accessed by them via a smartphone or other relevant technology.

Uber said that drivers had the discretion to decide whether to accept bookings or not - because they were self-employed, independent contractors. Any contract for undertaking driving work which a driver chose to accept was between them and the passenger, and Uber was not involved in the process, other than to provide the technology.

In return for providing the means by which to obtain a fare, Uber acted as a fare collection service, charged a "service fee" and paid the fare to the drivers net of this fee. However, Uber also set the fare by way of a journey calculation algorithm which was embedded into the App. Drivers had to abide by this fare under their service agreement with Uber (or they could choose to charge less, although this seems an unlikely proposition).

The drivers argued that in addition to other significant controls placed on them, the fee collection and payment structure afforded them no autonomous opportunity to increase the level of their earnings whenever they were logged into the App.

Ultimately then, due consideration needed to be given to key employment status criteria commonly found in employment status cases – the degrees of mutuality of obligation, supervision, direction, control, personal service and autonomy. In summary, how far a person is able to choose how the work is done, what work is carried out, where the work can be carried out and how much can be charged for that work.

Analysis of the Supreme Court's approach and its conclusions

The Supreme Court approached its decision by relating back to statutory rights principles on the basis that the purpose of the employment legislation is to protect those in a subordinate position whereas contract law assumes that the parties are equal and knowingly enter into the contract.

Use of the purposive approach to deciding a case

In Autoclenz Ltd v Belcher [2011] UKSC 41 the Supreme Court contrasted the circumstances in which contracts relating to work or services are often concluded with 'those in which commercial contracts between parties of equal bargaining power are agreed'. The case involved 'valeters' performing car cleaning services which Autoclenz had contracted to provide to third parties. In order to obtain work the 'valeters' were required to sign written contracts which stated that they were subcontractors and not employees of Autoclenz – and contained other clauses designed to support this proposition. In determining that they were in fact "Workers" (taking account of what happened in practice), Lord Clarke stated that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem."

Uber submitted that its case differed from Autoclenz, in that there was no inconsistency between the terms of its written agreements and how the relationship operated in practice - and that therefore there was no basis for departing from the written agreements. Lord Underhill in a dissenting judgment in the Court of Appeal accepted this approach, commenting that "there is nothing in the reasoning of the Supreme Court [in Autoclenz] that gives a tribunal a free hand to disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position."

However, Lord Leggatt reaffirmed the use of the approach taken in Autoclenz stating in paragraph 69 that: "In short, the primary question was one of statutory interpretation, not contractual interpretation". The task for the tribunals and courts was to determine whether the claimants fell within the definition of a "Worker" in the relevant statutory provisions – if so, they qualified for the rights set out in those provisions, regardless of what had been contractually agreed.

Lord Leggatt went on to cite with approval Lord Reed's comments in UBS AG v Revenue and Customs Comrs

[2016] UKSC 13 quoting Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454: “The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.”

5 elements of control

The Supreme Court in Uber said that the findings of the ET justified its conclusion that, although free to choose when and where they worked, at times when they were working drivers working for and under contracts with Uber. Paragraphs 94 to 100 of the decision detail five aspects of the ET’s findings which Lord Leggatt considered were worth emphasising – and illustrate Uber’s control over the drivers. These are:

Uber fixes the fares and its own level of “service fee” and also is sole arbiter on decisions relating to refunds to passengers, sometimes deducting them from the driver’s payment and sometimes choosing to refund the passenger itself.

Uber dictates both the contractual terms and the driving and etiquette standards of the drivers.

Drivers are closely monitored on accepting or turning down fares, are given limited information about the passenger they are to collect and are not given any information on the destination until they have collected the passenger. This denies them the ultimate decision about whether they as an individual driver wish to travel there. They are also penalised for not accepting enough fares. This system of control was considered to be placing the drivers “in a position of subordination” for commercial reasons.

Uber dictates which types of cars drivers can use and exerts control over them through the App, including deducting fees if the passenger complains about the route taken.

Uber restricts contact between driver and passenger and drivers are specifically barred from contacting passengers except to return lost property.

