THE EMPLOYMENT TRIBUNALS

Appellant: **Middlesbrough Football & Athletic Company (1986) Limited**

Respondent: **Commissioners for HM Revenue & Customs**

Heard at: **Teesside Hearing Centre** **On:** **4th & 5th February 2019**

Before: **Employment Judge A E Pitt**

Representation:

Claimant: **Mr R Bloom Solicitor**
Respondent: **Mr G Rowell Counsel**

JUDGMENT

It is the Judgment of the Tribunal that:

1. For the avoidance of doubt the appellant's appeal against the notice of underpayment dated 30th April 2018 insofar as it relates to the employee DC is dismissed upon withdrawal.

2. The notices of 30th April 2018 and 29th January 2019 are consolidated in this appeal.

3. All the above notices (save as relating to the said employee DC) shall be rescinded.

4. There shall be no order as to costs

REASONS

1. This is an appeal, pursuant to section 19C National Minimum Wage Act 1998 ('the 1998 Act') by the appellant, against notices issued by the respondent under section 19 of the 1998 Act.

2. The notices were issued on 30 April 2018 in relation to eight employees and former employees of the appellant. Each of the notices relates to a different reference period and includes a schedule of underpayments for each of the

employees. Those original notices have been replaced by notices dated 29th of January 2019, which relate to 7 employees or former employees of the appellant. The reason for the withdrawal of the original notices and replacement notices being issued is that it is now agreed by the appellant in relation to one former employee that deductions were made which should not have been made.

3. I read witness statements and heard evidence from Zakir Hussain who is employed by respondent as a National Minimum Wage Compliance Officer and who issued the notices. On behalf of the appellant, I heard from David Joyes the Chief Financial Officer of the appellant and John Harding a partner in Price Waterhouse Coopers LLP ("PWC") who were engaged by the appellant to advise in relation to the investigation by the respondent. I was given a bundle numbering some 500 pages many of which I have not referred to. I have specifically looked at the appeal application and the grounds for appeal at pages 8 and 9 and documentation signed by the employees in relation to the deductions from their wages (pages 500 -523.)

Findings of Facts including Agreed Facts

4. The parties produced a brief set of agreed facts which are embodied into the following findings of fact which I reach on the balance of probabilities, having considered the oral and documentary evidence placed before me.

5. The respondent commenced an investigation into the appellant business on 20 July 2016. There were concerns in relation to two particular deductions namely administrative charges levied by the appellant in relation to attachment of earnings orders and deductions made from wages to pay for season tickets (known as a 'season card'). The appellant appointed PWC as advisers who undertook a self review. During the next two years correspondence was exchanged between the parties in relation to underpayments and the parties also met to discuss the underpayments.

6. The employees whose wages were under investigation were employed either in clerical or hospitality roles within the appellant and their gross wages were paid in accordance with and in some cases above the rate then in force for the National Minimum Wage ('NMW'). None of the employees were contractually obliged to buy season cards in order to continue their employment. The season cards were bought by the employees on behalf of family members. Following the deductions, the employees' wages fell below the rate then in force for the NMW. It is agreed that the appellant did not offer any scheme for employees to purchase season cards by instalments. In all cases covered by the notices of underpayment, the appellant was responding to a direct request from the low paid employee. The employees requested the cost of a season card be spread over a number of weeks and the cost deducted from their wages; this was agreed between the appellant and the employees in writing in documents headed 'Memos'. These memos

show that each employee agreed in writing to the deduction and that the amount of the deductions differed, as requested by the employee and the full amount of the cost of the season card was paid over a number of weeks or months. Some employees paid for the season card in full before the start of the season whilst others paid for it over 39 or 40 weeks taking them well into the season itself. In effect they received the benefit of the season card before having paid for it.

7. Following this investigation, the appellant no longer accedes to any request from the employees to pay for season cards by instalments. The named employees continue to purchase season cards without the ability to pay by instalments.

