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HOLIDAY PAIN?

The decision in the case of Harpur v Brazel [2022] UKSC 21 was handed down on 20 July 2022, having been heard at the Supreme Court on 9 November 2021. Justine Riccomini analyses this decision, which upholds that of the Court of Appeal from August 2019 and dismisses the appeal by the Harpur Trust. The result is that employees who only work part of the year are now entitled to the same holiday pay as those who work all year round. This could mean that some part-year workers employed on permanent contracts such as so-called 'term-time workers' may be entitled to receive arrears of pay, with potentially far-reaching consequences.

Background

The case concerns itself with a music teacher (Mrs Brazel) who worked at Bedford School, run by Harpur Trust ("the trust") and discusses the issue of how to work out holiday pay when taking into account the part-time workers directive, EU legislation in the shape of the Working time Directive which was legislated for in the UK under the banner of the Working Time Regulations SI 1998/1833, now classified as "retained EU law" by s.2 European Union (Withdrawal) Act 2018, and the definition of a week's pay for the purposes of calculating holiday pay.

Sympathy has to be extended at this point to the small employer who completes their own payroll and relies on guidance from various sources. This case serves to highlight the overly complicated nature of holiday pay entitlement and calculation and the bear traps which any unsuspecting employer can fall into along the way.

The Employment Tribunal found in favour of the trust in 2015, deeming their holiday pay calculations to be correct at the time, after Mrs Brazel presented her initial argument that the trust's holiday pay calculation placed her at a financial detriment under the Part-Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 (otherwise known as the part-time workers' directive) after the trust changed its holiday pay calculation methodology back in 2011. Mrs Brazel appealed to the Employment Appeal Tribunal who

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found in her favour. Following this defeat, the trust lodged an appeal to the Court of Appeal – that hearing took place on 2 May 2019 and the decision was released in August of the same year.

The Court of Appeal upheld the decision of the Employment Appeal Tribunal, and opined that in accordance with the Working Time Regulations, Mrs Brazel's holiday pay need not be reduced on a pro-rata basis because she was a part-year worker but should instead be calculated using the so-called '12-week method' (see section headed "The calculation" below), at which point the trust lodged a further appeal to the Supreme Court. The Court of Appeal accepted that to adhere strictly to the Working Time Regulations and

not pro-rate for part-year workers would give rise to anomalous results in some cases yet found there was no scope to deviate from the regulations, which were general in nature and did not take account of special circumstances.

Furthermore, they said that they "would expect it to be unusual for workers whose services are required for only a few weeks a year to be employed on permanent contracts, as opposed to being engaged on a freelance basis", whilst accepting that part of the reason this may happen in some sectors might be due to safeguarding and similar reasons.

The focus on 'getting holiday pay right' has been in the media a lot recently, with some fairly radical changes brought about by cases such as this one, Bear Scotland v Fulton and Pimlico Plumbers v Smith. In Pimlico, the company appealed against numerus employment tribunal claims including one for arrears of holiday pay brought by Mr. Smith. Notably in that case, Mr Smith had brought all his claims within three months of the termination date, except for his last period of unpaid holiday, which was over three months prior to the termination date.

Pimlico had argued that Mr Smith was self-employed and thus ineligible to paid holidays, but the Supreme Court disagreed in 2018 and deemed him to be a Worker, which entitled him to the statutory minimum of 5.6 weeks' paid holiday. That decision then enabled him to apply to the Employment Tribunal for arrears.

Why this case is important for employment tax purposes

This case is important for employment tax practitioners and payroll professionals because it highlights how easy it is for an employer to fall foul of the legislation – after all there is a mixture of domestic and EU legacy legislation to consider – not for the faint hearted.

Depending on what is deemed to be a holiday pay entitlement thus determines the pay level and subsequently of course, impacts the relevant employment taxes payable, the employer returns and the employee's own personal tax position. So in short, it's vital that the calculation is performed by someone qualified and therefore knowledgeable and experienced enough to do the job and get it right first time.

As the recent media attention focused on large scale payroll mistakes made by household names such as Asda and Next in recent months shows, not only can employees suffer hardship, but HMRC can become alive to the issues and adjust the business's risk rating across all taxes, which is hard to come back from and affects reputation.

The holiday pay calculation

Mrs Brazel had varying hours throughout the year on a part-year working, permanent basis. Her employer changed the way in which they calculated her weekly holiday pay entitlement from September 2011 by taking the total earnings for each school term based on hours worked and multiplying it by 12.07% (this being the rounded-up percentage representing 5.6 weeks divided by the (assumed) number of working weeks in a year (46.4) x 100). A holiday payment was then made to Mrs Brazel of that result. This method was based on guidance the employer had read in an Acas guidance manual, "Holidays and Holiday Pay", which has since been amended.

Mrs Brazel challenged those calculations on the basis that as a part-year worker, she was instead entitled to holiday pay the employer had been using before September 2011 when they used the '12-week method' as prescribed in s.16 of the Working Time Regulations 1998 which incorporates s.224 of the Employment Rights Act 1996 (i.e. a 12-week reference period x 5.6 weeks) to calculate average weekly pay and thereby determine the weekly value of the holiday pay due. If she was correct, the corresponding percentage (were a percentage allowed to be used) would have been 17.5% of pay, not 12.07%.

Readers should be aware that after this case commenced, the legislative provisions were updated yet again in April 2020 to direct employers to utilise a 52-week period to determine the holiday pay average as opposed to the 12-week method (or if the worker has been employed for a shorter period, the number of complete weeks in which the worker has worked since they commenced employment with that employer).

Regulation 16 of the Working Time Regulations 1998 as revised in 2020 now also determines that the definition of a week's pay for annual leave purposes equates to the worker's average weekly remuneration in the preceding 52 weeks they have worked (or if the worker has been employed for a shorter period, the number of complete weeks in which the worker has worked since they have been employed). The Acas guidance mirrors this, as does the 2020 BEIS guidance.