These factors led Lord Leggatt to conclude that there was no doubt the drivers were “Workers”.

Whether there is mutuality of obligation

In exploring the key concept of mutuality of obligation, the judgement notes that the fact a driver can turn down work is not fatal to a finding that they are an employee or “Worker”. What is more important is to consider whether there is an irreducible minimum of obligation. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work. Lord Leggatt opined that Uber’s ability to log a driver out of the App if they turned down too much work and to keep them locked out of the App for a further ten minutes entitled the ET to conclude that Uber was exerting a form of punishment on the drivers if they failed to undertake what it considered to be an acceptable minimum amount of work.

It is interesting to note that this is yet another case where the courts have considered it necessary to examine the concept of mutuality to determine whether to discard a claim that a person is self-employed, but HMRC have chosen to remain at odds with the courts and continue to exclude it from their employment status indicator tool “Check Employment Status for Tax“ (CEST). HMRC consider it to exist in <u>all</u> contracts, which is contrary to the crucial test set out by MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, which reads:

“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.”

When exactly were the “Workers” working?

At paragraph 130 of the decision, Lord Leggatt wrote: “…the employment tribunal was, in my view, entitled to conclude that, by logging onto the Uber app in London, a claimant driver came within the definition of a “Worker” by entering into a contract with Uber London whereby he undertook to perform driving services for Uber London.”

Lord Leggatt went on to discuss several other factors and concluded that from the moment they log in to the App, the drivers are present in their capacity as “Workers” and remain so until they switch off the App – be that on a break or at the end of a shift.

Supreme Court conclusions

The Supreme Court was keen to emphasise that employment legislation is there to “give protection to vulnerable individuals who have little or no say over their pay and working conditions” where they are dependent on and controlled by a person or

organisation, stressing that… "the legislation also precludes employers, frequently in a stronger bargaining position, from contracting out of these protections".

The Supreme Court agreed unanimously that the decisions made in previous tiers of litigation were correct and that it is impossible for a driver to be classified as self-employed when the working arrangements that exist deny the drivers the autonomy which must be present during the period when the drivers are logged into the App for them to be truly self-employed. Lord Leggatt concluded by saying that "the Employment Tribunal were entitled to find that the claimant drivers were "workers" who worked for Uber London under "worker's contracts" within the meaning of the statutory definition. Indeed, that was, in my opinion, the only conclusion which the tribunal could reasonably have reached."

In terms of the contracts themselves, Lord Leggatt opined that the clear intention of the drafter of the contracts was to avoid any claims to "Worker" status by the drivers – and he was unhappy with Uber for attempting to do the work of the courts in presupposing what inherent powers a contract contains and what rights are to be derived from it by the other party to the contract – something he clearly considered to be outside their authority and remit.

The case will now return to the Employment Tribunal which will decide how much compensation drivers are entitled to.

Implications for future decision-making by engagers

Employment status is a complicated and tricky issue, and employers are not assisted by guidance in that there are no helpful definitions set out in relation to employment law of what exactly constitutes employment, self – employment and "Worker" status; nor does employment tax guidance clearly distinguish between employment and self-employment. The decision-making process is not made any easier by the fact that for employment tax purposes, an individual carrying out paid work in the UK can be employed or self-employed (i.e. 2 status choices), whereas for employment legislation purposes, there are three status choices to consider – employed, "Worker" and self-employed – which has been the case for around 15 years now.

The decision-maker, who is most often the engager, paying the individual to do the work, has to battle with a healthy balance of subjectivity and objectivity when deciding on the status of a "Worker" – and very often, as happened in Uber, attempts to configure an artificial working relationship to achieve a business goal. For this reason alone, it is important for all engagers to consider not how they would ideally like the business model to work, forcing a square peg into a round hole, but what the actual facts of the situation reveal.

Employment Taxes?

The decision to classify the drivers as "Workers" will not mean that Uber faces any additional costs in terms of employment taxes - as "Workers" they remain self-employed for tax purposes, albeit now having limited employment rights. This means that Uber will not need to place them on a payroll, and deduct PAYE or NICs, nor will it need to pay any employer's NICs in respect of the drivers.