8. The deductions were made from net pay so there was no savings in national insurance by either the appellant or the employees.

9. Mr Joyes told me that the sums, having been deducted, were paid into the appellant's general account and were available for the appellant to use to discharge debts as it saw fit.

The Law

10. The notices were issued pursuant to Section 19 of the 1998 Act. The Act also requires the employer to pay a financial penalty as specified within the notice. The determination of whether or not a deduction is permitted is to be found within regulation 12 National Minimum Wage Regulations 2015 ('the 2015 Regulations') the relevant parts of which read:

"(1) deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions save as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation.

(2) the following deductions and payments are not treated as reductions-
a) deductions or payments in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;
(b) deductions, or payments, on account of an advance under an agreement for a loan or advance of wages….;
(e) payments as respect the purchase by the worker of goods or services from the employer unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the workers employment".

I note this case is not concerned with the provisions of regulation 14 as referred to in Regulation 12(1).

11. I was referred to 2 cases. The leading authority is **Leisure Employment Services Ltd v The Commissioners for HM Revenue and Customs 2007 EWCA CIV 92 ('LES'); and Commissioners for Revenue and Customs v Lorne Stewart plc [2015] IRLR 187** ('**Lorne Stewart'**). In relation to the former I was referred not only to the Court of Appeal decision but also the decision of the Employment Appeal Tribunal ('EAT') Elias J (President) presiding **2006 ICR 1094** which was endorsed by the Court of Appeal.

12. The LES case concerned the definition of the '*use and benefit'* provision in regulation 12. The facts of the LES case were employees working on holiday resorts were able to be accommodated at their request on site. In order to do so, they had to enter into an accommodation agreement. Part of the accommodation agreement was that each employee pays £6 to the employer to discharge utility debts. This sum was on top of an accommodation charge and both of which were deducted from the employee's wages and took those wages below the NMW then in force. The question for the court was whether or not the £6 deduction fell within the exception at Regulation 12(1) namely was it for the employer's own use and benefit? In the judgement of Lord Justice Buxton at paragraph 17 it was held that the payment does not have to be for the sole benefit of the employer. If that were the case the regulations would have said so.

13. In the EAT Elias J referred to the decision of Lord Diplock in **R v National Insurance Commissioners ex parte Hudson (1972) AC 944:**
"to find out the meaning of particular provisions in social legislation of this character calls, in the first instance, for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them. Meticulous linguistic analysis of words and phrases used in different contexts… should be subordinate to this purposive approach"

14. Elias J went on at paragraph 31: *"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 of at least the National Minimum Wage, save where carefully circumscribed exceptions apply."*

15. At Paragraph 50 Elias J continued *'in my judgment the act of withholding money at source from the sums which would otherwise have been paid to the worker constitutes a deduction. A deduction is to be contrasted with a payment by the employee which is a situation arsing where the money is initially paid over by the employer to the employee but is then paid back to the employer.'*

16. At Paragraph 57 Elias J went on: *'On the face of it, this was not an unreasonable arrangement and had they left it to the workers to pay for their own gas and electricity direct to the utility companies, they would not be liable to reimburse these payments. Moreover, in this case the company was not, it seems, charging too much for the services offered (at least when assessed across the board; the individuals may have had to pay more than they used). However, it seems to me that there is no way of regulating the*

employer who does not seek to give what are, in effect, benefits in kind and who charges a distortionate price. The legislation has to take a strong line to ensure that the statutory minimum wage is properly secured for workers even if this means that certain arrangements, not objectionable in themselves, cannot be permitted.'