Under the 52-week reference period, the periods when no work is done/ no pay is due are ignored and no account is taken of any pay earned in periods falling more than 104 weeks (i.e. 2 years) prior to the holiday pay calculation date – the 2 year limit having been

imposed by the Bear Scotland v Fulton decision handed down by the Employment Appeal Tribunal in 2014.

What was the Supreme Court asked to do?

The task for the Supreme Court in this instance was to consider the trust's appeal on the grounds of statutory interpretation. The trust maintained that holiday pay entitlement should be computed in accordance with the "conformity principle" arising out of the European Court of Justice's interpretation of the Working Time Directive. This principle directs the employer to pro-rate leave based on the amount of work actually performed during a year.

However, the Supreme Court noted the Court of Appeal's stance, where they rejected the conformity principle and opining that the overarching UK statutory Working Time Regulations could not be deviated from. The Supreme Court therefore had to decide which was the correct interpretation of statute to adopt in this case.

The arguments presented

The main arguments submitted by the trust were:

1. That the result would be skewed to Mrs Brazel's financial advantage if the conformity principle was not adhered to, and the principle should apply to "all working patterns". The Supreme Court rejected this argument on the grounds that there was nothing in that legislation which explicitly conferred a duty to apply that principle to all working patterns;
2. That the Marleasing Principle should apply, which asserts EU law over domestic law. However the Supreme Court rejected this at para.44 of the judgement, stating: "But EU law only requires UK legislation to be so interpreted if that result is consistent with domestic rules of statutory interpretation";
3. The use of the calendar week was not the correct approach to defining a week's pay for a number of reasons, including that it failed to "properly to afford workers the rights conferred by the [Working Time Directive]". The Supreme Court rejected this at para. 46 of the judgement by stating: "Our task is, however, to construe the WTR and the meaning of "week" used there. In our judgment, the conformity principle enunciated by the CJEU cannot operate so as to allow a construction of the provisions so that they apply to part year workers in the way that the Harpur Trust contend."
4. The guidance from Acas had been misleading. The Supreme Court rejected this on the grounds that guidance cannot usurp legislative provisions.

The main arguments submitted by Mrs Brazel were:

1. She would be placed at a disadvantage under the part-time workers directive;
2. Section 229(2) of the Working Time Regulations is not a general dispensing provision allowing the court to recalculate the amount of a week's pay in any way it considers appropriate;
3. She was entitled to receive holiday pay under the '12-week method' as prescribed in s.16 of the Working Time Regulations 1998 which incorporates s.224 of the Employment Rights Act 1996, which the trust was adhering to prior to September 2011, and which it changed to a different methodology post September 2011 after ostensibly following an Acas guidance booklet.

Analysis of the Supreme Court's approach and decision

The Supreme Court assessed the various layers of legislation which cover the holiday pay space and examined whether the European legislation containing the conformity principle unequivocally trumped UK domestic legislation.

The Supreme Court considered whether the fact the general provisions in the Working Time Regulations give rise to anomalies which might present part-year permanent workers with an unfair advantage over part time and full-time workers. Concluding that in some cases, it might, they agreed that this in itself was not sufficient reason to deviate from the Working Time Regulations because there are no special circumstances in that legislation which allow an employer to do anything other than carry out the calculations as set out. This in itself must amount to a policy choice made by Parliament when the legislation was debated and passed.

The Supreme Court examined the overarching statutory method contained in the Working Time Regulations which allowed for a more generous calculation (and was not prevented from doing so by the EU Directive) and found that the trust's thinking was flawed by relying upon and adopting the Acas guidance which was in direct contravention of it in September 2011.

In conclusion, the Supreme Court decided that the amount of leave to which a part-year worker under a permanent contract is entitled is not required by EU

law to be, and under domestic law is not to be, pro-rated.

Cases referred to during this hearing

The following cases were referred to in the proceedings and subsequent decision which apart from assisting the judiciary to make a decision, also contain some interesting points which employment tax practitioners may find useful in terms of further reading.

Russell v Transocean International Resources Ltd [2011] UKSC 57; [2012] ICR 188. The employee was an offshore oil worker, working a 2 weeks on-/ 2 weeks off-rig pattern. It was held that an employer could lawfully require an employee to take leave in a break period.

R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99) [2001] ICR 1152. In this case it was established that a worker is entitled to take all their leave and be paid for it at the start of the leave year if that is their choice and if it does not inconvenience the employer. It was noted that the idea of leave accruing over the year as and when hours are worked is also inconsistent with regulation 15A as inserted in to Working Time Regulations.

QH v Varhoven kasatsionen sad na Republika Bulgaria (C-762/18) [2020] EU:C:2020:504. It concerned the leave entitlement of workers who had been unlawfully dismissed and then reinstated in their employment following the annulment of the dismissal by the domestic court and concerns itself with the conformity principle.

How this decision impacts employers

Employers who have employees working for them on a part-year but permanent contract basis - and this could be in any sector, but notably in the civil service and education sectors there are many who work under these arrangements – will need to review their historic holiday pay calculations policies as a matter of priority to ensure they are commensurate with the applicable law at the time the payments were made.

It is entirely plausible to consider the eventuality that so-called ‘large scale repayment agents’ who have historically approached employees to claim tax relief on uniforms and other items may be approaching employees to encourage them to have their holiday pay independently reviewed with a view to charging them a commission if they are successful in obtaining an arrears payment. This can only serve to muddy the waters and employers would be best to undertake urgent employee communications programmes to ensure the employees hear from them first and ‘cut out the middle-man’.

Furthermore, this decision may have an impact on the morale of full-time as well as part-time employees, whose holiday pay is worked out on the same basis of entitlement – a radical change from the previous position. Although part-time workers have a suite of rights under the part-time workers directive, this judgement could mean that some part-time workers are entitled to less holiday pay pro-rata than part-year workers, even where they work the same hours. Note however that the decision in this case only applies the statutory minimum annual leave entitlements covered by the Working Time Regulations – not to any additional leave allowance over and above this which may be present within an employment contract.

The implications for the employer in terms of additional funding requirements for holiday pay are less like a dream holiday and more like a holiday nightmare. The whole shebang may negatively impact labour market flexibility for employees who are just looking for some work they can carry out to suit their domestic arrangements – potentially creating a barrier to flexible working as we are presently coming to know it.

