Appeal No. UKEAT/0234/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 January 2020
Judgment handed down on 20 March 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

COMMISSIONERS FOR HM REVENUE AND CUSTOMS — APPELLANT

MIDDLESBROUGH FOOTBALL AND ATHLETIC COMPANY (1986) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GEORGE ROWELL (of Counsel) Instructed by: HMRC National Minimum Wage Solicitor's Office and Legal Services 3rd Floor South Bush House London WC2B 4RD
For the Respondent	MR NICHOLAS SIDDALL QC (One of Her Majesty's Counsel) Instructed by: Mr R Bloom Bulkhaul Limited Brignell Road Riverside Park Industrial Estate Middlesbrough TS2 1PS

SUMMARY

NATIONAL MINIMUM WAGE

By agreement with the employees concerned, Middlesbrough Football Club made deductions from their wages in respect of the cost of season tickets. HMRC served enforcement notices on the basis that the deductions unlawfully took their pay below the national minimum wage ("NMW"). The Employment Tribunal concluded that the proper construction of the **National Minimum Wage Regulations 2015** was that an exception applied to this arrangement, and these deductions therefore should not have reduced remuneration, for the purposes of the NMW calculation. It therefore rescinded the notices. HMRC further appealed to the EAT. The appeal was allowed and the enforcement notices reinstated.

Held:

(1) The arrangements in this case were properly treated as deductions and not payments, in accordance with the ordinary meaning of the words, and applying **Revenue and Customs Commissioners v Leisure Employment Services Limited** [2006] ICR 1094 (EAT); [2007] ICR 1056 (CA). (The **LES** case). The regulation primarily relied upon by the Club as excepting these deductions from the NMW calculation – regulation 12(1)(e) – unambiguously applies only to payments within its scope, not deductions. There is no need or room for a purposive interpretation, as the language is clear. In any event an expansive interpretation of "payment" so as to apply to this case, following the approach taken in tax legislation, as advocated by the Club, was inappropriate. It would undermine, rather than further, the purposes of the NMW legislation.

(2) The Employment Tribunal had been right to conclude that this arrangement was for the "use and benefit" of the Club, so that, unless some specific exception did apply, these deductions reduced reckonable pay for the purposes of the NMW calculation. The monies deducted were freely available to be used by the Club as it wished, and the deductions were for its benefit, because it thereby secured payment for the season tickets. The fact

that the employees also benefited from the arrangement did not affect this. **LES** followed and applied.

(3) The Tribunal had erred in concluding that the employees concerned were not contractually committed to the arrangement. However, it was still right to conclude that the exception in regulation 12(2)(a) did not apply. That exception is only of potential application where a contractual provision for a reduction is triggered by conduct on the part of the worker amounting to misconduct, or by another specific event amounting to voluntary conduct for which the worker is responsible. **LES** and **Commissioners of HMRC v Lorne Stewart plc** [2015] ICR 708 considered and applied.

(4) The Employment Tribunal had correctly concluded that the present case does not fall within the regulation 12(2)(b) exception, which applies to reductions on account of certain loans. The arrangement in this case could not properly be construed as a loan of cash. That exception could not properly be construed as applying to a non-cash loan; but in any event the arrangement in this case did not involve a non-cash loan either.

(5) A direction issued by the Secretary of State on 11 February 2020, pursuant to section 19A(2) **National Minimum Wage Act 1998**, does not affect any of the foregoing conclusions.

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HIS HONOUR JUDGE AUERBACH

Introduction

1. Where an enforcement officer of HMRC believes that a worker has received less than the amount of the national minimum wage to which they are entitled, section 19 **National Minimum Wage Act 1998** (**"the 1998 Act"**) empowers the officer to serve a notice of underpayment on the employer. If the employer disputes the notice, then, pursuant to section 19C, they can appeal against it to the Employment Tribunal. An appeal from the decision of the Employment Tribunal, on a point of law, may be pursued to the EAT in the usual way.

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2. Middlesbrough Football and Athletic Company (1986) Limited runs Middlesbrough Football Club. Officers of HMRC considered that certain of its employees, in clerical or hospitality roles, were being underpaid the national minimum wage, and it served notices of underpayment. The Club appealed to the Employment Tribunal. The Tribunal (Employment Judge A E Pitt), in a reserved decision following a hearing in February 2019, concluded that the employees were not being underpaid, and rescinded the notices. The Commissioners of HMRC have appealed to the EAT. They are therefore now the Appellant, and the employer is the Respondent to this appeal. To avoid confusion, I will refer to them as HMRC and the Club.

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3. At issue is the correct treatment, for the purposes of the calculation of whether a given employee has received the national minimum wage, of reductions made to what the employees concerned would otherwise have been paid, in respect of the provision of season tickets, which the Club also calls season cards.

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4. The basic underlying facts were and are not in dispute. None of the employees concerned was obliged to buy season cards as a term or condition of their employment. The season cards in

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question were for the use of family members. Individual arrangements were reached, between the Club and each employee, whereby the costs of the season cards were, in each case, met, by the wages paid to the employees being reduced by designated weekly instalments. There were usually, but not in all cases, 39 or 40 weekly instalments.

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5. If, for the purposes of the national minimum wage calculation, the amount of the wages paid to each of these employees fell to be reduced by the amount of the corresponding season card instalment, then these employees were paid less than the national minimum wage. If not, then they were not. It is not suggested that there was any attempt here to avoid paying the national minimum wage. The question is simply whether, on a correct construction of the legislation, the effect of this arrangement was that the employees concerned did not receive the minimum wage to which they were entitled, applying the appropriate approach to the construction of those provisions.

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The 2015 Regulations; the "LES" case

6. The relevant regulations are the **National Minimum Wage Regulations 2015** (SI 2015/621) (**"the 2015 Regulations"**). Part 4 concerns "Remuneration for the Purposes of the National Minimum Wage". Within that Part, regulation 8 provides:

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> **"8. The remuneration in the pay reference period is the payments from the employer to the worker as respects the pay reference period, determined in accordance with Chapter 1, less reductions determined in accordance with Chapter 2."**

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7. Chapter 1 then concerns "Payments from the Employer to the Worker", including provision in regulation 10, in respect of certain payments and benefits in kind that do not form part of a worker's remuneration for these purposes. Chapter 2 is headed "Reductions". Within that Chapter regulations 11 and 12 provide:

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"Determining the reductions which reduce the worker's remuneration

11.—(1) In regulation 8, the reductions in the pay reference period are determined by adding together all of the payments or deductions treated as reductions in that period in accordance with this Chapter.

(2) To the extent that any payment or deduction is required to be subtracted by virtue of more than one provision in this Chapter, it is to be subtracted only once.

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Deductions or payments for the employer's own use and benefit

12.—(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 except 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—

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(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 an advance of wages;

(c) deductions, or payments, as respects an accidental overpayment of wages made by the employer to the worker;

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(d) deductions, or payments, as respects the purchase by the worker of shares, other securities or share options, or of a share in a partnership;

(e) 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 imposed by the employer in connection with the worker's employment."

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8. Neither the **1998 Act**, nor the **2015 Regulations**, define "deductions" or "payments".

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9. Before coming to the Tribunal's decision, and the grounds of appeal, it is helpful at this stage to give an initial overview of one particular authority, which the Tribunal considered in some detail, as shall I. That is **Revenue and Customs Commissioners v Leisure Employment Services Limited** [2007] ICR 1056 (CA), upholding the decision of the EAT reported at [2006]

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ICR 1094. That case concerned the interpretation of the predecessor regulations to the **2015 Regulations**, being the **National Minimum Wage Regulations 1999** (SI 1999/584) (**"the 1999 Regulations"**) as amended. I will refer to that case as **LES**.