17. At paragraph 13 Buxton LJ in the Court of Appeal judgment says as follows *"First, it is nothing to the point that the employee has a free choice whether to apply for accommodation in the first place. The issue with which we are concerned arises out of the fact of the provision of the accommodation and is only that fact that enables the employer to make any deduction at all. The legislator was careful to write the rules on that basis and not to limit them to the type of case, of which he must have been aware, where an employee such as a caretaker is required to live on site."*

18. At paragraph 26 Buxton LJ goes on:
"*Nor is it relevant to contend that the arrangement for collection of the £6 benefits the employees in a general sense, and therefore (it would seem to be contended) does not benefit the employer. There are two reasons why that argument is not open to LES. First, the question, specifically limited by the Regulations, is whether the deduction is for the use and benefit of the employer. The question is not whether the arrangement in the context of which that deduction is made benefits the employee. That is why we have to concentrate on the effect on the employer's position of his making the deduction. Second, and more generally, it is not surprising that the Regulations exclude this line of argument. For reasons already indicated, the legislator will have wanted to avoid endless debate about the general equity and benefit of arrangements made by the employer, and the legislator has done that by drafting the regulations in specific and limited terms."*

19. At paragraph 35 Smith LJ states *"the only party to benefit from the deductions was LES, as, if the deductions had not been made, it would have had to pay the whole of the suppliers bill instead of only part of it. This situation is to be contrasted with the position where an employee deducts the sum from wages, for example to pay trade union subscription or a donation to charity, at the request of the employee and on her behalf in such circumstances, the employer has no interest in whether the payment is made; it is done by him only as a matter of administrative convenience."*

20. At Paragraph 36 Smith LJ continues: "*I am satisfied this conclusion is in accordance with the policy objective behind this legislation. As Elias J said the policy is to ensure that the statutory minimum wage is properly secured. Permitted deductions should be clearly defined recognisable. the question whether a deduction is or is not permitted should not be a matter of calculation; it should not be dependent upon the assessment of the value of the benefit derived from the provision of the service which deduction is made; nor should it be reliant on the inferring of the trust. It should be obvious on the face of the transaction. Here, without any enquiry into value*

to the employee of the gas and electricity provided to him/her, it is clear that the employer benefits from deduction."

21. The Lorne Stewart case concerned a recoupment provision in the employee's contract namely that if the employee left the company within two years of a training course, she would have to repay the company that part of the cost of that course such sum being deducted from the final wages paid to the employee. The case concerned the application of Regulation 33(a) of the NMW Regulations 1999 specifically the interpretation of *'workers conduct or any other event in respect of which he…. is contractually liable .*' In giving the decision of the court HHJ Shanks said at paragraph 12 *"…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."* I interpret this to mean that this section permits an employer to make a deduction where an employee has been subject to disciplinary proceedings the outcome of which is a financial penalty.
The Judge goes on:
"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 [the regulation] and the controlling mechanism on abuse is that 'any other event' should indeed … be interpreted as having some relationship to the conduct for which the worker is responsible, but not necessarily 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 to 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."
That is to say the words '*any other event'* do not have to relate to misconduct.

22. I was also referred to the guidance issued by HMRC in relation to deductions from pay specifically, as I had raised the issue, the burden of proof. This indicates that items such as a loan or an advance on wages do not fall within the ambit of NMW Regulations. Benefits in kind it indicates are expressly prohibited.

Submissions

23. Both advocates provided me with written skeleton arguments which I do not intend to rehearse in full.

Appellant

24. The appellant argued that whilst it is conceded the appellant had the use of the money, it derived no benefit from the money as it was not obtaining any advantage or profit in receiving the money over many weeks as opposed to an upfront one lump sum payment. Any ancillary benefits flowing from obtaining a season card such as additional purchases at any game and **the**

filling **of** the seat do not hold water because the seat and in any event the season cards were still purchased when the ability to pay by instalments was withdrawn.

25. The deductions were made at the request of the employee, supported by the dissenting judgment of Wilson LJ in LES. The deductions were not to buy goods required by the employee. The deduction is akin to a Christmas savings club.

26. In relation as to whether this is "any other event", the other event is the request by the employee to pay by instalments.