Finally, the unintended consequences of this may be that some employers may now be encouraged to attain the same financial result by re-engineering part-year workers’ permanent contracts so that, in financial terms, reductions in working hours means they are not exceeding the old 12.07% cost base.

Conclusion

Whilst this decision simplifies the holiday pay calculation for employers and offers lower-paid workers who do not have guaranteed hours some respite, undoubtedly, this case decision will have serious repercussions for those employers who have been using a different method of calculating holiday pay to that currently prescribed in legislation. This area of legislation needs to be reviewed and re-written to add clarity and certainty to the position for employers and employees alike if the original intentions of the 2017 Taylor report and Good Work Plan still hold any water.

THE NEW TRUST REGISTRATION SERVICE AND UNINCORPORATED SPORTS CLUBS

The deadline for non-taxable express trusts to register with HMRC's Trust Registration Service was 1 September 2022, unless they fell within an exemption from registration.

Firms taking on non-taxable express trusts as clients should ensure that they are registered, where appropriate, with the TRS.

Non-taxable express trusts are required to register as follows:

- Trusts created before or on 6 October 2020 must be registered by 1 September 2022.
- Trusts created after 6 October 2020 must be registered within 90 days of creation, or by 1 September 2022 (whichever is the later).

Trusts that were in existence on or after 6 October 2020, and have since ceased, are still liable for registration with the TRS. HMRC has confirmed that trustees of such trusts should register them and then immediately close the trust record. This is because 6 October 2020 was the date when the 2020 amendments to the 2017 money laundering regulations came into force to require express trusts without tax liabilities to register on the TRS.

The TRS Manual includes the following guidance on the exemption for UK charities from registering with the TRS:

"Trusts that are registered as a charity in the UK are excluded from registration as express trusts (Sch3A(5) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017).

Further, any charitable trusts not required to register in England and Wales by virtue of section 30(2) of the Charities Act 2011 are also excluded from registration as express trusts. This means that the charity is not required to register on the Trust Registration Service (TRS) if it is:

1) an exempt charity, or
2) and excepted charity, or
3) its income is less that £5,000 a year."

This article is intended to give a brief overview of some of the issues for charities and non-taxable express trusts and leads into the following article prepared by independent tax adviser, Richard Baldwin, on the implications for unincorporated sports clubs and their advisers on the TRS requirements. This article was first published on icas.com on 18 August 2022.

The following article has been written by Richard Baldwin MBE, FCA, CTA, Independent Tax Advisor

The new Trust Registration Service (TRS) brings with it a requirement for most unincorporated sports clubs in the UK to register with HMRC before the end of this month.

This will have implications for both clubs and their professional advisers. Many club treasurers are chartered accountants volunteering for clubs which provide valuable sporting activities in their local communities. This article should help clarify the registration obligations for treasurers, their clubs and professional advisers.

Overview

An article published by ICAS in early 2020 explained the background to this new TRS but indicated that more details were expected from HMRC. Most of these have now been provided in HMRC's Trust Registration Service Manual. The following sections of the Service Manual are most likely to be of interest to professional advisers:

- Types of trust that need to be registered (TRSM 20000)
- Registration (TRSM30000)
- Discrepancy reporting (TRSM50000)
- Penalties (TRSM 80000)

The legal authority for the new TRS is the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (as amended in 2020) which apply throughout the UK. Under these express trusts are required to register with the TRS even if they are inactive.

The deadline for registration of these express trusts if they are not taxable trusts and were in existence on 6 October 2020 and not exempt is 1 September 2022.

Most existing unincorporated sports clubs with their assets owned via a trust will be required to register before this deadline. Other newly created trusts will have until the deadline or 90 days after creation to register.

There have been and will continue to be separate registration requirements for taxable trusts which are unlikely to be relevant for unincorporated members sports clubs.

Impact on unincorporated sports clubs

Unincorporated sports clubs and associations have no separate legal capacity so their property must be held by individuals or by a legal entity on their behalf. This will be the case for freehold or leasehold property (heritable property in Scotland), bank accounts, intellectual property and equipment. Often within sport property is held by those club members willing to act as trustees. This may be evidenced by a formal trust document with some National Governing Bodies of Sport providing model documents of these “bare trusts” for their affiliated members and may even arise by implication. The appointment of trustees may also be provided for in the Club’s Constitution. The question is whether these bare trusts are required to register with TRS following the Regulations and the guidance in HMRC’s TRS manual.

An express trust is any trust that is set up deliberately usually in the form of a written document. This is in contrast to other types of trust which may be set up automatically by the operation of the law.

An unincorporated association or club which uses a bare trust would therefore be an express trust as it will have been set up deliberately by the club’s members at the time. This general position is confirmed by HMRC’s guidance in TRSM23060. This goes on to state that if the unincorporated association is a charity then it is excluded from registration. However this exclusion does not apply to associations registered with HMRC as community amateur sports clubs (CASC’s). HMRC’s Example of The Readstone Tennis Club in TRSM23060 confirms this.

An unincorporated association liable to corporation tax does not make the bare trust which it has established a taxable trust for TRS purposes. The bare trust remains a non-taxable trust under TRS subject to the rules explained in this article.

Consideration of this issue for unincorporated sports clubs

In addition to considering the detailed guidance in HMRC’s TRS Manual guidance has been sought from HMRC’s Trust Policy Adviser responsible for TRS. HMRC has confirmed that there is no exclusion for bare trusts unless one of the exclusions in the Regulations applies. The conclusion therefore is that the only exclusion which may be available is where the club is a charity. As I note above HMRC has confirmed that unincorporated CASC’s have to register with TRS.

In the light of this all unincorporated sports clubs should review the requirement for their bare trusts to register with TRS. Registration will involve providing detailed information including the identification of a lead trustee and specific details for lead and other trustees (see TRSM32000 and the following pages). Once registered, changes e.g. in trustees or their details must be completed online within 90 days using TRS. In the light of these requirements now might provide a good opportunity to review the documentation supporting the trust arrangements and to ensure they are up to date.