Whilst claims have been made by some commentators that the Supreme Court decision will change the face of the gig economy, it should be noted that as in many other status cases decided in recent years, this judgment does not go all the way by classifying the drivers as employees – and as such, does not confer upon them the entire suite of employment rights which are enjoyed by employees, for example, the right to a redundancy payment, or to claim unfair dismissal.

How this decision impacts the 'gig economy'

This decision is likely to offer the many hundreds of thousands of UK based individuals currently in the gig economy (which one definition describes as "a labour market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs") a degree of hope that things may be looking up on the job security front.

Indeed, other gig workers may now decide to try to obtain similar results, having learned of the Uber outcome – and the decision may convince some gig economy businesses to change their business model if they feel under pressure to do so, in a similar way to Hermes, who devised a new structure in which to place their drivers. Uber has stated that it will undertake a consultation with its drivers throughout the UK – it will be interesting to see the outcome of this – but they have stated that they will only be acting upon the Supreme Court decision insofar as it applies to the claimant drivers and not their entire driver population.

One thing is certain – now is the right time for the UK Government to continue the work it started by commissioning the Taylor Review published in 2017 and the subsequent publication of the Good Work

Plan, to ensure that all workers have the protections they need to void large scale exploitation.

A note on VAT

Whilst this case concentrated wholly on employment matters, there may be some VAT implications for Uber. Had the drivers been classified as employees of Uber, Uber would have to charge VAT on the services provided to its passengers. However the classification of the drivers as “Workers” complicates things somewhat, as they are still technically self-employed for tax purposes.

Conclusion

Many industry bodies and think-tanks are now calling for there to be a statutory definition of self-employed – and for there to be an alignment of the definitions and categories for tax and employment law purposes.

It seems logical that tax should not drive a decision on whether someone is employed, self-employed or indeed a “Worker” – the correct tax treatment should flow from the legal position on employment status, and discussions have been had with BEIS, HMRC and HM Treasury policy teams about that very point over the last few years, with varying degrees of success. We note too, the call in the recent Treasury Committee report ‘tax after coronavirus’ to government to address the problems around taxing income from work.

THE ICAS/CIOT TAX MANIFESTO

The ICAS and the CIOT recently issued its “Manifesto” of priorities for the Scottish tax system in the 2021-2026 Scottish Parliament, as detailed in the joint ICAS CIOT Tax paper ‘Building a Better Tax System’ .

Scotland’s tax system has continued to evolve since the last Scottish Parliament elections in 2016. ‘Building a Better Tax System’, the ICAS and CIOT joint tax manifesto for the Scottish Parliament elections, identifies three areas of policy that need to be addressed to help deliver a devolved tax system which can continue to evolve, and -be sustainable, resilient, and better understood by taxpayers.

Strengthen decision making

First, there are proposed actions to strengthen decision-making and accountability, so that tax can take a more prominent role in the Scottish political calendar. Tax decisions should be more visible as they are the bridge between policy aspirations and policy delivery. Voters need to have the opportunity to see clearly how these decisions are being made.

To improve parliamentary oversight of Scotland’s taxes and strengthen decision-making, we recommend:

Creating a full-time Minister for Scottish Taxes with political accountability for Scottish tax policy and its relationship to the wider UK tax regime

A Scottish Taxes Bill that, like the Budget Bill, provides for a guaranteed slot in the parliamentary timetable to make the legislative changes needed to maintain the integrity of the tax system

A dedicated Finance Committee, returning the focus of the Committee exclusively to the scrutiny of tax and spending decisions (rather than, as at present, the Finance and Constitution Committee)

Improved collaboration between the institutions responsible for Scottish taxes and their interaction with the wider UK tax system across Scotland and the UK. This should include a reset in relations between the UK Government and the devolved administrations to better recognise the continuing importance of UK tax decisions for devolved tax policy choices

Making the case for new taxes

Second, we detail the steps that should be considered when introducing or reforming taxes, with a view to creating a longer-term approach to tax policymaking. It is an area that may take on greater significance as debates over how to pay for the cost of the pandemic increase in a post-coronavirus world.