Respondent

27. The respondent submitted that in relation to 'use and benefit', the sums were not collected on behalf of a third party and the appellant was free to spend the money as it so wished. The question is not whether the appellant derived an economic benefit. The 'any other event' cannot apply to a long-term arrangement and service, namely the right to attend a season's football matches

28. With regard to this arrangement amounting to a loan, the memos do not describe the arrangement as a loan rather they were to purchase services by instalments.

The Issues

29. It was agreed that the issues to be determined were:

29.1 were the deductions made for the appellant's use and benefit?

29.2 if so, were the deductions '*in respect of the worker's conduct, or any other event, where …. the worker is contractually liable*?'

29.3 if not, was a deduction '*on account of an advance under an agreement for a loan or advance of wages'?*

29.4 if not, did the deductions constitute '*payments as respect the purchase by the workers of goods and services from the employer?'*

Discussion and Conclusions

30. I note at this point the observations of Diplock LJ in **Hudson** (above) that in interpreting the 2015 Regulations I must ascertain the social ends to which the 2015 Regulations are intended to achieve and further I note the comments of Elias J to the elimination of payment by benefits in kind and a desire to ensure workers should receive cash in hand of at the least the NMW save where carefully circumscribed exceptions apply. In particular, I

note in this case that the season cards were not benefits in kind. The employees had to pay the full rate required, they did not receive any benefit save for paying for them over an extended period of time.

31. Clearly the 1998 Act and the 2015 Regulations made pursuant to it were to ensure that employees received the NMW rate at any time in force subject to lawful deductions such as national insurance and income tax and other deductions allowed by the 2015 Regulations.

32. I also note that it is clear from the case law that the motive behind the deduction is irrelevant as indicated by LJ Buxton in **Hudson** (above) the legislator would have wanted to avoid a debate about the general equity and the benefit of the arrangements made by the employer and for that reason the regulations have been drafted in specific and very limited terms.

33. In addition, I note this is not a case of an employer paying the incorrect sum to its employees rather, having paid its employees at the rate then in force, was it entitled to make deductions from the net pay to pay for a season card.

Deductions for Employers Use and Benefit

34. Having considered the **LES** case the following is clear, it matters not that the employees of the appellant obtained a benefit as a result of this arrangement; it matters not that the appellant was receiving sums which it might be entitled to receive from any person wishing to support it and purchase a season card. What is clear from the evidence of Mr Joyce, the sums obtained from the employee's wages were paid into the appellant's accounts, they were not used to discharge any particular debt to a third party, they were not paid into any separate account held for the benefit of the ticket system, but they were generally available for the appellant to use as it saw fit.

35. I do not accept Mr Bloom's argument that the appellant did not derive any benefit because it was not obtaining an advantage or profit from receiving the money over these weeks. The benefit to the appellant was the money it received in consideration for the season card Whilst I note the argument of Mr Bloom that the cards were bought even when the scheme was withdrawn, the question I have to ask myself if this; when the sums were deducted from the wages what could the appellant do with those sums? If it could use them for any purpose, it clearly derived a benefit from them. The fact that the employees continue to buy the season cards does not overcome the benefit argument in relation to the sums deducted from the wages.

36. Putting those facts together, it seems clear to me the fact that the appellant could use the money to pay any debts owed to it meant not only it had the use of the money but also it also benefited from the use of the money. Accordingly I conclude that if the reductions made by the Appellant are to be

lawful then they will have to fall within one or more of the exceptions set out in Regulation 12(2) of the 2015 Regulations.

The Exceptions

37. Having come to that conclusion, I must then look to see whether any of the exceptions apply, again applying a limited interpretation of each of those exceptions.

Conduct or any other event

38. Were the deductions as a result of any event where the employee is contractually liable? Mr Bloom points me to the request for the season card as being the event, whilst Mr Rowell says that the event is each and every deduction and therefore cannot be an event. The regulation itself refers to deductions in respect of any other event where the worker is contractually liable. Although I have not been shown an in-depth analysis of the contracts of employment, it seems clear to me that the requests for the season cards were not such that the employee was contractually liable for them. Indeed, as these were requests outwith the contract of employment to which the employer acceded, the employees could not be said to be liable to pay for the season cards under the terms of their contract of employment.