Valuations

It is worth noting that non-taxable trusts are not required to provide details of valuations of trust assets at the point of registration. This means that unincorporated sports clubs structured as bare trusts do not need to provide asset valuations because they cannot be taxable trusts for TRS purposes (see “Bare trusts” at TRSM10030).

Reporting discrepancies –the position of professional advisers

From September “Relevant Persons” must ask trustees or agents who are engaging in a new business relationship with them to provide proof of registration on the TRS. A Relevant Person is an organisation working in a professional capacity that carries out due diligence checks under anti-money laundering regulations. Relevant Persons can include financial institutions, auditors, accountants, tax advisers and legal professionals (see TRSM24020). The work must be expected to have an element of duration at the time when contact with the trust is established.

The trustee or agent who is engaging in the business relationship will need to use the online service to download a pdf copy of a report to show proof of registration and then send it to the Relevant Person. If a Relevant Person finds a discrepancy in trust data (or there is no data at all since the trust is not registered on TRS) when reviewing proof of registration the organisation will in the first instance seek to resolve it with the trustee or agent who is engaging in the

business relationship. If, for example, the trust is not registered it should register.

If the discrepancy cannot be resolved then the Relevant Person has to report the discrepancy to HMRC. This will be acted upon by HMRC who will ask the trust to resolve the discrepancy. HMRC say that once the Relevant Person is satisfied that the discrepancy has been resolved (presumably registration with TRS in the case of an unregistered club) and the proof of registration document down loaded and received, they can continue to engage in a business relationship with the trust.

It seems that this process has important implications for both the unincorporated club and its professional advisers. An unregistered unincorporated sports club wishing to engage accountants to provide ongoing advice may be prohibited from doing so until its trust is registered with TRS. This may delay the provision of valuable financial advice.

Penalties

Failure to register or keep TRS information up to date on time may lead to a financial penalty imposed under the Regulations. Trustees will be able to appeal any penalties charged.

In recognition of the fact that the registration requirement is a new and unfamiliar obligation for trustees HMRC say there will be no penalty for a first offence of failure to register or late registration unless that failure is shown to be due to deliberate behaviour on the part of the trustees. However HMRC may issue a warning letter if the trust is not registered requiring registration within a certain time period. Failure of the trustees to do so subsequently may trigger a penalty.

Where failure to register is due to deliberate behaviour on the part of the trustee a £5,000 penalty per offence may be charged.

The penalty regime for failure to keep information on TRS up to date is similar to that for failure to register. Again where the failure to update is due to deliberate behaviour on the part of the trustees a £5,000 penalty may be charged per offence.

Comment

Without doubt the requirement for unincorporated sports clubs which are not charities to register with TRS is creating additional red tape for those clubs causing them costs in terms of the volunteer time of club trustees and professional fees for those who need assistance with TRS. It is difficult to see the benefit, if any, of this in preventing money laundering. TRS will impose a burden on volunteers at tens of thousands of unincorporated sports clubs, most of whom are unaware of the requirement to register under TRS and are likely to fail to do so without prompting. Accountants have an important role to play in raising this issue with their local clubs.

About the author

Richard Baldwin is an independent tax adviser who has specialised in the taxation of sport since 1981. Since retiring as a Deloitte tax partner in 2005 he has advised many community sports clubs on tax. He is a member of HMRC's Charity Tax Forum which has been involved with discussions on TRS. He and colleagues within National Governing Bodies of Sport have received guidance on TRS from HMRC's Trust Policy Adviser.

HMRC PRODUCES Q&A STYLE CJRS COMMON ERRORS GUIDANCE

The CJRS Forum was set up around a year ago with the intention of finalizing the scheme, ironing out any kinks and problems experienced by stakeholders with operating the system and making sure claims are tallied properly. ICAS has been a member of the Forum since its inception.

Many debates have ensued in the intervening period, not least with the issue of offsetting underclaims and overclaims, to try to make life easier for everyone involved.

The Forum has just succeeded in getting HMRC to publish a much-needed Q&A style guidance sheet to explain some of the most common errors and how to resolve them.

The guidance is eight pages long and covers all of the most commonly raised areas of confusion for employers where it is possible errors could have been made. It is likely that most employers will find that the errors they have made will be covered by the guidance, as it has been created with input from the main professional and representative bodies who have collectively brought the issues to HMRC's attention.

The areas of query covered are:

- How does an employer disclose an error to HMRC?
- Does HMRC expect claims not calculated in line with the HMRC Direction and guidance to be corrected and the amounts repaid?
- If an employer has acted on incorrect HMRC advice do they have to make a correction?
- If a different method has been used to HMRCs preferred method for calculating reference pay but it is consistent with guidance, does it need correcting?
- When do NICs overclaims need to be corrected?
- If a different method has been used to HMRC's preferred method for calculating the unworked hours in the claim period but it is consistent with guidance, does it need correcting?
- What will HMRC accept for calculating the lookback period for reference pay?
- What if an employer has not used the higher of the average pay and lookback methodology, for variably paid employees?
- Do calculations need correcting if an employer has used the fixed pay method for employees with elements of variable pay where they considered this best represented how they were paid?
- If employer claimed 80% of reference pay after the taper was introduced is a recalculation required?
- If the value of benefits in kind provided via salary have been included in calculation of reference pay, does this need to be corrected?
- My employees were furloughed as they could no longer work at my premises because of the effect of COIVID-19. Do I have to show HMRC there was a financial impact on my business?
- If HMRC identifies an error during an enquiry does it need correcting?
- If there is no written furlough agreement before a claim is made, is the claim still valid?

It is important that anyone involved in the processing of payrolls and making CJRS claims sees this guidance. HMRC has, however, decided not to publish it on GOV.UK.

RUSSIAN SANCTIONS: ACCOUNTANCY AND MANAGEMENT CONSULTANCY SERVICES

On 4 May 2022, Foreign Secretary (at the time of writing) Liz Truss announced the UK Government's intention to prohibit the provision of accountancy, management consultancy and public relations services to Russia. This has now been brought into legal effect through The Russia (Sanctions) (EU Exit) (Amendment) (No. 14) Regulations 2022 and became effective from 21 July 2022.