Decisions to introduce new taxes should not be left to the mercy of last-minute Budget concessions. A less scattergun, and more strategic approach, to tax-policy making is in the best interests of the long-term health of the tax system. The case for reforming existing taxes or introducing new taxes must be grounded in:

- Identifying the purpose and locus of the tax
- Consulting early and widely on how the tax is to be designed and operated
- Ensuring the structures of Parliament are fit for purpose to facilitate better tax policy making
- Maintaining sight of existing tax powers
- Ensuring collection and compliance are easy

Improving public understanding

Last but not least, we call on the Scottish Parliament to consider how it can improve public awareness and understanding of the devolved tax regime.

Awareness and understanding of the devolved taxes are low, but voters should be able to better understand the tax powers of the Scottish Parliament so that they can hold their representatives accountable. Devolution provides an opportunity for Scotland to take the lead and promote a devolved tax regime that leads to a better-informed – and engaged – public. This can be helped by:

- Reinstating the Scottish Government's pre-pandemic work on a tax communications strategy to show taxpayers how the tax system works, the responsibilities that the UK and Scottish governments have over the tax system and the contribution that the devolved taxes make to public services
- Promoting better understanding of the tax system by considering the role that Scotland's education system can play in boosting public awareness and understanding of how the tax system works
- Greater visibility for the devolved taxes in the Scottish political calendar

TAX & HMRC UPDATES

New guidance and support from HMRC if you cannot pay your tax bill

HMRC previously issued a series of YouTube videos to help taxpayers understand the compliance check process. They have now added a new video 'Help if you can't pay your tax bill' to the series which explains how HMRC deals with taxpayers who are unable to pay a tax debt.

You can view the full series of videos here.

HMRC has also made improvements to gov.uk guidance and developed a brand new help and support page. The guide explains the compliance check process and the help taxpayers and agents can get, during and after the check.

PAYE online for agents: liabilities and payments viewer

Since 2015 agents have been able to opt in to see the liabilities and payments of clients who are employers. However, there were some issues with the data (for example, it did not show the Apprenticeship Levy) and the data shown to agents was not the same as data viewed by clients in their Business Tax Accounts. Larger firms were also excluded from using the service.

HMRC has been working to make improvements to the service and has provided an Agents' guide to new screens. These will enable agents to see exactly what the client sees, with data appearing on the 12th following the end of the tax month. Data quality issues have also been addressed. Access to the updated service is being rolled out gradually so that HMRC can ensure, at each stage, that the service is running well. Some larger firms should have been able to access the service in May.

Agents who already have access to the new screens are requested to report any data that appears to be incorrect to HMRC, so that any problems can be resolved quickly. Reports should be made by using the "*Get help using this service*" link (which is available once logged in), providing a description of the problem and sending screen grabs.

HMRC Advisory Fuel Rates updated

The latest Advisory Fuel Rates effective from 1 June 2021 has been published and can be found here.

Personal allowance rises from 6 April

The personal allowance has increased to £12,570 for 2021/22 tax year starting 6 April 2021. It will then be frozen until 2026 as announced in the budget in March.

In Scotland, the Scottish rates of income tax have also increased.

The dividend allowance remains at £2,000 with tax paid on any dividends over this amount.

HMRC to contact self-employed for SEISS 4

HMRC have been contacting eligible self-employed individuals in mid-April based on their tax returns to give a date for making applications.

Communications were sent either by email, letter or within the online service.

The online service to claim the fourth grant was available from late April. All claims must be have been made on or before 1 June 2021.

There is no requirement that an earlier SEISS grant has been claimed in order to be able to claim the fourth grant.

Visit gov.uk for further details.

HMRC Agent Update 84 published

The latest version of HMRC's Agent Update has been published and can be found here.

HMRC publish updated bulk CJRS templates

HMRC have issued updated templates for employers claiming CJRS –for 16-99 employees use this template, and for 100 or more employees use one of these templates. Employers will need to enter all the information in the right format before uploading the completed template or it will be rejected.

