

DERBYSHIRE COUNTY COUNCIL
CABINET MEMBER MEETING FOR COUNCIL SERVICES

11 July 2016

Report of the Strategic Director of Corporate Resources
CHILDCARE VOUCHERS

1 Purpose of the Report

To seek approval to continue to provide childcare vouchers when an employee is in receipt of Statutory Maternity Pay (SMP), or no pay following the expiration of their Occupational Maternity Pay (OMP), subject to review in 12 months.

2. Information and Analysis

The provision of childcare vouchers under the Council's salary sacrifice scheme enables more women with young children to remain in, or return to, the workplace. Guidance from HMRC was that childcare vouchers provided under a salary sacrifice scheme could not be deducted from Statutory Maternity Pay. The Council was under obligation to continue to provide and pay for the vouchers when an employee is on maternity leave and is no longer in receipt of Occupational Maternity Pay and receives SMP only.

An employee can choose to have a maximum of £243 in childcare vouchers. Their entitlement to this amount is dependent upon the earnings disclosed as part of the registration process with Busy Bees, the childcare voucher provider for the Council. Busy Bees undertake the assessment to determine the value of childcare vouchers the employee is entitled to. If the employee continued to receive childcare vouchers during a subsequent period of maternity leave they were entitled to receive the childcare vouchers with no deductions made from their statutory pay. The Council currently pay childcare vouchers on behalf of the employee between weeks 18 and 52 (or earlier if they return to work) of their maternity leave.

However, the Employment Appeal Tribunal (EAT) in *Peninsula Business Services Ltd v Donaldson* EAT/0249/15 held that it was not discriminatory for an employer that offers childcare vouchers in return for a deduction from pay to cease to offer the vouchers during maternity leave.

The EAT concluded that as the vouchers are provided in return for a deduction from pay the childcare vouchers are not a "benefit" for the purposes of maternity leave legislation and can be stopped during maternity leave.

Effectively the EAT accepted that childcare vouchers deducted from pay should be regarded as part of remuneration and do not have to be offered during maternity leave. The EAT said that it does not matter for these purposes what label has been given to childcare vouchers in tax legislation. It makes no difference that childcare vouchers are described as a "non-cash benefit" in the Income Tax (Earnings and Pension) Act 2003, which is the legislation that enables tax savings when purchasing childcare vouchers.

The 5 counties HR group was approached to determine what action they have taken and the response is as follows;

Nottinghamshire and Cambridge (part of Northants Shared HR service) have no immediate plans to change their current process and will continue to pay for vouchers when OMP has ceased.

Northants continue to pay the vouchers when the employee is on SMP only or no pay. When the employee returns to work, the total amount of vouchers paid by Northants is recovered.

It is proposed that the Council maintain their current practice of meeting the cost of the vouchers, when an employee on Maternity leave is in a period of no occupational pay, as detailed in the report above. The current practice is considered to be an important employee benefit at a time of significant financial strain for employees and their families.

It is recommended that this practice also extends to employees who curtail their maternity leave and opt into Shared Parental Leave (SPL) with their partner. The benefit is then also available to men and women.

It is proposed that Derbyshire County Council review the position in 12 months.

3. Financial Considerations

During the period, 1st April 2015 to 31 March 2016, 31 Council employees received childcare vouchers that were paid for by the Council at some point during week 18 and week 52 of their maternity leave. In paying the childcare vouchers between week 18 and week 52 the Council incurred a cost of £21,997. This amount will vary depending on the number of employees on maternity leave in receipt of childcare vouchers and therefore, it may be necessary to review this annually.

Whilst the Council have not had any cases of an employee on SPL in receipt of childcare vouchers it is worth noting that extending this benefit to SPL could potentially increase costs to the Council as:

- SPL is paid at statutory pay only and therefore the benefit can be accessed earlier (from week 2 to week 52)
- SPL is available to men and women

4. Other Considerations

In preparing this report the relevance of the following factors has been considered: social value, prevention of crime & disorder, equality of opportunity, human resources, human rights, environmental, health, property and transport considerations.

5. Legal Considerations

During ordinary and additional maternity leave, the employee is entitled to the benefit of all the terms and conditions of their employment that would have applied had they not been absent, except remuneration (sections 71 and 73 Employment Rights Act 1996 (ERA 1996) and regulation 9 Maternity and Parental Leave etc. Regulations 1999 (MPL 1999)).

For employees on maternity leave remuneration is replaced by OMP and SMP where they meet the qualifying criteria. Remuneration is defined under regulation 9(3) MPL 1999 as “sums payable to the employee by way of wages or salary”. It was not clear from the legislation how childcare vouchers should be treated, that is whether they should be treated as “remuneration” or as a non-cash benefit which is preserved during maternity leave.

HMRC had issued guidance to the effect that childcare vouchers were non-cash benefits rather than “remuneration”, even if they had been provided by way of salary sacrifice and therefore should be maintained during maternity leave. However, as detailed in this report the EAT held in *Peninsula Business Services Ltd v Donaldson* that childcare vouchers provided under a salary sacrifice scheme are part of the employee’s “remuneration” and therefore do not have to be provided during maternity leave. Accordingly, it was not an unlawful detriment, nor discriminatory, for the employer to cease to provide them during a period of maternity leave, as the obligation to maintain terms and conditions during maternity leave does not extend to remuneration.

In making its decision the EAT remained cautious that it may not have identified all the relevant legal provisions and stated that it expressed its conclusions “somewhat tentatively”. The Council may wish to see how further case law develops, before deciding to change their practices in relation to childcare vouchers and the terms and conditions on which they are offered.

6. Key Decision?

No.

7. Call-in Is it necessary to waive the call-in period in respect of the decisions being proposed within this report?

No.

8. Background Papers

None.

9. Officers' Recommendation

That approval be given:

- To continue to provide childcare vouchers once the employee's Occupational Maternity Pay (OMP) had ceased during weeks 18 and 52 of the employee's maternity leave.
- To extend the benefit to men and women who have opted into a period of Shared Parental leave.
- To review the position in 12 months.

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