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10. In that case the employees concerned were seasonal workers at Butlins holiday resorts. They were not obliged to live in accommodation provided by the employer, but all elected to do so. Under that arrangement, each agreed to their pay being reduced by a fixed sum of £6 per fortnight in respect of gas and electricity. The employees were held to have no direct obligation to the utility companies. That fell on the employer. In respect of the employees overall, the amount that it paid the utility companies was greater than the overall amount recouped from the employees, though some individual employees may have used gas and electricity for which the actual fortnightly cost was less than the £6. If the employees' remuneration fell to be reduced by the £6 per fortnight, they were underpaid the minimum wage. If not, they were not.

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11. The EAT, Elias P (as he then was), concluded that the £6 per fortnight was properly described as being "in respect of the provision of living accommodation". As it exceeded the credit which an employer may claim for such provision, the remuneration fell to be reduced on that account, to below the level of the minimum wage. He went on to find that it was also a deduction for the employer's use and benefit, so that the provisions providing for a reduction in such cases also applied, as none of the exceptions to them applied. In the Court of Appeal Buxton and Smith LJ agreed with Elias P on both routes. Wilson LJ dissented on the second route, but as he agreed on the first route, he concurred that the appeal should be dismissed.

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The Employment Tribunal's Decision

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12. In summary, the key elements of the Employment Tribunal's Reasons in the present case were as follows.

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13. First, the Judge found that "this arrangement" was "for the employer's own use and benefit" within the meaning of regulation 12(1). In light of the decision in **LES**, it was clear that

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it did not matter that the employees benefited from the arrangement, nor that the Club was receiving sums which it might receive from any supporter wishing to purchase a season card. The instalments were not used by the Club to discharge any particular debt, nor paid into a hypothecated account. They were available for the Club to use as it saw fit. The benefit to the Club was that it thereby obtained the consideration for provision of the season card.

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14. Accordingly, concluded the Judge, the instalments fell to be treated as reductions, unless any of the exceptions in regulation 12(2) applied, regulation 14 being plainly not applicable. Three possibilities were considered, as follows.

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15. First, the Judge concluded that regulation 12(2)(a) did not apply, in particular because the requests for season cards were "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." (Paragraph 38).

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16. Nor, the Judge found, was there a loan under regulation 12(2)(b). The case was not analogous to one in which the employer makes the employee a loan to purchase a travel season ticket from a third party. The season card was not borrowed until the money was paid back. The employee did not receive the money to purchase the season card, and then pay the money back in instalments. The case was "more akin to the employee receiving a benefit in kind and then paying for it." (Paragraph 40).

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17. Did regulation 12(2)(e) apply? For HMRC it was contended that what was at issue were deductions, but that sub-provision applied only to payments, and not deductions. The Judge cited

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various passages from the decisions of the EAT and Court of Appeal in **LES**, in particular the following paragraphs from the decision of Elias P:

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> **"50. I do not accept that the fact that it is taken as a contribution towards the cost of utilities prevents the monies withheld being treated as a deduction. 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 arising where the money is initially formally 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 has nothing to do with its purpose. The purpose would be relevant to the question whether a deduction is of a nature which would adversely impact on the calculation of the Minimum Wage, but it does not alter the fact of there being a deduction.**
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> **51. In my judgment, there is no doubt that a deduction occurs when an employer withholds money from the employee at source. It would be a distortion of language to call it anything else. It follows that regulation 35(e), if applicable at all, can only assist the employer in the case of Ms Keenan who actually paid the £6.00 to the employer."**

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18. The Judge accepted that she was bound by the decision in **LES** unless she could properly distinguish it. However, she concluded that it *could* be distinguished. Her reasoning, in summary, was as follows.

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19. The Judge attached significance to the fact that regulation 35 of the **1999 Regulations**, which had been considered in that case, was headed "payments not to be subtracted", whereas regulation 12 of the **2015 Regulations** is headed "deductions or payments" and the preamble to regulation 12(2) states: "The following deductions and payments are not to be treated as reductions."

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20. She also considered that the reductions in the present case were clearly made in respect of a purchase from the employer. She asked whether the purpose of the **2015 Regulations** was to prevent an employee from agreeing to a deduction in order to pay for goods or services from the employer. If it was, she said, the Regulations would have said so. If the purpose was to prevent remuneration by way of benefits in kind, save as excepted, then that did not apply, because the season cards were for third parties, and were not a benefit in kind.

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21. The Judge recognised that she should adopt a purposive approach. Ultimately, she concluded as follows.

> **"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."**

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22. The Judge therefore rescinded the relevant notices of underpayment.

The Appeal

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23. HMRC appealed. The notice of appeal was reviewed by HHJ Stacey, who considered the grounds of appeal to be arguable and directed a full hearing. The Club's Answer resisted the appeal, relying on the Employment Tribunal's reasons, and on an additional Ground. It also raised what it described as a cross-appeal. I considered that on paper. I observed that I was unsure whether the points raised strictly amounted to Grounds of cross-appeal, as opposed to advancing further reasons for upholding the Employment Tribunal's decision, albeit by a different route. But either way I considered the points raised to be arguable, and directed that they be considered at the same hearing. That hearing also, in the event, came before me.

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24. Before the Employment Tribunal the Club were represented by Mr Bloom, a solicitor, and HMRC by Mr Rowell of counsel. At the hearing of this appeal the Club were represented by Mr Siddall QC, and HMRC once again by Mr Rowell. I had written skeleton arguments, and heard very full oral argument, from them both.

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The Cross-Appeal – Procedural Point

25. I will consider first, a procedural or jurisdictional point concerning the proposed cross-appeal. Mr Rowell argued that the Grounds raised in what he called the purported cross-appeal were not by way of a true cross-appeal, and should not be entertained at all. He invoked the principle that an appeal is against a judgment or order, rather than against some element of a Court or Tribunal's findings or reasons. This principle, of which the notorious example in the jurisdiction of the Courts is **Lake v Lake** [1955] 2 All ER 538, applies equally, he submitted, to Employment Tribunals and the EAT. See: **Wolfe v North Middlesex University Hospitals NHS Trust** [2015] ICR 960.

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26. That said, in oral submissions Mr Rowell accepted that these same Grounds could have been raised in the Answer as additional Grounds for upholding the Tribunal's decision; but since they were not, he said, that would require an application to amend. He in fact also addressed these Grounds substantively in his skeleton, and orally at the appeal hearing.

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27. Mr Siddall argued that this case could be distinguished from **Wolfe**. The Grounds that the Club sought to raise under the heading of a cross-appeal were points that could potentially make a substantive difference, were the appeal to succeed. They were also of wider interest. On at least one of those Grounds there was no prior authority. If amendment be required, to treat the Grounds as additional Grounds for upholding the Tribunal's decision, he so applied.

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28. Mr Rowell in reply maintained that the principle in **Lake v Lake** applied. He said he had no instructions to concede the application to amend. I therefore need to address the point.

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29. My conclusions on this point are as follows.

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30. In **Wolfe** the employee's claims of disability discrimination failed before the Employment Tribunal. The Tribunal found her to have been disabled only in respect of certain time periods. She appealed on the basis that the Tribunal had failed to consider the possibility that, in respect of one particular period, she should have been considered disabled. The employer sought to cross-appeal an apparent finding that stress alone could amount to a disability. The EAT (HHJ Serota QC) held that this related only to a part of the *reasoning*, not any *decision*, and the reasoning was of no significance, as it related to a different time period, in which it was not suggested that any discrimination had occurred. He concluded that the proposed cross-appeal could not be entertained. I need to consider his reasoning more closely.

