Appeal No. UKEAT/0250/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 November 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

COMMISSIONERS FOR REVENUE AND CUSTOMS — APPELLANT

LORNE STEWART PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES TUNLEY (of Counsel) Instructed by: HM Revenue & Customs Solicitor's Office 3rd Floor South West Wing Bush House Strand London WC2B 4RD
For the Respondent	MR KEN HERSEY (Consultant) Lorne Stewart Plc Stewart House 420 Kenton Road Harrow Middlesex HA3 9TU

SUMMARY

NATIONAL MINIMUM WAGE

Lorne Stewart paid for employees to attend courses on condition they signed an agreement to repay all or part of the cost of the course if they left within two years and providing for the money to be deducted from their final salary payment. The deduction of that money led to the final salary payments of a number of employees who had resigned within the two years being *prima facie* below the minimum wage. HMRC issued a Notice of Underpayment, which Lorne Stewart appealed. The issue was whether the money deducted came within regulation 33(a) of the **National Minimum Wage Regulations 1999** and in particular whether the liability to repay was "in respect of conduct of the worker, or any other event, in respect of which he is contractually liable".

It was held that for an event to come within the words "any other event" it had to have some relationship to conduct by the worker in the sense that the worker should in some way be responsible for the event in question.

In this case the employee had voluntarily resigned before the expiry of the two years; this was "any other event" in that sense and Lorne Stewart were therefore entitled to deduct the repayment for the purposes of the national minimum wage.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Her Majesty's Revenue and Customs against a Decision of Employment Judge Heal, sent out to the parties on 4 April 2014.

The Facts

2. Lorne Stewart plc paid for certain employees to undergo training courses. Before being provided with a training course, employees were asked to sign a standard form agreement. The particular one I am concerned with relates to a lady called Louise Brade which is to be found in my bundle at page 53. The agreement says this:

> **"The Company has approved your request to attend the course set out below. Approval is given on the condition that you agree to make a repayment of any costs in the event that you leave the Company before attending the course, or a part repayment if leaving within two years of its end date."**

The course that Miss Brade was to attend was a foundation degree in Leadership Management, commencing in March 2009. The total cost of the course was £1,800. The agreement contains a reimbursement schedule, which has two columns, "leaving date" and "reimbursement", and provides for a sliding scale of costs to be reimbursed. If you leave before the course starts, you have to pay back 100% of the costs incurred. If you leave within six months of the course end date, it is 90%, and so on down. If you leave at the end of the two-year period it's 25% and once two years have gone by you do not have to pay anything back at all.

3. There is then a declaration in the agreement which says, "I have read, understood and accept the conditions set out in this Agreement." And then the words:

> **"I authorise the Company to make any deductions from my pay or from any final monies due in the event of termination of employment, in respect of the relevant amount as set out above. If any balance remains outstanding after such deduction(s), I undertake to reimburse the Company accordingly."**

It is then signed by Ms Brade and by Mr Hersey on behalf of Lorne Stewart plc. Mr Hersey was then the HR Director and has appeared today as a consultant on behalf of Lorne Stewart.

4. Miss Brade resigned before the two years had expired and therefore, in accordance with the agreement, Lorne Stewart were entitled to make a deduction from her final salary payment. The deduction made meant that her final salary payment was *prima facie* at a rate below that required by the **National Minimum Wages Act 1998** and the Regulations made thereunder. HMRC therefore issued a Notice of Underpayment and Lorne Stewart appealed against that to the Employment Tribunal.

5. Under regulation 32 of the **National Minimum Wage Regulations 1999** certain deductions from remuneration during a pay reference have to be subtracted in calculating the wages for the purpose of the National Minimum Wages legislation including, by regulation 32(1)(b), any deduction made by the employer for his own use and benefit except one specified in regulation 33. Clearly this deduction would come within regulation 32(1)(b) unless it is specified in regulation 33. Regulation 33 says this:

> **"The deductions excepted from the operation of regulation 32(1)(b) are–**
>
> **(a) any deduction in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable."**

6. That is the relevant exception for the purposes of this appeal. The issue was, and remains, whether the deduction from Miss Brade's salary for the final period for which she was employed came within regulation 33(a) and therefore was not relevant for the purposes of calculating her remuneration for the purposes of the National Minimum Wage. The Employment Tribunal found that regulation 33(a) did apply and therefore allowed Lorne

Stewart's appeal against HMRC's Notice of Underpayment. HMRC have appealed to this Tribunal.