The UK and other jurisdictions continue to widen the scope of trade sanctions imposed on Russia in response to the invasion of Ukraine earlier this year. One of the latest trade sanctions to be imposed by the UK Government is in relation to certain professional and business services, which specifically includes 'accountancy services' and 'business and management consulting services'. Despite being announced in early May, it is only from 21 July that the prohibition became legally in force. Similar prohibitions are already in force through EU sanctions (Regulation (EU) 2022/879) and US sanction (Executive Order 14071).

The UK's prohibition is introduced by The Russia (Sanctions) (EU Exit) (Amendment) (No.14) Regulations 2022 ('the 2022 Regulations') and came into force on 21 July 2022. The 2022 Regulations amend the Russia (Sanctions) (EU Exit) Regulations 2019 ('the Regulations') in several respects.

The prohibitions set out in the Regulations apply to firms established or operating in the UK as well as overseas operations of UK established firms.

Extent of prohibition

One of the biggest questions which was unanswered by the initial announcement was the extent of services which would be caught under prohibition. Only now the legislation has been published has the extent of the prohibition been able to be established.

The Regulations now provide under regulation 54C that a person must not directly or indirectly provide, to a person connected with Russia—

a) accounting services;

b) business and management consulting services;

….

'A person connected with Russia' is defined by Regulation 21(2) and means:

a) an individual who is, or an association or combination of individuals who are, ordinarily resident in Russia;

b) an individual who is, or an association or combination of individuals who are, located in Russia;

c) a person, other than an individual, who is incorporated or constituted under the law of Russia;

d) a person, other than an individual, who is domiciled in Russia.

Providing such services is now a criminal offence other than where a special licence is obtained from OFSI or in certain other limited circumstances defined under new Regulation 60D of the Regulations. Regulation 54C (3) also provides that it is a defence for a person to show that they did not know and had no reasonable cause to suspect that the person to whom the services were provided was "a person connected with Russia".

Service provisions affected

The 2022 Regulations introduce a new regulation 54B to the Regulations which defines for the purposes of Russian sanctions what is meant by 'accounting services' and 'business and management consulting services'.

For the purposes of Russian sanctions, 'accounting services' means—

a) accounting review services, which are services involving the review by a person of annual and interim financial statements and other accounting information, but excluding auditing services;

b) compilation of financial statements services, which are services involving the compilation by a person of financial statements from information provided by a client, including preparation services of business tax returns when provided together with the preparation of financial statements for a single fee, but excluding such preparation services of business tax returns when provided as a separate service;

c) other accounting services such as attestations, valuations, preparation services of pro forma statements;

d) bookkeeping services, which are services consisting of classifying and recording business transactions in terms of money or some unit of measurement in the books of account, but excluding bookkeeping services related to tax returns.

Similarly, 'business and management consulting services' means advisory, guidance and operational assistance services provided for business policy and strategy and the overall planning, structuring and control of an organisation, which includes (but is not limited to) management auditing; market management; human resources; production management and project management consulting.

Advisory services in relation to corporate restructuring and strategy where they relate to certain specified goods or technology are already covered by separate sanction provisions relating to financial services.

It should be noted that 'audit services' are specifically excluded from the definition of 'accounting services' but 'management auditing' is included within the prohibition of 'business and management consulting services'. Broadly therefore, statutory auditing will not be caught by the trade sanction but internal audit services are prohibited.

Statutory guidance on the sanctions relating to Russia is published on the GOV.uk website and gives further information on the implementation of the prohibitions and compliance with them.

Exemptions

Beyond where a licence has been obtained from OFSI, regulation 60DA of the Regulations introduced by the 2022 Regulations provides an exemption from the prohibition on providing accounting services in respect of any act that is carried out:

- in relation to the discharge or compliance with UK statutory or regulatory obligations (other than obligations arising under contract); or
- in relation to contractual obligations that arise under a contract concluded before 20 July 2022, or an ancillary contract necessary for the satisfaction of such a contract.

For the exemption to apply in relation to contracts concluded before 20 July:

- the act must be carried out before 21 August 2022 (the end of the period of one month beginning with the day on which the regulation comes into force);
- the person providing the accounting services must notify the Secretary of State no later than the day 10 working days before the day on which the act is carried out;

In addition to the above, an act necessary for the official purposes of a diplomatic mission or consular post in Russia, or of an international organisation enjoying immunities in accordance with international law which involves the provision of accounting services is also exempt from the trade sanction.

Steps to be taken

Firms dealing with Russian companies and individuals must be alert to ensure that they comply with all relevant sanction regimes and legislation in the jurisdictions in which they operate.

Accountancy firms have already been reviewing their business relationships and often disengaging with businesses and individuals connected to Russia. Firms should now consider whether a further review their client base is required to ensure they are not falling foul of the new trade sanctions or to identify if they might need to apply for a licence to be able to continue some types of work.

The UK's National Economic Crime Centre has recently published a Red Alert on Financial Sanctions Evasion Typologies: Russian Elites and Enablers which provides information on some common techniques which are being used to evade sanctions.

RULE CHANGE WILL ASSIST CHARITIES MANAGE THEIR PENSION LIABILITIES

Amendments have been made to the Local Government Pension Scheme (LGPS) (Scotland) Regulations 2018 which enable Deferred Debt Agreements (DDAs) to be established between Scheme funds and sponsoring employers, including charity employers. The changes came into force on 1 June 2022.

DDAs allow sponsoring employers to defer any exit payment and to carry on participating in the Scottish LGPS on an on-going basis without any active members.

Under DDAs, employers are better able to manage liabilities already built up in the scheme without building up any additional ones. Sponsoring employers also continue to benefit from investment returns and favourable member movements that could reduce the ultimate cost of providing benefits.

The changes will give Community Admission Bodies (CABs), including the many charity employers participating in the Scottish LGPS, the potential to enter a DDA in circumstances where this is judged to be necessary to keep the employer on a financially sustainable footing.