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31. The Judge noted that, pursuant to section 21 **Employment Tribunals Act 1996** ("the **1996 Act"**) an appeal lies to the EAT from a "decision" of the Employment Tribunal. The **1996 Act** does not define that word, but rule 1(3) of the **Employment Tribunals Rules of Procedure 2013** defines an "order or other decision", and the Judge proceeded on the basis that this provided at least a guide to the meaning of "decision" in section 21. That definition includes a decision which finally determines a claim, or part of a claim, or any issue which is capable of finally disposing of a claim or part of a claim, even if it does not necessarily do so.

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32. The Judge then discussed **Secretary of State for Work and Pensions v Morina** [2007] 1 WLR 3033 (CA), which was concerned with the right of appeal conferred by section 15 **Social Security Act 1998** in respect of any "decision" of a Social Security Commissioner. The Court of Appeal had distinguished this language from that at issue in **Lake**, which concerned an appeal against a judgment or order. Even bearing in mind the policy in **Lake**, it concluded that the "decision" sought to be appealed in **Morina** was, in reality, two decisions, one on jurisdiction,

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A the other on merits. Further, what was sought to be challenged in that case was a ruling on a fundamental issue, not merely a finding of no wider lasting legal significance.

B 33. HHJ Serota QC concluded that, in the case before him, the finding that the employer sought to challenge was *obiter* and not part of the *ratio* of the Tribunal's decision. The proposed cross-appeal was not against a decision which had been capable of disposing of any part of the claim. It was an immaterial finding of no general significance.

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34. I should perhaps note that section 21(1) of the **1996 Act** begins:

> **"An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of …"**

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35. **Wolfe** considers what does or does not count as a "decision" for these purposes. It should be noted that the section also allows for the possibility of an appeal on any question of law

E "arising in any proceedings before" an employment tribunal. That said, it must be remembered that the EAT will not grant a full hearing to an appeal where there are no reasonable grounds for bringing it (see **Employment Appeal Tribunal Rules 1993**, rules 3(7) and (10)); and whether there is any reasonable prospect of the decision of the Employment Tribunal being overturned or

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36. In all events, following the general approach to the law set out by HHJ Serota QC in

G **Wolfe**, I consider that the case before me is more analogous, factually, to **Molina**, than to **Wolfe**. The Grounds set out in the proposed cross-appeal seek to challenge the Tribunal's conclusions that regulation 12 as a whole applied, and that the exceptions in regulations 12(2)(a) and 12(2)(b)

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alternative basis for rescinding the notices of underpayment. It seems to me that these were, therefore, issues which were capable of finally disposing of the claim (or strictly, in this case, of the appeal to the Employment Tribunal itself).

37. Further, if these proposed Grounds are not considered on their merits, there is a real risk of injustice to the Club. Were I to uphold the appeal without considering them, then I would reinstate the notices. But if it were to be the case that the Tribunal had also erred in respect of the points raised by one of these Grounds, then the notices would have been reinstated notwithstanding that the Judge ought still to have rescinded them for other reasons. It would have been otiose and unnecessary for the Club to raise the points in the proposed cross-appeal merely as an attempted appeal of its own, in the absence of any appeal by HMRC, but it is potentially not otiose at all to have raised them in response to HMRC's appeal.

38. I conclude that these Grounds were properly raised as a cross-appeal; but if I am wrong about that, the application to amend the Answer to embrace them should, in light of all these considerations, be granted. I will therefore, in principle, consider the Grounds of Appeal, the Club's additional Ground for resisting the appeal, and the Grounds raised in the cross-appeal.

The Grounds of Appeal and Arguments

The Grounds of Appeal

39. I start with the Grounds of Appeal and the arguments of HMRC in relation to them.

40. The notice of appeal identifies five grounds, lettered A – E. There is a high degree of overlap and repetition among them. But I will start by summarising each of them, and Mr Rowell's principal arguments in relation to them.

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41. Ground A is to the effect that the Tribunal erred in treating regulation 12(1)(e) as capable of potentially applying to what were in fact deductions, notwithstanding that regulation 12(1)(e) refers only to payments, and does not refer to deductions.

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42. Mr Rowell argued that "payments" cannot possibly be construed as referring to sums withheld from wages at source. These are, and are only, deductions. That is, first, he said, a matter of the ordinary meaning of the words. Secondly, he said, Elias P's decision in the **LES**

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case (unappealed on this point), is binding authority on this point.

43. Ground B is to the effect that the Tribunal misconstrued the reference, in regulation

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12(1)(e), to "a requirement imposed by the employer in connection with the worker's employment." Mr Rowell argued that the Tribunal was wrong to take account of the voluntary nature of the arrangement, because the policy of the legislation requires that remuneration should

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reach a worker in cash, save where one of the limited exceptions applies, in order to ensure that there can be no doubt that the worker has exercised a genuine choice.

44. Ground C is to the effect that the Tribunal erred in attaching significance to the fact that

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the season cards were for family members, not for the employees' own use. Mr Rowell argued there was nothing in the wording of the legislation, nor any policy consideration, to warrant the making of such a distinction. The Tribunal was also wrong, he argued, to conclude that this was

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not "a benefit in kind in the accepted sense of the word". Providing for a family member was self-evidently a benefit to the employee, as it fulfilled a moral obligation or perceived need.

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45. Further, submitted Mr Rowell, the same approach should be taken, as applies in the income tax legislation, whereby "benefits in kind" is defined to include benefits for the members of an employee's family or household, which is itself widely defined.

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46. Ground D contends that the Tribunal erred in failing to have adequate regard to the purposes of the legislation, as discussed in the **LES** case, in particular:

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(a) to ensure that permitted reductions are clearly defined and limited without leaving room for the exercise of discretion by the employer or the Court (per Buxton LJ at paragraph 7);

(b) that the "goods and services" exception deliberately only applies to payments, and not deductions, to ensure that it only applies where the employee has exercised a real choice (per Elias P in the EAT at paragraph 19, approved by Buxton LJ at paragraph 7); and

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(c) to eliminate remuneration by way of benefits in kind, except to the extent that carefully circumscribed exceptions apply (per Elias P at paragraphs 31 and 57).

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47. Ground E contends that the Tribunal's decision was contrary to the binding authority of the **LES** case. In particular, argued Mr Rowell, the purported basis on which the Tribunal distinguished that authority was wrong. The **2015 Regulations** were consolidating regulations,

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intended to simplify the legislation, not to effect substantive change. This was explained in **Royal Mencap Society v Tomlinson-Blake** [2019] ICR 241 (CA) at paragraph 17.

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48. The Tribunal was in any case mistaken to attach significance to the difference between the heading of regulation 35 of the **1999 Regulations**, and that of regulation 12 of the **2015 Regulations**. In the **1999 Regulations**, reductions by way of either deductions or payments were

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dealt with in a series of regulations, from regulation 31 onwards. In particular, regulation 32 addressed deductions to be subtracted, regulation 33 deductions not to be subtracted, regulation

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34 payments to be subtracted, and regulation 35 payments not to be subtracted. Regulation 12 of the **2015 Regulations** contained material drawn from various parts of those predecessor regulations. This explained the difference in headings between that of regulation 35 of the **1999 Regulations** and that of regulation 12 of the **2015 Regulations**. Further, the heading of regulation 12 refers to deductions and payments because, taken as a whole, it deals with both subjects. But that does not mean that all sub-paragraphs within it do so. Sub-paragraphs (a) to (d) expressly apply to both deductions and payments. But sub-paragraph (e) expressly only applies to payments within its scope.