One new feature is that if employers cannot provide a National Insurance number for an employee, they can now select a reason for this. Do not change the format of the template or it will not be accepted by HMRC's system.

HRMC working to improve the Agent Dedicated Lines

Many firms have reported delays on the Agent Dedicated Line (ADL). ICAS has made detailed submissions to HMRC regarding problems with the ADL raised by members and there are ongoing discussions with HMRC on these issues. Please raise concerns you have with us. One specific concern focused on whether ADL advisers can accept multiple queries during a single call. Given that very long waiting times have been reported, it is essential that firms are able to deal with as many issues as possible on a single call.

HMRC has now clarified the position as below. In summary, ADL call handlers should take multiple queries in a single call, but for health and safety reasons, call handlers are expected to take a break each hour, so calls should not exceed 60 minutes.

"We acknowledge that we have not been able to offer the level of service to our Agents that we would like to over recent months. Agents remain a vitally important stakeholder group and we have appreciated their ongoing patience during this exceptional period. We have kept our commitment to keeping our telephony resourcing model under review and we have identified areas for improvement.

One of those areas is clarification around how many of your clients our advisers can deal with on a single call. We have identified inconsistencies which could impact on the service you receive, and we are working to put that right.

There is no "one number" of your clients our advisers can deal with during your calls. However, due to Health and Safety Regulations, our advisers can spend no longer than an hour at a time on the phone.

We are encouraging our colleagues to tell you at the beginning of your call how long they have until their next health and safety break so that you can work together to progress as many of your clients as possible in the time available. Please feel free to ask your adviser how long they have if they do not offer this information. We are appealing to you to be pragmatic in what you can achieve in the time available, particularly if you have complex cases.

We are updating our pre-recorded messages to remind you that our advisers are only available for up to one hour to deal with your queries."

Should you wish to provide further feedback or concerns please contact the ICAS team at tax@icas.com

EMPLOYMENT CORNER

NIC change for hiring veterans takes effect

The new National Insurance Contributions (NICs) relief for employers who hire veterans applies from 6 April 2021. The relief provides a zero-rate of secondary Class 1 NICs on civilian employment after leaving the regular armed forces.

For the twelve months between April 2021 and March 2022, employers will need to pay the associated secondary Class 1 National Insurance contributions as normal and then claim it back retrospectively from April 2022 onwards.

Further details can be found in the HMRC press release 'Tax cut for employers of veterans brought in'.

Gender Classification on payslips – a potential problem for employers

More cases are coming to the fore of employees querying their gender classification on their payslips, where they consider themselves to be non-binary. The DWP currently issues NINOs to "male" or "female" genders, so at the moment it is not possible to classify someone as "non-binary" on a payslip.

Much more care is needed on the subject of gender issues by employers and it is important to keep up to date with this fast-changing area of law and debate. For more information on this, try reading:

https://www.hibob.com/guides/hr-leaders-guide-for-non-binary-gender-inclusion/

www.acas.org.uk/.../Supporting-trans-employees-in-the-workplace.pdf
http://genderedintelligence.co.uk/projects/kip/work

https://www.gov.uk/employee-changes-gender

A reminder of employment related pay and payslip law

The Wages Act 1986 governs UK pay law. As of 6 April 2019, further changes were made to pay law in the form of The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018. The changes were brought in to ensure employees have clarity on what they are being paid and to show time worked/hours paid (for NMW and NLW purposes). Guidance issued by BEIS can be found here.

All employees are entitled to receive a payslip under this legislation, and payslips must contain a number of compulsory elements. Employees require payslips for many reasons, but mortgages, loans visa applications as well as tax returns and benefits in kind are the most commonplace. Payslips must also show earnings before and after any deductions as well as the amount of any variable deductions (such as income tax, NICs and pension contributions).

Employees have the right to receive payslips, regardless of the number of working hours completed or whether the contract is a casual, or so-called "zero hours" document. Payslips are also governed by GDPR legislation.

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