While immediate costs to the employer are likely to be lower under a DDA and therefore much more affordable regular valuations do need to be carried out and payments due under DDAs adjusted, if necessary, subject to any affordability constraints.

This approach is fair to other employers in the scheme as under a DDA an employer would retain all of its obligations to the scheme.

Before Scheme funds can enter into DDAs they will need to update their Funding Strategy Statements, meaning that DDAs may not be available in practice until several months after the effective date of the amendment regulations.

The proposed changes bring the 2018 Regulations into line with recent amendments to the LGPS Regulations 2013, which apply in England and Wales, and with the Occupational Pension Schemes (Employer Debt) Regulations 2005, which were amended in 2018 to introduce DDAs for private sector multi-employer schemes.

Other emerging options for addressing pension liabilities

Scheme funds in Scotland are evolving and the ability to enter a DDA is one of a number of changes we which provide charity employers with increased flexibility:

- Cessation debts guaranteed for 90 days. Historically there has been an issue where an exit illustration has been provided but by the time the exiting employer has completed their consultation and actually exited, the amount of the deficit has deteriorated so much as to now make the exit unaffordable. The 90 day guarantee over the exit debt valuation will avoid this issue by creating greater certainty for all parties.
- Changes to the exit valuation basis. Actuaries of some Scottish Scheme funds are adopting a different exit calculation basis from the 'nil risk' gilts basis which has been used historically. However, there are actuaries who have evolved to a probability of success basis which in most cases materially reduces the cessation debt and indeed for many employers makes it affordable. It is to be hoped that this more equitable approach will be adopted more consistently across Scottish Scheme funds.
- Wider range of investment options available. Some Scheme funds are considering widening the range of investment portfolios available to their employers which would allow them to target their specific membership profile more closely, and indeed provide lower risk and less volatile funding for employers looking to exit on a DDA basis. This could create greater certainty of contributions with a much lower risk of material changes.

In conclusion

ICAS members advising charities should be aware that charity trustee boards, where LGPS membership is presenting a charity with cost and risk challenges, may now be reviewing their charity's membership in light of these new options.

ICAS RESPONDS TO BEIS CONSULTATION: 'POST-PANDEMIC ECONOMIC GROWTH: UK LABOUR MARKETS'

A question of status

On 27 May 2022, the UK Parliament issued a consultation through BEIS entitled "Post-pandemic economic growth: UK labour markets" #2646" which required a response by 8 July 2022. ICAS reserved its comments to certain questions within the section entitled: "Employment status and modern working practices five years on from the Taylor Review".

It was considered necessary by the ICAS Tax Board to respond to this section of the consultation because of the ongoing debate through the courts, between taxpayers, HMRC, BEIS, HM Treasury, business leaders and representative bodies throughout the UK.

The question which has been rumbling on for a number of decades now is how to tackle employment status to make it less complex, fairer and capable of being complied with. The position was summed up rather neatly at the Court of Appeal by judge Sir David Richards, who stated at paragraph 56 of the recent Atholl House case decision: "It might be supposed that, and it would certainly be desirable if, there were one clear test or approach to determining whether a person was an employee".

Breaking point

Indeed, ICAS recently highlighted the ongoing complexity of employment status decisions in an article which asked whether it should take four court hearings to decide status. It would appear the system is at breaking point.

Readers will note that The UK Government issued its response to the 2018 employment status consultation by HM Treasury, BEIS and HMRC in July 2022. The report does not propose any changes in the immediate term and as such, the ICAS response to the BEIS consultation noted above is as important as ever, to emphasise that a solution must be found. This will not be an easy thing to do but the employment status situation clearly cannot continue as it stands.

Read the ICAS response.

ICAS REGULATION BOARD PUBLISHES NEW POLICY POSITION PAPER

As part of its ongoing review of ICAS' regulatory strategy, the ICAS Regulation Board has discussed and agreed a number of policy positions, covering some important regulatory issues and principles.

These positions have been set out in a recently published policy paper, which we encourage ICAS stakeholders to read and engage with.

The role of the ICAS Regulation Board

The ICAS Regulation Board is the body appointed by Council to take responsibility for regulatory policy at ICAS and maintain professional standards amongst Members, Students, Affiliates and Firms.

The Board is also a strategic body, discussing developments in regulation and closely monitoring ICAS' relationships with its oversight regulators.

Policy positioning

The Regulation Board is conscious of ICAS' Royal Charter requirement to act in the public interest. ICAS' regulatory functions are therefore designed and exercised to place the public interest first. The Charter also requires ICAS to represent its members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.

The Board wants all stakeholders – including Members, Firms and oversight bodies – to be aware of these positions, so that they can be reviewed, considered and revised as appropriate.

AN INTRODUCTORY GUIDE TO EMAIL ACCOUNT SECURITY

Written by David Fleming, Chief Technology Officer at Mitigo

A business email account is the most common entry point for criminals and is at the root of most successful cyber-attacks on accountants. Since email is the most used function in a business, it is not surprising that it is used by criminals to exploit. What is surprising, is that the security of a firm's email system is still not considered a high priority.

This article will describe how attacks start in order to give an insight into the key things that you need to defend against. It will also describe some common consequences of an attack to help understand why this subject deserves real attention. Finally, ten top tips on how to avoid becoming a victim will be given.

Top 4 attack approaches

The most common methods of attack against accountancy firms' email systems are:

1. Phishing – blanket emails are sent to every address that may have been acquired from social media, the dark web and/or website scraping. They could pose as legitimate suppliers and trick you into giving away your email login credentials. In Mitigo's simulated attacks, 20% of untrained staff typically fall for this type of attack.
2. Malicious attachments – emails with fake attachments will tempt you to open them with headings like “missed message”, “urgent invoice” or “bank statement” for example. These contain malicious code that will attempt to get control of your computer in some way.
3. Account hijack – with credentials purchased from the dark web, automatically breaking weak passwords or tricking you with phishing attacks, the criminals can obtain access to your account. They can then login and impersonate you, with full functionality and access to all of your email history.
4. Spoofing – the criminals create their own email accounts and pretend to be you. They are not inside your account but send emails to employees to try and get access to business systems and data.