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49. Accordingly, concluded Mr Rowell, there was no proper basis to distinguish **LES**, and the Tribunal was wrong to do so.

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50. The Tribunal also, he argued, wrongly regarded as a valid point of distinction, its proposition that the employees in this case "simply" exercised their freedom of choice. In **LES**, he observed, it made no difference that the employees had been free not to live in the employer's accommodation.

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51. I turn to Mr Siddall's arguments in opposition to the Grounds of Appeal.

52. Mr Siddall, in his skeleton and orally, made a straightforward concession. He accepted that the Tribunal was wrong to attach significance to what it took to be a shift in the wording between the two sets of Regulations, given what was said by the Court of Appeal in **Tomlinson-Blake**. That is subject to the fact that he reserved the right to argue otherwise later, should the Supreme Court in **Tomlinson-Blake** in due course reach a different conclusion. But he did not invite me to postpone the determination of the present appeal on that account.

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53. This led on to a second concession. Mr Siddall accepted that regulation 12(1)(e) is differently worded from the sub-regulations 12(1)(a) to (d), and refers solely to payments, as opposed to deductions and payments. He suggested that Grounds of Appeal A – E were all essentially facets of the same point, namely that the Tribunal erred in its construction of regulation 12(1)(e); and he conceded that it did so err, unless the additional Ground for resisting the appeal advanced by the Club was made out.

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The Club's Additional Ground for Resisting the Appeal

54. I turn, then, to that additional Ground. This is that the Tribunal was, in the event, right to view a deduction made at the worker's request as falling within the meaning of the term "payment" for a different reason not advanced by the Tribunal itself. This draws on sections 18(1) and 686(1) of the **Income Taxes (Earnings and Pensions) Act 2003** ("**ITEPA 2003**"), which provide as follows.

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> **"18 Receipt of money earnings**
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> **General earnings consisting of money are to be treated for the purposes of this Chapter as received at the earliest of the following times—**
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> ***Rule 1***
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> **The time when payment is made of or on account of the earnings.**
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> ***Rule 2***
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> **The time when a person becomes entitled to payment of or on account of the earnings.**
>
> ***Rule 3***
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> **If the employee is a director of a company and the earnings are from employment with the company (whether or not as director), whichever is the earliest of—**
>
> **(a) the time when sums on account of the earnings are credited in the company's accounts or records (whether or not there is any restriction on the right to draw the sums);**
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> **(b) if the amount of the earnings for a period is determined by the end of the period, the time when the period ends;**
>
> **(c) if the amount of the earnings for a period is not determined until after the period has ended, the time when the amount is determined.**
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> **….**
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> **686 Meaning of "payment"**
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> **For the purposes of PAYE regulations, a payment of, or on account of, PAYE income of a person is treated as made at the earliest of the following times—**

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Rule 1

The time when the payment is made.

Rule 2

The time when the person becomes entitled to the payment.

Rule 3

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If the person is a director of a company and the income is income from employment with the company (whether or not as director), whichever is the earliest of—

(a) the time when sums on account of the income are credited in the company's accounts or records (whether or not there is any restriction on the right to draw the sums);

(b) if the amount of the income for a period is determined before the period ends, the time when the period ends;

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(c) if the amount of the income for a period is not determined until after the period has ended, the time when the amount is determined.

But this is subject to subsection (5) (PAYE pension income: social security pension lump sums)."

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55. Mr Siddall also referred to similar wording in the *Employment Income Tax Manual EIM 42280* of 2018. He referred also to authorities on the wide construction of the concept of "payment" for these purposes, and which contain *dicta* to the effect that "payment" has no single, or wholly unambiguous, meaning. (These were: **Garforth (Inspector of Taxes) v Newsmith Stainless Limited** [1979] 2 All ER 73, and **RFC 2012 plc (in liquidation) v Advocate General for Scotland** [2017] 1 WLR 2767.)

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56. He submitted that consideration of the approach taken in the tax and PAYE context properly informs the linguistic meaning, or interpretation, of "payment" in regulation 12(2)(e), as embracing the situation in the present case. That, he said, is because this is also a case where the employee retains control of the money and directs its use, by voluntarily agreeing to it being deducted to pay for the season ticket. That approach, he submitted, was consistent with, and did not undermine, the purpose of the national minimum wage legislation.

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57. Further, said Mr Siddall, the fact that the tax legislation could be drawn upon for the purposes of the minimum wage scheme was borne out by considering regulation 10(n), which listed, among payments and benefits that do not form part of remuneration, payments in respect of expenses that are allowed as deductions under section 338 **ITEPA 2003**.

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58. Mr Siddall's skeleton accepted that this construction involved a departure from the decision of the EAT in **LES**. However, he noted that this point was not pursued to the Court of Appeal. He further noted that this particular line of argument was not advanced or considered in **LES**, and respectfully submitted that the decision in **LES** was, in this respect, *per incuriam*.

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59. In oral submissions Mr Siddall expanded on this strand of his argument. He submitted that this part of the decision in **LES** was wholly *obiter*, because the EAT had decided the appeal on the living accommodation point, notwithstanding that Elias P had gone on to consider the "use and benefit" point as well. Similarly, the Court of Appeal had unanimously upheld the decision on the first route, notwithstanding that a majority had also upheld it on the second route. I was therefore free, he argued, to depart from **LES** on this point. Alternatively, referring to the principles set out in **Lock v British Gas Trading Limited** (No 2) [2016] IRLR 316, concerning when the EAT will or will not depart from its own previous decisions, Mr Siddall maintained that **LES** was, on this point, decided *per incuriam*; alternatively (though he himself ranked this argument last) that decision was, he said, manifestly wrong.

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60. Mr Rowell did not accept that any part of **LES** was *obiter*. HMRC had two alternative routes to success in that case. Both succeeded. Either would have been sufficient, but it could not be said that one of them was *obiter* and the other not, merely because of the order in which they were considered. In any event, he said, the decision was not *per incuriam*. That could be

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said to be so only so in cases where the Court had overlooked a relevant authority or statutory provision, or otherwise only in rare and exceptional cases. A previous authority could not be treated as decided *per incuriam* where it was merely being said that some new or better argument could be advanced. See: **Morelle Limited v Wakeling** [1955] 1 All ER 708.

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61. Nor, said Mr Rowell, was the decision in **LES** manifestly wrong. Rather, it was right, and the additional Ground for resisting the appeal was wrong on its merits. He argued, first, that the contention in that Ground was contrary to the plain meaning and scheme of the **2015 Regulations**. Either a reduction was a deduction or it was a payment. The scheme deliberately distinguished between them. If a deduction fell to be treated as a payment merely because it was voluntarily agreed to, that would deprive the distinction of much of its effect.

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62. Secondly, the provisions of **ITEPA 2003** have a different purpose, namely to restrict opportunities for tax avoidance. That is why they (and the associated tax authorities) extend the concept of "payment" in the tax context, so that it is deemed to occur not just when actual payment is made, but as soon as the employee is entitled to receive payment. But there was no warrant for applying this approach to the national minimum wage legislation. The policy of restricting or preventing tax avoidance did not apply to it. Rather, the policy considerations articulated in **LES** would be undermined by this approach.