The Law

7. The question for me is one of pure construction of regulation 33(a). It is agreed that, in construing the regulations, a purposive approach should be adopted. The purpose of the regulations was considered by Elias J in a case called **Revenue and Customs Commissioners v Leisure Employment Services Ltd** [2006] ICR 1094 at paragraph 31 where he said:

> **"I take the purpose here to be specifically the elimination of payment by benefits in kind and a desire to ensure that workers should receive cash in hand or at least the national minimum wage, save where carefully … circumscribed exceptions apply. …"**

That case went to the Court of Appeal, who made some remarks relevant to purpose in the decision of Buxton LJ at paragraph 14 where he talks about the possibilities of abuse and says:

> **"… as the President of the Employment Appeal Tribunal Elias J will have had well in mind, workers who have to seek the protection of the minimum wage provisions are likely to be in the less advantaged areas of the workforce, possibly with little job security, and unlikely to have strong trade union representation. Broad but simple rules, not leading to elaborate arguments of law when those rules have to be enforced, are likely to be the protection for them that the legislator has thought necessary."**

8. In **Leisure Employment Services** the employers were seeking to deduct £6 per fortnight for gas and electricity in accommodation which they were supplying to the employees concerned. That was a fortnightly deduction. Although contractually provided for, it took the wages below the *prima facie* national minimum wage. It can be seen that that is a rather different case to this one. Nevertheless there are remarks in the Judgment of Elias J that are relevant for this appeal and which both parties have referred me to. In paragraph 46 Elias J records Mr Bowers' submission that the contractual obligation to make payments in respect of utilities by the company is an event within the meaning of regulation 33(a). Elias J went on at paragraph 47 as follows:

> **"Mr Clarke [he was acting for HMRC] disagrees and submits that, read in context, "any other event" as defined in those regulations must mean some specific event akin to the concept of conduct which is specifically identified in those provisions. He suggests, for example, that it could involve negligence or bad workmanship. It could not sensibly cover a continuing obligation to pay in relation to the regular supply of gas and electricity. Furthermore, he contends that if Mr Bowers were right then, in effect, any contractual liability could be said to fall within the concept of "other event". If that were so, it would be otiose to have certain of the exceptions which are found in the Regulations …"**

Then at paragraph 48 Elias J says this:

> **"I agree with that submission. In my judgment, the concept of "event" is to be much more narrowly construed than Mr Bowers contends. I do not think that it can extend to a contractual obligation of this nature; neither the natural meaning of the word nor the context justifies such a reading."**

9. It will be seen that there were, in effect, two possible reasons for accepting Mr Clarke's submissions: first, that a contractual liability to pay for utilities which he had continuously used could not be properly described as an "event", and second, because, even if it was an event, it was not in any way akin to the concept of conduct.

Submissions

10. Mr Hersey for Lorne Stewart accepts that both of those reasons should be applied to a proper interpretation of the regulations: in other words that "any other event" must be akin to the concept of conduct as well as requiring a single "event". He says that a voluntary resignation as here, as opposed to a dismissal for redundancy, for example, would come within that concept.

11. Mr Tunley for HMRC says that regulation 33(a), being an exception to the minimum wage legislation and open to abuse, should be construed narrowly. Examples of abuse would be this very case if Miss Brade had, through no fault of her own, been dismissed for redundancy or a case which he posits at paragraph 42 of his Skeleton Argument:

> **"… where the employer and workers agree that in the event that a worker requests a referral to occupational health, the worker will be responsible for all or a share of the cost. By the**

Tribunal's definition that is conduct on the part of a worker or any other event and would entitle the employer to pay less than the NMW. Parliament could not have intended this."

He says that, construing the provision narrowly, "conduct" must mean *misconduct* and that "any other event" must be akin to misconduct. Examples would be cases of bad workmanship, negligence and damage to property under a worker's control.

Conclusion

12. I agree with Mr Tunley that the word "conduct", as used in the regulation, is in any case one can imagine very likely to amount to *misconduct* because otherwise that conduct would be unlikely to give rise to a contractual liability on the part of the worker. But when it comes to "any other event", I cannot accept that the event must be akin to *misconduct*. It seems to me that the proper way to interpret regulation 33(a) and the controlling mechanism on abuse is that "any other event" should indeed, as Mr Hersey submits, be interpreted as having some relationship to conduct for which the worker is responsible, but not necessarily to something which amounts to *misconduct* by the worker. Thus a voluntary resignation or damage to property for which the worker is responsible would come within the concept of "any other event" but not a dismissal forced on a worker for redundancy or a request of a referral to Occupational Health, which would presumably have been brought on by ill-health for which the worker could not be said to be responsible.

13. That, it seems to me, having regard to the purpose of the regulations, is the proper interpretation of the words "any other event" in regulation 33(a). In this case, it is common ground that Ms Brade (and a number of other workers who I have not mentioned who were also the subject of the notice) resigned voluntarily and thus, on my interpretation, Lorne Stewart

were entitled to deduct the money due back in respect of their courses without infringing the minimum wage legislation. I therefore reject the appeal.

14. I finally note that, on my interpretation of regulation 33(a), the same result would not always apply in the case of a deduction made under Lorne Stewart's standard form. If under the agreement a deduction was to be made because of a dismissal for redundancy, the national minimum wage legislation would still require that the minimum wage was paid in the final pay reference period. Only because it is a voluntary resignation in this case does regulation 33(a) entitle that deduction to be made.