Top 3 consequences

If the criminals are successful in the approaches above the most common consequences are:

1. Virus spreading spam email – thousands of emails are sent from the business email address to every contact associated with that business. The aim of the email is to contaminate their systems with a view to stealing money. We probably don't need to describe how damaging this can be for a previously trusted business.
2. Payment diversion – the main object here is to get money diverted to their bank accounts by tricking the business or client into sending money to the wrong payee. There is the obvious financial and reputational damage but the conversation with the ICO will be tricky if a client has lost thousands of pounds because your firm didn't protect their data sufficiently.
3. Ransom – this is the most damaging consequence and can be business ending. The criminals use the access they have gained to steal confidential and personal information (as well as encrypting your systems), then threaten to release this information if you don't pay a ransom fee. The average business downtime from this is around 3-4 weeks.

Top tips to help defend against email attacks

The top 10 areas you must address to defend against the greatest cyber threat facing your business:

1. Appropriate business email account – free and basic email systems are not good enough. An upgrade may be required to get the appropriate level of capability.
2. Employee discipline – work email addresses should be used for work purposes only and this should be made clear to staff. The dark web is littered with business email addresses that have been used on personal accounts such as Amazon and eBay, that have then been lost along with passwords and critical information.
3. Unique, strong passwords and strong authentication – passwords should not be a repeat of anything you have used elsewhere, and it is essential that authentication has another factor e.g. a code on your phone.

4. Inbound filters – these should be expertly set with no reliance on defaults. If done well, it will stop the deceptive emails ever getting into staff inboxes.
5. Domain records – the end of an email address, @acme.com, is called the domain. There are three important records that need to be set in the domain control panel to avoid criminals easily spoofing your address.
6. Staff training and simulation – make sure staff receive annual training and run simulated attacks to make sure they know what to expect.
7. Access methods – a clear policy should be in place on how staff access emails e.g. from a laptop, mobile, via a web browser, etc. The more this is reduced, the more access points can be switched off in the security settings.
8. Payment methods – a robust process should be in place that ensures changes to payee details have strong challenge processes.
9. Antivirus & browser integration – your web browser, email service and antivirus software need to be configured to work in unison to stop attacks. This is the most important retrospective control as it is unwise to rely on staff spotting the criminals' tricks.
10. Alerts and blocks – alerting from security systems should be sent to your technical support, with rules set to block, not allow.

This article serves as a starting point and a roadmap. It is wise to invest some time and resources to getting this right – it will be the best money you spend this year.

ICAS PUBLISHES GUIDE TO SCOTTISH TAXES FOR 2022

ICAS has published a revised Guide to Scottish Taxes. It is based on the legislation in place in March 2022 and includes the five income tax rates and bands that are in place for Scottish taxpayers in 2022/23.

Scotland's taxes are increasingly diverging from the rest of the UK, and there are practical and administrative considerations that taxpayers, tax advisers, and the accounting profession need to be aware of.

The guide discusses:

- the background to Scottish taxes;
- public finances in Scotland;
- which tax authority is responsible for which tax; and
- a brief outline of each Scottish tax.

Income Tax Bands	2022-23 £
Starter rate – 19%	12,571* – 14,732
Scottish basic rate – 20%	14,733 – 25,688
Intermediate rate – 21%	25,689 – 43,662
Higher rate – 41%	43,663 – 150,000**
Top rate – 46%	Over £150,000**

*Where an individual is entitled to the standard UK Personal Allowance.

**As with the rest of the UK, those with earnings exceeding £100,000 will suffer a Personal Allowance reduction of £1 for every £2 earned over £100,000. Therefore, when income reaches £125,140 the personal allowance is fully withdrawn.

If you wish to contribute to the debate…why not contact the ICAS tax team at tax@icas.com.

Or consider helping the tax department in its policy work by joining a tax committee as a volunteer.

HMRC MISS A PENALTY

In the case of Radice (2021) TC08176 the first tier tribunal held that Mr Radice was not careless in relying on his professional advisor. He appealed against a £4,500 penalty in respect of an inaccuracy in his tax return for the year to 5 April 2016. HMRC considered that he had been careless in failing to include certain information in his return and had therefore paid the incorrect amount of tax. The penalty was the minimum due for careless prompted inaccuracy.

Mr Radice's advisors had ticked box 31 in the residency pages of his 2015/16 tax return, stating that he had been resident in the UK for 12 or more of the preceding 14 years.

However, they should have ticked box 30 indicating that he had been resident UK for 17 out of the 20 preceding years. He had in fact been resident for 19 of those years and had not provided the date of his entry into the UK in box 27 of the return.

Based on this incorrect information, his advisors had incorrectly computed the level of the remittance basis charge and he paid only £60,000 rather than £90,000.

Mr Radice accepted that wrong entries had been made in his return and promptly paid the additional £30,000, when HMRC closed their enquiry.

Mr Radice's advisors submitted that:

- He had relied completely on their advice. The inaccuracy related to the newly updated remittance charge which had increased from a flat £30,000. The partner in charge knew that Mr Radice had arrived in the UK more than 20 years prior but this had not been communicated correctly to the firm's staff when the return was being prepared.
- There has been a number of cases where it has been held that a taxpayer may reasonably rely on a professional advisor as regards completion of his tax return. While HMRC said that Mr Radice should have known that he was in the UK for more than 20 years and that this was relevant to his return and liability, this was a minor change in the tax legislation that a taxpayer could not be expected to follow or understand.
- Mr Radice was reasonable to rely on the firm to compute his tax liability. His situation was not straightforward in that he had made a payment to account and a further lower payment to account based on his 2015/16 tax return, and there was also the remittance basis charge to complicate matters.