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63. Further, said Mr Rowell, Parliament had not enacted any similar extended definition of "payment" in the **2015 Regulations**. Had it wanted to do so, it could have. The two pieces of legislation were, in this regard, to be contrasted, not compared. Reference to regulation 10(n), he submitted, reinforced his point. Parliament had plainly been alive to the tax legislation as a

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potential source from which to borrow a definition, when it wanted to do so. It chose to do so in regulation 10(n), but not to do so in regulation 12.

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The Appeal – Discussion and Conclusions

64. I turn to my conclusions on the appeal, including the Club's additional Ground for resisting it.

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65. In view of the concessions made by Mr Siddall, I can start by saying, fairly briefly, that I consider that he was right to make them. He was bound to make the first concession, by virtue of what the Court of Appeal said in **Tomlinson-Blake** alone. But I add that, even without any prior authority binding me, I would have concluded that the Tribunal's reasoning attaching significance to the difference between the headings of the old regulation 35 and the new regulation 12 was misconceived, essentially for the reasons advanced by Mr Rowell.

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66. I also consider that Mr Siddall's second concession was rightly made. Elias P has authoritatively held in **LES** that there is a deduction whenever the employer withholds monies at source, regardless of the underlying purpose of doing so. Unless the additional Ground on which the appeal is resisted affords one, there is no other good or sufficient reason for me to depart from that analysis; and this would lead to the conclusion that the Tribunal should have found that regulation 12(1)(e) was not engaged at all.

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67. In view of these concessions I therefore do not need to say any more about Mr Rowell's other arguments in support of the Grounds of Appeal, save to the extent that the same arguments may have some bearing on the additional Ground advanced by the Club for resisting the appeal, and/or the Grounds of cross-appeal.

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68. I turn, then, to the Club's additional Ground for resisting the appeal. I reject it on its merits. My reasons are as follows.

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69. First, in the absence of prior authority, I would have found that the arrangements in the present case involved deductions and not payments, as a matter of the ordinary meaning of words. Parliament has been clear and explicit in the **2015 Regulations** in adopting the overarching terminology of "reductions", distinguishing, within this, between "deductions" and "payments" and spelling out which provisions apply to one, or to both of these. I do not think there is any room to construe "payments" in this context as a term of art, embracing something which would, in ordinary parlance, be regarded as a deduction, and not a payment, by drawing on a different piece of legislation which does contain its own distinctive definitional provision.

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70. I agree with Mr Rowell that this is, in fact, a point of contrast between the two regimes. If Parliament had wanted, in the **2015 Regulations**, to adopt an approach to the concept of "payment", similar to that which it took in **ITEPA 2003** (or to follow the interpretations given by the tax-context authorities), it could have done so. I also agree that consideration of regulation 10(n) reinforces the conclusion that it deliberately chose not to do so.

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71. Secondly, I do not agree that the underlying purpose reads across. Mr Rowell's suggestion that the **ITEPA 2003** provisions have an anti-tax-avoidance purpose seems to me to make sense. These essentially, as I understand it, put a duty on an employer to make provision for PAYE, whenever an employee becomes entitled to payment, regardless of whether, or when, they are actually paid. There is no reason to suppose that general policy considerations concerning the collection of income tax through the PAYE system, should read across to the quite different context of the operation of the national minimum wage. A wide construction of

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"payment", that would restrict the opportunities for avoidance in the tax context, would arguably have the opposite effect in relation to the purpose of the minimum wage legislation, to secure workers a minimum level of cash remuneration, subject to very limited exceptions.

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72. Thirdly, I disagree with Mr Siddall's submission that the construction he advocates would further the legislative purpose behind the national minimum wage legislation and not undermine it, on the footing that, in a case such as the present, the employee retains control of the money and directs its use. This is really just another version of the argument that it does not offend the policy of the legislation for money to be withheld at source under an arrangement which is, on the part of the employee, entirely voluntary. This was a theme to which Mr Siddall returned a number of times in oral submissions, and I need to consider it more fully.

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73. In **LES** Elias P observed, of the fact that regulation 12(2)(e) applies to payments, but not deductions:

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> **"19. Presumably, the rationale for that provision is that it is thought that this exception should only apply in circumstances where the employee has received the money into his own hands. That is more likely to make the decision to purchase goods or services one of real choice. In any event, whatever the rationale, that is an exception found in relation to payments by or due from the worker which is not applicable to deductions. In other words, payments by the employee falling within regulation 35(e) do not have to be subtracted from the total remuneration, but they do if the arrangement whereby money is received by the employer takes a form of a deduction from the payroll."**

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74. Further on, he said:

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> **"57. For all these reasons, in my judgment this appeal succeeds and the enforcement notices must be restored. I have sympathy for the employers in the circumstances of this case. 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 employers were not, it seems, charging too much for the services offered (at least when assessed across the board; 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 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."**

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75. Buxton LJ, in the Court of Appeal, observed (within paragraph 7):

> **"The legislator plainly thought that, in order to ensure that workers did indeed obtain the minimum wage, permitted deductions should be clearly defined and limited, without leaving room for the exercise of discretion either by the employer or by the court. As Elias J, with his experience of this field, said at §56 of his judgment, the legislation has to take a strong line to ensure that the statutory minimum wage is properly secured for workers."**

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76. He also observed, within paragraph 14, that he agreed with Elias P's foregoing observations, and added:

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> **"And as the President of the Employment Appeal Tribunal Elias J will have had well in mind that 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."**

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77. In argument, Mr Siddall noted that there was no suggestion in the present case of any attempt at avoidance, or that the employees had been pressured in any way. It was, he submitted, not contrary to the policies detected by Elias P and Buxton LJ for such an entirely voluntary arrangement to be entered into. The interpretation for which HMRC contended, would, he said,

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effectively mean that the employees received free season tickets. I should not conclude that this was correct unless the purposive approach compelled it, which it did not.

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78. I reiterate that I do not consider that there is any room to interpret the concept of "payment" in regulation 12(2)(e) as embracing what is, in ordinary parlance, a deduction. That is for the reasons, with which I agree, explained by Elias P in **LES**, and in the absence of a special

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definitional provision applicable to the use of this word in this regulation. It is therefore not, in fact, necessary to resort to a purposive approach to interpretation, because there is no ambiguity in the language that needs to be resolved. But if I had had to consider it, applying a purposive approach, I would have been of the view that the interpretation advocated by Mr Siddall goes

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against the grain of the purposes of the national minimum wage legislation of which the **2015 Regulations** form a part. That is for the following reasons.

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79. There may be any number of situations which involve arrangements which, in the eyes of the common law, are voluntary, but which, viewed through an economic, social, or some other policy-driven lens, may be regarded differently, and in respect of which Parliament may choose to make specific provision. These are not necessarily confined to situations in which there is a concern about the possibility of some form of attempt to avoid payment of the national minimum wage, or other abuse by the employer (and, to repeat, neither was alleged to have occurred here). Parliament's concerns may not be confined to such scenarios.

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80. Mr Siddall referred me, at one point in submissions, to section 14(4) **Employment Rights Act 1996** enabling workers to consent in writing to deductions from wages. But, though part II of that **Act**, and the national minimum wage legislation, both regulate wages, and share some concerns and use some common concepts and language, the former is concerned with regulating deductions from wages generally, whereas the national minimum wage legislation, as the name implies, sets flat rates of minimum wages for workers, which are absolute in level. It must be inferred that part of the purpose is to ensure a floor beneath which the lowest paid workers in society do not fall, in terms of the minimum cash remuneration they can expect to receive, subject to limited exceptions. If Parliament had wanted to allow workers to opt out of, or vary the applicability of, that regime to themselves, by a voluntary written agreement along the lines permitted by the general deduction from wages legislation, it could have done so; but in the national minimum wage legislation it has taken a different, more stringent, approach.