A Loan

39. In this regards I note that the memos I have seen do not refer to the arrangement as a loan. I considered however whether despite the name of the arrangement, this was in fact a loan of money to the employee in order to purchase the season card.

40. The Oxford English dictionary defines a loan as '*A thing that is borrowed, especially a sum of money that is expected to be paid back with interest'.* This is not a case where the appellant has paid the employee a lump sum in order to buy for example a season ticket for travel purposes with another provider, but rather this is an employee paying by instalments for something provided by the appellant itself. Having considered the definition, can I apply it to the season card? That is to say, was the season card borrowed until such time as the money was paid back? I think this is a convoluted argument. This is not a case of the employee receiving the lump sum and then paying it back, it is more akin to the employee receiving a benefit in kind and then paying for it. I conclude that this arrangement is not a loan for the reasons set out above.

Payment for Goods or Services

41. This appeal revolves around the question of whether the payments for goods or services, that is to say the season card, were deducted from the wages of the employees under a separate arrangement or contract between the appellant and the employees. The question is whether the sums amount to a reduction in the employees' wages for the purposes of the exceptions in

Regulation 12(2). Mr Rowell argues that Regulation 12(2)(e) makes specific reference only to payments and not to deductions and he asks me therefore to conclude that this is still a deduction in line with the comments of Elias J in **LES.** Mr Bloom argues that this is a payment made by the employee for goods or services from the appellant and asks me to consider on what possible basis Parliament would wish to penalise an employer in these circumstances.

42. I note that the season card and purchase of the same is not a requirement of holding employment at the appellant and, if this were the case, the arrangement would be prohibited by Regulation 12(2)(e) of the 2015 Regulations.

43. Is the employee making a payment in respect of a purchase? Clearly the employee is making a payment to the appellant for *'goods'* namely the season card.

44. I note the comments of Elias J in **LES** were clear where he concluded at paragraph *50 'In my judgment, the act of withholding money at source from sums which would otherwise have been paid to the worker constitutes a deduction. A deduction is to be contrasted with a payment by the employee which is a situation arising where the money is initially paid over by the employer to the employee but is then paid back to the employer, the distinction simply focuses on the mechanism whereby the money is received. It is nothing to do with purpose'.*

45. It is clear that the employer is providing goods, i.e. the season card to the employees in this case. Secondly, the sums deducted are not made in order to comply with a requirement imposed by the appellant in connection with the workers' employment. If that was so, it would be prohibited.

46. Mr Rowell argues that as the word *'deduction'* is missing from Regulation 12(2)(e) of the 2015 Regulations, I must follow the decision of Elias J in **LES** as contained at paragraphs 50 and 51. That decision is in relation to Reg 35(e) of the 1999 NMW Regulations which read;

'Payments not to be subtracted under Reg 31(1)(b)….
(e)any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the workers contract or any other requirement imposed on him by the employer in connection with his employment'

47. Elias J was clear at paragraphs 50 and 51: '*A deduction is to be contrasted with a payment by the employee which is a situation arising where the money is initially paid over by the employer to the employee but is then paid back to the employer, the distinction simply focuses on the mechanism whereby the money is received. It is nothing to do with purpose …In my judgment there is no doubt a deduction occurs where the employer withholds money from the employee at source.*'

48. I note however there is a subtle difference in the two regulations to this extent: Regulation 35 of the 1999 Regulations is headed *'Payments not to be subtracted'* whilst under Regulation 12 of the 1998 Regulations the heading is *'Deductions or payments for the employer's own use or benefit'* and Regulation 12(2) commences*; 'The following deductions OR PAYMENTS (my emphasis) are not treated as reductions.*

49. Whilst Elias J was considering the word deduction, it must be that under the 2015 Regulations I must consider the word in light of the whole of Regulation 12 and in considering and interpreting it give a purposive approach.