The tribunal considered the penalty provisions in schedule 24 FA 2007 and noted that:

- A penalty was payable by a person who gives HMRC a tax return containing an inaccuracy which amounts or leads to an understatement of a tax liability, and the inaccuracy was careless.
- An inaccuracy is careless if it is due to a failure of the taxpayer to take reasonable care.
- Where a disclosure has been made to HMRC, they can reduce the percentage penalty, but this could not be reduced below 15% as the disclosure had been prompted.
- HMRC can reduce a penalty where they consider the error is because of special circumstances.
- HMRC may suspend all or part of a careless inaccuracy penalty but did not consider it appropriate in the case of Mr Radice.

In their decision, the tribunal said that whether there is a failure to take reasonable care falls to be judged by reference to a prudent and reasonable taxpayer. The question, therefore, is what action a prudent and reasonable taxpayer, in the appellant's circumstances, would have taken as regards the inclusion of the omitted information. It is an essential part of self assessment that there is an obligation on a taxpayer himself to correctly include all taxable income in a tax return and account for the tax due on it.

In the tribunal's view, the hypothetical reasonable and prudent taxpayer can be attributed with an awareness of his obligations and with the need to be mindful to take reasonable steps to fulfil that obligation. He would therefore take all reasonable steps to ensure that he is aware of all amounts which may need to be included in the return.

In general terms, where a taxpayer engages an advisor to submit a return on their behalf, as the taxpayer is the person responsible for the self assessment tax return, the tribunal would nevertheless expect the taxpayer acting reasonably and prudently, to take reasonable steps to provide accurate information to the adviser and to review and take some part in checking the information included in the return. What is reasonable to expect from the taxpayer will depend on all of the circumstances of each case.

In a situation such as that of Mr Radice, the tribunal said that a reasonable and prudent taxpayer would obtain advice on the basis for and computation of charges to tax under the complex remittance basis rules and accordingly, it is reasonable for the taxpayer to rely on that advice. The tribunal did not consider that Mr Radice was careless in failing to spot that an error had been made in his return in view of the difficulties for taxpayers in understanding and keeping up to date with such rules.

From the correspondence, the tribunal found it plain that Mr Radice had reviewed his return and that he would have seen the statement in box 31 that he had been resident for 12 out of the last 14 tax years which, on its own terms, was correct. They did not consider that he could reasonably have been expected to realise that other boxes in that section of his return needed to be filled in, or the significance of the information required in the other boxes when his advisors, in whom he had reasonably relied, had selected box 31, and he knew that the information in it was correct.

Mr Radice's appeal was therefore allowed.

ICAS, and other professional bodies, have campaigned for years for the lengthy and overly complex UK tax system to be simplified and not further complicated. It is therefore hardly surprising that individuals such as Mr Radice come a cropper, not through carelessness but due to the severe complexities of the tax system with which they have to try to cope.

HMRC, TAX & COMPANIES HOUSE UPDATES

HMRC update on Corporation Tax repayments

From 5 September 2022, following a successful trial, HMRC will aim to respond to all progress chasing calls for Corporation Tax repayments within one working day, where the customer has waited more than 8 weeks since submitting their claim. Corporation Tax advisers will escalate these cases to a technical adviser in real time. Where a technical adviser is not available to respond in real time, the customer will be added to a list to be worked on by a technical adviser within one working day.

This will particularly benefit customers with complex cases and those who are in receipt of a high value repayment, and will significantly reduce the number of times a customer will have to contact HMRC to progress their Corporation Tax repayment claim.

New VAT registration service

ICAS are aware that some agents are having difficulty accessing the online VAT Registration service as an agent and are being asked for personal details.

As a reminder, agents should not be asked for personal details. The following link should be used to access the VAT Registration Service using your agent services account credentials.

The problem occurs when the registration is attempted from the older AOS portal.

HMRC have advised that it is currently taking 8 weeks to process new VAT registrations.

GOV.UK ID check – new way to prove identity

From this month, HMRC will be offering some users an alternative way to prove their identity to access HMRC's online services.

Those using an iPhone may be offered the choice to use GOV.UK ID check when setting up their HMRC login through Government Gateway. This allows you to use the camera on your phone to confirm a match with their driving licence.

Government Digital Service (GDS) has developed the app and HMRC is the first department to adopt it.

HMRC update their guidance on MTD ITSA

HMRC has updated guidance on how Making Tax Digital (MTD) for Income Tax Self-Assessment regime (ITSA) will work for buy-to-let landlords and sole traders with qualifying income over £10,000 which will see the end of self assessment tax returns.

The new income tax framework will be mandatory from 6 April 2024.

The new guidance clarifies who needs to sign up for MTD and when. However, much of the detail on how the process will work in practice for different types of taxpayer is still outstanding.

The four pieces of updated guidance are as follows:

- Check if you can sign up for Making Tax Digital for Income Tax
- Check when to sign up for Making Tax Digital for Income Tax
- Sign up as an individual for Making Tax Digital for Income Tax
- Using Making Tax Digital for Income Tax

New tax residence indicator tool

HMRC have launched a new tool to help customers determine their tax residence status. The link is available on GOV.UK at tax on foreign income: UK residence and tax.

The tool applies the rules as set out in the Statutory Residence Test (SRT) to help determine an individual's residence status for tax purposes.

Further guidance on the SRT is available here.

HMRC advisory fuel rates for company car users

HMRC has published the latest advisory fuel rates (AFR) for company car users, effective from 1 September 2022.

HMRC reviews rates quarterly on 1 March, 1 June, 1 September and 1 December.

AIA and loan to participators

The Corporation Tax online service has now been updated (16 September 2022) to accept returns featuring Annual Investment Allowance claims over £200,000. This also applied to loans to participators claims under Section 455, with the new rate of tax of 33.75%.

PAYE for agents online service

All agents who are enrolled can now opt in to see liability and payment data.

The PAYE for agents online service means agents can view their client's liability and payment data held by HMRC.

Companies House introduce new WebFiling account

The new WebFiling account will be introduced on 12 September and is the first step in creating a single sign-in across all Companies House services.

Key features include:

- multi-factor authentication;
- the ability to link a company to the WebFiling account to give more control over filings;
- the ability to digitally authorise people to file on a company's behalf on WebFilings;
- see who's digitally authorised to file for the company;
- option to sign up to emails.

Those that file on behalf of one or more company will be able to manage them from one account.

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