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81. In the case of regulation 12(1)(e) Parliament has decided, deliberately, to draw a distinction, in respect of purchase of goods and services from the employer, between a case involving payments, and one involving deductions; and then further, within that, between one involving a requirement imposed by the employer in connection with the employment, and one

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not. Both decisions reflect policy choices by Parliament. Had it wanted to extend the exception more widely, it could have so provided. I must assume that it has drawn the line in the way that served the particular purposes of this legislation. Further, it has chosen to do so in that way, even though the result is that, in certain particular cases, arrangements which the individual employee fully wishes to enter, and does not personally regard as objectionable, cannot be taken into account when calculating whether they have received the minimum wage. Some may regard that as paternalistic, others as progressive, but it is for Parliament to decide.

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82. For all the foregoing reasons, Mr Siddall's submissions by reference to the tax legislation do not, therefore, persuade me to conclude that regulation 12(1)(e) applies to the facts of this case, nor that what was said in **LES** was wrong. It follows therefore that what was said in that case was not manifestly wrong. It was not *per incuriam*. Even if that part of the decision was *obiter*, I still agree with it; so, I do not need to pronounce on whether it was.

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83. I conclude that the Club's additional Ground for upholding the Tribunal's decision fails.

The Cross-Appeal

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The Grounds

84. I turn to the three Grounds set out in the cross-appeal, which I am considering, as I have explained, on the basis that they do properly amount to a cross-appeal and/or should in the alternative be treated as further Grounds for resisting the Appeal.

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85. Ground 1 contends that the Tribunal erred in finding that these deductions were for the use and benefit of the Club. The relevant passage in its Reasons is, in full, as follows.

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> **"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**

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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.

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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."

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86. Ground 2 contends that the Tribunal erred in its approach to whether the arrangement in this case amounted to "any other event" for the purposes of the regulation 12(2)(a) exception. On this point its full reasoning is as follows.

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"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."

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87. Ground 3 contends that the Tribunal erred in concluding that this arrangement did not amount to a loan for the purposes of regulation 12(2)(b). On this point its full reasoning was as follows.

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"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."

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88. Further arguments in the original cross-appeal, to the effect that the Tribunal overlooked a material shift between the wording of the old and new Regulations, enabling earlier authority to be distinguished on that basis, were not pursued by Mr Siddall.

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Ground 1 – the Arguments

89. In relation to Ground 1 Mr Siddall submitted that the approach to the meaning of "the employer's own use and benefit" in **LES** need not be followed, again because it formed, he said, an element of an *obiter* part of that decision. I should, instead, he said, follow the approach of Wilson LJ (as he then was) in **LES**, who considered (see paragraphs 47, 48 and 52 in particular) that the natural conclusion was that the utilities payments deductions in that case were neither for the use nor for the benefit of the employer.

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90. Further, Mr Siddall argued that, because the season cards were for the employees' family members, the situation in this case should have been regarded as akin to one in which there was a trust, and/or in which the employer is collecting a trade union subscription or charitable donation on the worker's behalf. The Tribunal should therefore, he argued, have found that the Club had no benefit or interest in these monies, and they were not for its use. Its decision on this point was, he submitted, perverse.

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91. Mr Rowell submitted that the Tribunal had correctly found – relying on the evidence of the Respondent's Chief Financial Officer – that the monies deducted were paid into, or remained in, the Club's bank account, and were available for its general use as it saw fit. There was not even, as there was in **LES**, a related obligation of the employer to make payments to a third party. The Club also benefited, because it thereby secured payments for the season cards. Applying the approach of the majority in **LES** (which, he said, I was bound to do, and which was in any case

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correct), the fact that the deductions also benefitted the employees was irrelevant. The Tribunal was therefore right to conclude that these deductions were, in the relevant sense, for the use and benefit of the Club, and that regulation 12(1)(e) was engaged.

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Ground 1 – Discussion and Conclusions

92. I start by reviewing the relevant passages in **LES**. In the EAT Elias P said:

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> **"43. I do not agree with Mr Bowers that this concept is a matter of fact for the Tribunal. It seems to me that the concept "the use and benefit of the employer" is a much more precise one. I think its meaning can be gleaned from the words in brackets in regulation 32(1)(b) (surprisingly not replicated in Section 34 but I am satisfied that the meaning must be the same in each section) namely "and accordingly not attributable to any amount paid or payable by the employer to any other person on behalf of the worker". In other words, if the money is deducted by the employer with an obligation to account to a third party on behalf of the worker, then it is not deducted for the employer's own use and benefit. In those circumstances, it is imprinted with a trust and the employer has the obligation to pay in accordance with that trust, namely, to pay specifically to the third party. Here the worker has no liability to the utility companies at all. That is a liability of the Company. (In fact it is an associated company, but it is agreed that nothing turns on that.)"**

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93. In the Court of Appeal Buxton LJ rejected an argument that the regulations required the deduction to be for the *sole* benefit of the employer (paragraph 17). He upheld the analysis that the employer, but not the employees, had a contractual obligation to the utility companies. The arrangement benefitted the employer by helping it to discharge that obligation (paragraph 24). This was so even if it also had a trust obligation to the employees in this regard (paragraph 25).

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94. Buxton LJ continued:

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> **"26. 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 the benefit of arrangements made by the employer, and the legislator has done that by drafting the Regulations in specific and limited terms."**

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95. I respectfully agree with the reasoning of Elias P and Buxton LJ, in preference to that of Wilson LJ. I therefore do not need to consider whether their reasoning was *obiter*.

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96. Applying that approach, I can detect no error in the present Tribunal's reasoning on this point. The findings of fact were plainly properly made, and the Tribunal's approach was entirely in line with the guidance in **LES**. Mr Siddall's arguments drawing on the fact that the season tickets were for the use of family members do not get off the ground. The Memo signed by each

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employee (of which there were examples in the Tribunal's bundle and mine) plainly bespeaks an agreement between the employee and the Club for the purchase of a season ticket. The fact that it was for the use of a third party does not alter that. There is no mention in the Memo of who

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will use the ticket, and indeed it is referred to as "my season ticket".

97. It was not suggested that the Club was expected to pay anything to anyone else, or have

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any dealings with the card user; nor that there was any evidence about whether, in a given case, there were any obligations as between the employee and the family member. The analogies contended for by Mr Siddall cannot be sustained. The Tribunal properly found that the Club benefited: this arrangement was the mechanism by which it got paid for the season cards. It

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properly found that the Club had no obligation to give any moneys deducted to a third party, or to spend them in any particular way. I agree with Mr Rowell that this was in fact an even more compelling case of a deduction for the employer's use and benefit than the facts of **LES**.

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98. This Ground therefore fails.

Ground 2

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99. There are two prior authorities of relevance to this Ground. The first is **LES**, in which Elias P said this:

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"The Meaning of "Event"

"46. Mr Bowers nevertheless contends that even if the payment falls into those categories, two of the specific exceptions apply. First, in relation to both deductions and payments, he relies upon Regs 33(a) and 35(a) and, in particular, submits that the deduction (or payment as the case may be) is in respect of "any other event in respect of which he…is contractually liable". Mr Bowers submits that the contractual obligation to make the payment in respect of utilities to the Company is such an event within the meaning of that section.

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47. Mr Clarke 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: for example, the exception relating to deductions on account of an advance under an agreement for a loan in reg. 33(b) or in relation to payments in the exception provided by 35(e).

