EIS Briefing: Classification of Backpay – December 2024

Background

Following sustained industrial action, in March 2023, Scottish teachers received m multiyear pay award comprising of the following:

- 1/4/2022 7% increase on all SNCT pay points with a pay cap at starting salaries of £80K above which a £5,600 uplift will apply

- 1/4/2023 A further 5% increase on all SNCT pay points with a pay cap at starting salaries of £80K above which a £4,000 uplift will apply

- 1/1/2024 A further 2% increase on all SNCT pay points with a pay cap at starting salaries of £80K above which a £1,600 uplift will apply

Originally, 17 of the 32 Scottish Local Authorities failed to pay back pay in the tax year 2022/23, with the payments being made instead in the following tax year. Thousands of EIS members have suffered disadvantage as a result of this because the back pay paid in 2023/24 fell to be taxed at the Scottish Higher Rate of 42%, whereas, if it was taxed in 2022/23 – the year in which it was earned and became contractually due – it would have been predominantly taxed at the Scottish Basic Rate of 21%.

Calculations made by the EIS suggest that a teacher with a standard tax code at the top of the main grade salary scale has now paid tax of £382 more than they should have been due under applicable tax legislation. When this calculation is taken altogether, the amount of money owed to Scottish teachers will extend to millions of pounds.

For over a year, the EIS has repeatedly taken action in attempt to push HMRC and for the affected Local Authorities to do the right thing by our members, however, these efforts have been unsuccessful. This briefing document outlines the extensive efforts of the EIS and details the unacceptable positions taken by HMRC, 16 Local Authorities and COSLA in response.

Actions taken in attempt to resolve this issue

May 2023

Having taken independent professional advice, the EIS first wrote to HMRC in May 2023 advising that there were between 15,000 and 20,000 Scottish teachers who would require to make individual claims for refunds, which they would be eligible to do once they were in possession of a P60 for the 2023/24 tax year.

At the same time, the EIS wrote to the affected 17 Local Authority employers, enclosing a copy of our letter to HMRC and asking that they share this with their relationship manager at HMRC.

August 2023

We were contacted by HMRC in late August 2023. At this point, HRMC did not disagree with the advice which the EIS had received from our independent advisors.

In March 2024, with the issue of P60s for the 2023/24 tax year imminent, the EIS made contact with HMRC once again, requesting guidance as to how our members should go about submitting individual claims to have their back pay reclassified from 2023/24 into 2022/23 in order to obtain the tax refund that they were due.

April 2024

On 30th April 2024, HMRC advised the EIS that they had written to the affected Local Authority employers stating:

"The right action is set out in the CWG2 Further Guide to PAYE and NICS at section 1.19.2. <u>2023 to 2024: Employer further guide to PAYE and National Insurance contributions - GOV.UK (www.gov.uk)</u> Councils should re-open the payroll for the year of the arrears and tax it in that year, filing an updated FPS as well. For National Insurance purposes add to current payroll."

May 2024

On the basis of this information from HMRC, in May 2024, the EIS wrote to the affected Local Authority employers and to COSLA, as the umbrella body for Scottish Local Authorities, quoting the correspondence which HMRC had issued and asking for confirmation that the advice had been received. The EIS also requested a timescale for when the recommended retrospective adjustments would be actioned.

In response, the EIS received a number of very similar communications from individual local authorities, containing an argument based on an erroneous extract from the HMRC Employment Income Manual. An example of this can be found below:

"When making payment of the back pay the Council applied the tax bands in operation in the 2023 tax year. The basis for this is the "receipts" principle in the Income Tax (Earnings and Pensions) Act 2003 which states:

EIM42279 – Employment income: basis of assessment for general earnings: the time when earnings are received: actual payment

Rule 1, Sections 18(1) and 686(1) ITEPA 2003

Earnings are treated as received when they are actually paid or when a payment on account of earnings is made. For payments on account see EIM42280.
Actual payment happens when the income comes into the control of the employee so that they are able to deal with it for their own use and benefit.

We will not be making any adjustments to the information submitted to the HMRC."

On 30 May, the EIS again wrote the COSLA setting out the reasons why the arguments presented by Local Authority employers were incorrect, copying this correspondence to all Local Authority employers who had used these as a basis for their responses. In this letter, the EIS pointed out that:

"If you refer to the previous section of the Employment Income Manual (EIM42260) you will see the following:

"Money earnings are treated as received for assessment purposes, and paid for PAYE purposes, on the earliest of the following:

- *when a payment of earnings is actually made or when a payment on account of earnings is made (see EIM42270)*
- *the time when a person becomes entitled to payment of earnings or a payment on account of earnings (see EIM42290)"*

On that basis, EIM42270 only becomes relevant where the point of payment is earlier than the point of entitlement. In other circumstances, reference should be made to EIM42290."

On 31 May, an email response was received from COSLA, which suggested that the common wording within responses from Local Authorities had originated from an informal meeting of some of the affected Local Authorities. However, this message stated also that the principal driver for resistance to applying the advice received from HMRC was to do with administrative capacity rather than technical tax compliance.

June 2024

During June 2024, many of the EIS Local Associations in the affected Local Authorities raised this matter with their employers. In these instances, whilst no Local Authority refuted the technical arguments which the EIS had put forward, they stated that had been advised that having submitted year end returns on the basis of the tax deducted from pay each year, they had fulfilled their statutory responsibilities, and whilst they acknowledged the requests made by HMRC to process retrospective adjustments, the EIS were continually advised that they would not be doing so as they did not have the technical and /or administrative capacity.

Of the then 17 affected Local Authorities, the only exception was City of Edinburgh Council, who, on 15 May 2024, advised that they were working to make the necessary payroll adjustments in June 2024 so that members in Edinburgh would have their tax corrected.

In the meantime, a number of EIS members did submit individual requests to HMRC to have their back pay reallocated from 2023/24 to 2022/23. Those who did received a variety of responses that were subsequently shared with the EIS:
- Some had their request processed and received a repayment;
- Some were asked for additional, personalised supporting documentation from their employer; and

- Others were told that it was the responsibility of their employer to make such adjustments and that HMRC could not process their request.

September 2024

In September 2024, the EIS formally engaged external advisors to communicate with HMRC on our behalf. They advised that an HMRC officer had stated that the guidance which allowed for applications from individual taxpayers to be addressed by HMRC, should only apply where the employer has made a 'mistake'.

At this point, the EIS understands that all applicable staff at HMRC had been advised that no further refunds should be processed relating to the back pay issue. Our advisors believe this position to be wrong, but having asked for it to be reviewed, have received no further response from HMRC.

EIS members are therefore caught in limbo between HMRC, who seem keen to avoid having to process thousands of individual claims for tax refunds and local Authority employers, who are (with the exception of City of Edinburgh) refusing to comply with the recommendation made by HMRC.