



Legal update — February 2019

## Employment and Tax

# Housing association Board Members: an update on payment, taxation and employment rights



**Whether to pay board members, what to pay them, and how to pay them have long been vexed questions. We've noticed an increase in the number of requests for advice on the status of board members, and on disputes with board members.**

### The taxation of payments to board members

Once a decision has been made to pay, it is then important to note that all board remuneration is generally taxable as employment income and liable to employee's and employer's NIC. A board member (including a director and a non-exec director) is an office holder for employment tax purposes and so is effectively taxed as an employee in respect of the duties he or she performs as a board member. If an organisation (as the employer for tax purposes) does not operate PAYE income tax and NICs on board remuneration, it will nonetheless remain liable to account to HMRC for such tax, together with interest and penalties for non-compliance.

Some board members operate via their service companies and often request their board remuneration payments be made to their company. There are a number of reasons why such members operate via personal service companies and tax efficiency forms part of the reasoning. Rather than making a payment to an individual, the organisation may pay a fee directly to the service company for the services provided, with the payment made gross on the basis that the service company is not itself an employee (and legally cannot be an employee).

However, it is very likely that a board member being paid through a service company will be subject to the same tax liability as one who is not, thus defeating the object of being paid in this way but also increasing the tax non-compliance risks for the employer organisation. First there's the issue of the need for a personal contract as a board member to consider, and in addition there's the Supreme Court's decision last year in *Pimlico Plumbers Ltd and Mullins v Smith* to take into account.

### Personal contracts

The NHF Code of Governance states that it is good practice for a board member to have a personal contract and that this contract should set out the requirements of the role.

Meanwhile, the UK Corporate Governance Code (which took effect on 1 January 2019) states that the responsibilities of the board should be clear, set out in writing and made publicly available. Remuneration is linked explicitly to the time commitment and responsibilities of the role. The Corporate Code is supplemented by the FRC Guidance on Board effectiveness which makes explicit reference to letters of appointment for non-executive directors and states that these letters should set out the expected time commitment.

It seems from all this guidance that board members are generally expected to have personal contracts clearly setting out their responsibilities. In other words, they will be expected to provide personal service. This means that any service company set up by the board member will not just be providing services in the way that any consultancy would, but the services of a specific individual, namely the board member.

The need for board members to have personal contracts means that it will be difficult for them to avoid the payment of tax (and even more so for the employer organisation to avoid having to deduct PAYE income tax and NICs at source), and this is reinforced by the Supreme Court's decision in *Pimlico Plumbers*. Even if there is no personal contract and factually the individual is and acts as a board member with the remuneration for that role paid direct to his or her service company, then in HMRC's eyes the employer organisation will generally be required to deduct and account for the employment taxes. Either way, the tax risks rest with the organisation.

### What are the implications of the obligation to provide personal service?

If Board Members have to provide personal service then it will be difficult to argue that any payment that they receive can be paid without the deduction of tax. This is

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particularly so in the light of the Supreme Court's decision in *Pimlico Plumbers*.

In *Pimlico Plumbers* the Court held that Mr Smith, a purportedly self-employed plumber, was in fact a "worker" with limited employment rights. This was because he worked under a contract whereby he undertook to do or perform personally work or services for *Pimlico Plumbers*. The Supreme Court upheld the tribunal's initial decision that the dominant feature of Mr Smith's contract was an obligation of personal performance. It found that the terms of the contract were clearly directed at performance by Mr Smith personally and, although there was a limited right to substitute (ie sub contract someone to do his job), the Court found it to be so insignificant as not to be worthy of recognition in the written terms.

The dominant purpose of a board member's agreement will be an obligation of personal performance, particularly if roles, duties, time commitments and remuneration are mentioned.

If a particular board member was to also provide separate consultancy services to the organisation (ie over and above their duties as a board member), then there is scope for these services to be provided via the board member's service company and without deduction of employment taxes at source. In such a case, HMRC would expect to see: (i) an arm's length consultancy agreement between the service company and the organisation for such consultancy services and with appropriate payment made gross (as legitimately not being employment remuneration for board member services); and (ii) a separate board member contract governing the board member duties with payment therefor subject to employment taxes deducted at source.

### **Review your payment mechanisms**

It is worth explaining to those board members who are currently paid via their service companies, or who want to set up this arrangement, that there is unlikely to be any tax advantage. Housing associations should consider how they should be paying their board members and what obligations they owe to HMRC.

One issue you should also review is the taxation of expenses for board members. As more board members carry out board work from home, and even attend board members remotely, the location where board members carry out work becomes more flexible; this gives rise to queries about the payment of travel and related expenses and ensuring tax compliance for the organisation.

### **Do board members have employment rights?**

This will all depend on whether the board members are paid or not. If board members are paid they will be

protected from discrimination under the Equality Act 2010 and from detriment for whistleblowing. They will also be entitled to be paid the National Living Wage (NLW). The time taken into account for the purposes of calculating whether an individual receives the NLW includes the time they spend working and travelling to and from work, and the time spent training and travelling to and from training, as well as the time spent at work and training. Paid board members will also be entitled to paid annual leave under the Working Time Regulations.

Currently, unpaid board members do not enjoy any employment rights although there is a suggestion that volunteers should have some employment rights in future.

### **Practical tips**

#### **Review your board members' contracts regularly – are they up to date?**

It's essential to keep on top of your board member contracts to ensure that they are legal and work in the way you want them to. Over time, requirements (and legal obligations) may change so it's important to incorporate a regular review of your contracts.

#### **Review how you pay tax on payments to board members**

It's unlikely that setting up a service company will confer any tax advantage on board members. If board members do wish to be paid via service companies you will have to be aware that tax is likely to be deductible from any gross payments made. However, there remains limited scope for any additional and separate consultancy services to be sourced via service companies, but care will be required contractually and in practice to ensure a strict separation of the board member role and the consultancy service, the respective payments and deduction of tax.

#### **Review that you are paying for expenses appropriately**

Review your expenses payments and ensure that you are applying the correct tax treatment. Are the expenses you reimburse still relevant to the duties that the board member is carrying out?

#### **Do your contracts limit the risk of employment claims?**

You will want to avoid any suggestion that your board members have employee status with all of its attendant rights. Make sure that the contract stipulates clearly that no employment relationship exists and ensure that this is carried through in practice.

**Just because board members are unpaid don't assume they're risk free!**

Even if you do not pay board members there is still a risk that, in future, individuals may have some employment rights. The government has announced that it will be issuing a consultation on whether to give volunteers and interns additional protections against harassment. While it remains to be seen whether this will be the case, it's an area to keep an eye on.

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