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48. 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."

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100. Mr Siddall submitted that Elias P had plainly found that the obligation of the employer in that case to pay utility bills was not "any other event", and that the construction advanced by the employer was too wide. But, beyond that, the extent to which HMRC's argument was accepted in that case was, he submitted, unclear.

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101. The second authority is **Commissioners of HMRC v Lorne Stewart plc** [2015] ICR 708. In that case the employee's resignation triggered a provision entitling the employer to deduct part of the costs of a training course from her final pay. The EAT (HHJ Shanks) upheld a finding that this was a deduction in respect of "conduct of the worker or any other event", and so was an exempt deduction. Mr Siddall relied on the following passage from the decision of the EAT (which begins with a comment on the foregoing passage in **LES**):

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"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.

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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

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> **voluntary resignation as here, as opposed to a dismissal for redundancy, for example, would come within that concept."**

102. Mr Siddall submitted that the EAT in that case therefore did not seek to resolve the issue identified in paragraph 9, as paragraph 10 indicated that the matter proceeded by concession in that case. He then relied on the holding, in paragraph 12, that "any other event" must 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."

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103. Mr Siddall continued that, in the present case, the Tribunal erred by not addressing the "any other event" issue, by finding that the employees were not liable for these payments, and by wrongly assuming that any contractual liability must, for these purposes, derive from the contract of employment. He submitted that the Tribunal should have concluded that the request for a season card *was* "any other event" and, applying the guidance in **Lorne Stewart**, that it arose from the conduct of the employee.

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104. In oral submissions Mr Siddall also referred to the provision in section 6 **Interpretation Act 1978** that in any Act, unless the contrary appears, "words in the singular include the plural and words in the plural include the singular". Accordingly "any other event" should be construed as embracing a series of events.

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105. Mr Rowell argued that, even if the Tribunal should have found that the Memos made the employees contractually liable, it did not follow that an arrangement to pay for a long-term service should be regarded as an "event". He argued that, in light of what was said in **LES** and **Lorne Stewart**, the reference here must be to a specific event *akin to conduct*, such as a specific instance of negligence or bad workmanship. Further, as Elias P had pointed out, extending this exception to any contractual obligation would make the exceptions at regulations 12(2)(b) and

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(e) unnecessary, and defeat the restriction of the exception at (e) to cases involving payments. He submitted that the Tribunal's conclusion on this exception was not only permissible, but the only possible correct conclusion.

106. My conclusions on this Ground are as follows. First, I agree with Mr Siddall that the Tribunal did err in concluding that the employees had no contractual obligation to the Club in this regard. The natural reading of the Memo is that the employee not merely agrees to the deduction of the instalments, but commits to paying them. There is certainly a commitment that, if the employment ends before the last instalment has been paid, the outstanding balance will be paid, or the ticket returned. The Memo records that the employee agrees to the terms that it contains. It bespeaks an intention to create legal relations.

107. But what of the point of construction of regulation 12(2)(a)? Without the benefit of any prior authority I would draw the following conclusions about that.

108. First, there must be "conduct, or any other event", in respect of which the worker is contractually liable. There is therefore, on the one hand the occurrence of the conduct or other event, and on the other, a contractual provision rendering the worker liable to suffer a deduction or make payment, which provision is *triggered by* the conduct or other event. "Conduct" obviously cannot itself be a contractual provision, and nor should "any other event" be construed as embracing the mere existence, or making, of a contractual provision or obligation. That is for at least two reasons. First, if Parliament had wanted to provide that the mere existence of a contractual obligation was sufficient, it could and would have said so. It could, indeed, in that case, have dispensed with the reference to "conduct, or any other event" altogether. Secondly, as Mr Rowell correctly submits, such an interpretation would make the provisions in regulations

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12(2)(b) and (e) and, I would add, arguably (d) as well, otiose. Their existence confirms that Parliament cannot have intended 12(2)(a) to be so wide.

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109. Further, without the benefit of any prior authority to guide me, I would conclude that the natural meaning of "event" is that it refers to a discrete or identifiable occurrence, rather than merely to an ongoing state of affairs or arrangement. The **Interpretation Act** should not be treating as indicating that this phrase can be read as if Parliament had stated "event or events".

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The very choice of the particular word "event" indicates otherwise.

110. Without the benefit of authority, I would therefore have concluded that the mere

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existence, or making, of a contract, or contractual commitment, which, in and of itself, creates a financial commitment on the part of the employee, is not sufficient. Rather, there must be some discrete episode or occurrence of conduct or some other event, which triggers an obligation to pay, or the right for the employer to make the deduction, under an existing contractual provision.

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111. Turning to the authorities, I am inclined to think that the correct reading of paragraphs 45 to 47 of Elias P's decision in **LES** is that in paragraph 47 he accepted the *whole* of Mr Clarke's

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submission as described in paragraph 46. I think that, if he only meant to accept the last part of that submission, he would have said so. But in any event, nothing in that decision contradicts my construction of this provision.

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112. Nor do I agree with Mr Siddall that paragraph 10 in **Lorne Stewart** merely records a concession on a point about the need for a single event, on which HHJ Shanks took no view. The Judge's use of the word "accepts", rather, tends to suggest that the Judge considered that Mr

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Hersey has signed up to a construction that is in fact correct.

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113. Further, in paragraph 12, HHJ Shanks said this:

> **"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."**

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114. Pausing there, the analysis in **Lorne** establishes that there must be either conduct, in the sense of misconduct, or some other event involving voluntary conduct for which the worker is responsible. That is consistent with my untutored analysis, and adds a further element to it.

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115. Putting it all together, I conclude that regulation 12(2)(a) is not so wide as to apply to the existence, or making, of any contract or contractual obligation. Nor does it apply where there is merely an ongoing state of affairs or arrangement. It cannot apply unless there is an occurrence of conduct on the part of the employee amounting to misconduct, or the occurrence of a particular event involving voluntary conduct for which the employee is responsible, and where, in either case, the conduct triggers, under an existing contractual provision, the obligation of the employee to make the payment in question, or the right of the employer to make the deduction in question.

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116. As to whether the conduct or other event must itself relate to the employment, I do not have to decide. That is because it follows from this analysis that, although the Tribunal in this case was wrong to conclude that the arrangement did not have contractual force, neither the request for the season card, nor its provision, nor the conclusion of the Memo, nor the existence of the ongoing obligations which it created, could have been properly construed as "conduct, or any other event" within the scope of regulation 12(2)(a). The Tribunal's conclusion, that regulation 12(2)(a) did not apply, was therefore correct.

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117. Ground 2 therefore fails.

Ground 3

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118. As to Ground 3, concerning whether this arrangement related to a loan within regulation 12(1)(b), in **LES**, at paragraph 30, Elias P said this:

> **"30. I will deal with the relevant issues in turn. In interpreting these Regulations, both Counsel accept that I should adopt a purposive approach to the construction of the provisions. Both rely on the well-known dictum of Lord Diplock in Jones and Hudson v The Secretary of State for Social Services [1972] 2 WLR 210, a passage which was, in fact, referred to in the decision of the Employment Tribunal. Lord Diplock said this (at page 212):**
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> **'To find out the meaning of particular provisions of 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 the words and phrases used in different contexts…should be subordinated to this purposive approach'."**

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119. The present Tribunal referred to this guidance, but, said Mr Siddall, it then erred in adopting an unduly meticulous linguistic analysis of the meaning of "loan". It wrongly assumed that a loan could only involve the provision or money and/or could not apply to the provision of credit. It also wrongly overlooked that part of the wording of the "Memo" which provided for the return of the card in the event of full payment not being made.