50. The reductions in this case are a payment in respect of a purchase from their employer, and that is clearly so. If the purpose behind the 2015 Regulations is to prevent an employee from permitting a deduction in order to pay for goods or services from their employer it would say so. In addition, if the purpose is the elimination of benefits in kind and a desire to ensure workers should receive sums in their pocket of at least the NMW save where the exceptions apply, I have asked myself: were the sums deducted a benefit in kind which the legislation is designed to prohibit? Although the sums deducted were for a season card, these were purchased on behalf of a third party. Clearly the employee could not utilise the season cards themselves as they were ordinarily at work when the season cards were used. I conclude the season cards were not a benefit in kind in the accepted sense of the word.

51. The title of 1999 Regulation with which Elias J in **LES** was concerned is: '*Payments not to be subtracted under Regulation 31(1)(h)'.* Regulation 12(2) of the 2015 Regulations is preceded by the phrase *'the following deductions and payments are **not** (my emphasis) treated as reductions*. Although I am not specifically asked to distinguish the decision of Elias J, to find in favour of the appellant I either have to ignore the comments of Elias J (which clearly I cannot do) or compare and contrast the two sets of Regulations to determine if the interpretation in respect of the 1999 Regulations still stands in light of the new wording in the 2015 Regulations.

52. I considered the purpose of the NMW Regulations as referred to by in Diplock LJ in **Hudson** above, which is to protect employees and their entitlement to wages. I also note he urges a purposive approach to interpretation of the Regulations.

53. In order to do this I read the 2015 Regulation as a whole: *'the following deductions and payments are **not** (my emphasis) treated as reductions…… payments as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement by the employer in connection with the workers employment.'*

54. I have carried out this exercise and I conclude that deductions as respect the purchase of the season card on behalf of third parties by the employees of the appellant in the specific and unusual circumstances of this case are

not to be treated as a reduction. The workers were not required to purchase the season cards in connection with their employment but chose to ask to do so on behalf of family member third parties. Taking a purposive approach to the 2015 Regulations and noting that the employees simply exercised their freedom of choice, I am able to distinguish the **LES** case and conclude that the appellant was entitled to make the deductions in respect of the season cards which are challenged by the notices issued by the respondent in this case.

Costs

55. The appellant makes an application for its costs following this appeal.

56. Regulation 76(1)(a) of Schedule I to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 permits a party to apply for its costs where the other party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof). The question of costs is a two-stage test, first has the party acted in a way prohibited? If yes, should the Tribunal exercise its discretion and award some or all of the costs sought?

57. Mr Bloom, on behalf of the appellant points to two pieces of correspondence. First on 9th March 2018, there was an offer by PWC on behalf of the appellant to pay the arrears if the notices are withdrawn - a quasi Calderbank letter. A second letter on 10th Jan 2019 asked the respondent to withdraw the notices.

58. I note that even where a claimant recovers less than a previous offer under a Calderbank letter, that does not of itself constitute unreasonable behaviour. Mr Bloom asks me to conclude that it was unreasonable of the respondent to proceed after the letter of 9th March 2018. In addition, he points to guidance which suggests that the respondent will itself apply for costs if it succeeds.

59. The respondent, amongst other tasks, has been appointed as guardians of the NMW legislation, It is they on behalf of society who investigate and enforce the NMW legislation. This is a duty they cannot resile from and they must perform it diligently.

60. In this case, I conclude that the respondent was entitled to pursue their objections to the appeal. It is a case of some legal complexity and by no means was it clear that the appellant would succeed. The result turned on the interpretation of one word in a complex set of regulations and in particular by me concluding that I was able to distinguish the interpretation of Elias J in the decision in **LES** in the particular circumstances of this case.

61. I do not consider that the respondent acted unreasonably.

62. I make no award as to costs.

EMPLOYMENT JUDGE A E PITT

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

26th March 2019