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120. Mr Rowell argued that the Tribunal's reasoning was sound, and honoured the purposive approach, by considering the substance of the arrangement and whether this looked like a loan. Further, he did not agree that the Tribunal should have found that there was a loan of the season ticket itself, merely because it might have to be returned if the employment ended before the final instalment had been paid. This was not, he said, a loan of anything at all, but a straightforward arrangement for the purchase of goods or services by instalments, with the seller having rights akin to a lien over the subject matter pending completion of full payment.

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121. These are my conclusions on this Ground.

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122. First, I do not think the Tribunal engaged in an unduly meticulous linguistic analysis. Parliament has, in terms, confined this exception to loans and advances of wages. It does not apply to other types of transaction, whatever economic similarities they may have to a loan or advance. The Tribunal therefore had to consider whether the deductions related to something that could, specifically, properly be described as a loan. In my judgment it properly concluded that they could not. My reasons are as follows.

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123. The agreement reflected in the Memo appears to me to be a straightforward agreement to pay for a season card or ticket by instalments. There is no express reference to a loan and nothing else in the language suggestive of a loan together with an agreement to repay that loan by instalments. Nor is there any reason to infer a loan. Indeed, the language suggests otherwise. The document states that if the employment ends before the final payment has been made, any outstanding monies "for the season ticket" must be paid at that point, rather than, say any balance of the loan, or something to that effect.

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124. Nor do I think that the argument that the Tribunal should have considered that this exclusion applied, on the basis that there was a loan of the season ticket itself, is sustainable. I do not in fact see how this exception could apply in respect of the loan of an item or chattel, rather than of money. The deductions or payments to which it relates must be "on account of an advance" under a loan agreement, or "an advance of wages". That must surely mean that, in either case, cash has been advanced, and the deduction or payment is then being made with a view to recouping that cash advance or part of it. It is difficult to see how one could apply this language to a loan of a thing, rather than cash. Further, this provision is surely the counterpart of regulation 10(a), which lists payments by way of an advance under a loan agreement, or of wages, among those which do not form part of remuneration. Where there is a cash advance, the two

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provisions balance out, consistently with the policy of the legislation. The repayments do not reduce pay, but the employee has had the benefit of the cash up front.

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125. In any event, in this case, it seems to me, the employee is neither purchasing, nor borrowing, the physical ticket or card. What they are getting, for their family member, is the right to attend games. The ticket or card is merely the evidence that they have that right. The option to return the card, instead of paying the final instalments, is a way of ensuring that there

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is no attempt to attend any more games after payments have stopped. It is surely not because the Club attaches intrinsic value to the plastic itself.

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126. For that reason, I also do not think Mr Rowell's lien analogy is quite right. But, in any event, what I have to decide is whether the Tribunal was right to conclude that this exception did not apply. For all the reasons I have given, I conclude that it was right about that.

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127. Accordingly, the cross-appeal is dismissed.

Post-Hearing Development

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128. This appeal was heard on 23 January 2020. I reserved my Decision. On 17 February 2020 the EAT received additional written submissions (and attachments) from Mr Siddall on behalf the Club, containing an application to be permitted to table those submissions, and for

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them to be taken into account in my decision. I gave directions permitting HMRC to table written submissions as to whether I should entertain this post-hearing submission, and, in any event, as to the substance of what it raised. A further submission addressing both points was duly received from Mr Rowell.

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129. What prompted the additional submission was the Secretary of State, on 11 February 2020, issuing a direction under section 19A **National Minimum Wage Act 1998**. That permits the Secretary of State to issue a direction specifying circumstances in which a notice of underpayment is not to impose a requirement to pay a financial penalty. This particular direction applies where five conditions are fulfilled, including in certain cases relating to purchases by the worker of goods and services from the employer, where the worker has consented to the deduction and received the goods or services in question. It applies to notices of underpayment issued after the date of the direction. I will call it "the Direction".

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130. In short, the nub of Mr Siddall's additional submissions, in substance, was that the facts of this case fell within the scope of these conditions, and that the Direction, and the accompanying guidance, reinforced his submissions on the interpretation of the **2015 Regulations**, and the powerful reasons why HMRC's interpretation of them should be rejected.

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131. Mr Rowell, in reply, accepted, as such, that I had the power to consider these further written submissions. Given that, when they were tabled, matters had not yet even reached the point of a draft decision being sent to the representatives prior to handing down, still less an Order disposing of the appeal being made, that must be right.

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132. However, Mr Rowell also submitted that I should not, in this case, exercise the power, as that should only be done exceptionally, once a hearing has concluded; and there were, he submitted, no sufficiently exceptional grounds to do so in this case.

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133. Mr Siddall referred to **Bass Leisure Limited v Thomas** [1994] IRLR 104, in which the EAT itself further reflected on whether a particular issue might have a critical effect on its

decision, immediately after giving an oral decision, but before issuing its order, and decided that it should hear further argument on it. The authorities from the civil jurisdiction to which I was referred by Mr Rowell concern cases in which the Court was invited to reconsider some aspect of its decision after a draft was sent out, but prior to final handing down and the associated order being made. Unsurprisingly, they indicate that it is only on exceptional grounds that an application made at such a stage will be entertained.

134. In this case, no oral decision had been given, nor any draft decision shared with the representatives under embargo, at the point where the application was made. It has also, practically, been difficult for me to judge whether to consider the substance of this submission without – well – considering the substance, at least to some degree. I have therefore done just that, and do not, therefore, think it necessary, on this occasion, to add to the jurisprudence on whether or when such post-hearing, pre-Order applications should or should not be entertained.

135. I turn, then, to the substance. In my judgment, neither the Direction nor the accompanying guidance, affects my foregoing reasoning or conclusions in any respect. That is for the following reasons.

136. First, this development does not involve any change or amendment to the legislation itself, prospective or (which would be highly unusual) retroactive. It concerns enforcement. Even as it relates to enforcement, it concerns only certain cases in which a requirement to pay a *financial penalty* may not be imposed, and even then, only certain cases where the notice of underpayment is served after the date of the Direction, which is plainly not the present case. Further, it can, inherently, only bite at all in a case where an enforcement officer considers that a notice of

A underpayment should be served, because they are of the opinion that the substantive legislation has not been complied with.

B 137. Secondly, as Mr Siddall rightly concedes in his submission, a decision by the Secretary of State – on behalf of the Government – to exercise the power to give this Direction, is an Executive action, which cannot affect the proper interpretation by the Courts (in this case the EAT), of the intention of Parliament in relation to legislation.

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138. Thirdly, in so far as Mr Siddall seeks to argue, as it were, by analogy, that the thinking behind the Direction chimes with the interpretative arguments that he deployed in relation to the

D legislation, I disagree. In particular, Mr Rowell referred to the Government response to the consultation, which preceded this development, which contains a statement of what I might call the social policy objectives of the NMW, and makes it clear that the Government has decided to

E make only limited amendments to the substance of the legislation. I agree with Mr Rowell that, if anything, the Government thinking reflected in this material chimes with the themes of the interpretative approach that he advocated, that I have in my foregoing reasons adopted, and that I consider to be in keeping, in particular, with the reasoning in **<u>LES</u>**.

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<u>Outcome</u>

139. As the appeal has been allowed and the cross-appeal dismissed, the Employment

G Tribunal's decision is quashed.

140. As the only legally correct outcome there can be is that the notices of underpayment in

H question must stand, I will substitute a decision to that effect.