EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108102/2022

Held via Cloud Video Platform (CVP) on 24 and 25 May 2023

Deliberations: 1 and 2 June 2023

Employment Judge D Hoey

Lees of Scotland Ltd	**Claimant** **Represented by:** **Miss Robertson – Counsel [Instructed by Messrs Burness Paull LLP]**
Commissioners for Revenue & Customs	**Respondent** **Represented by:** **Mr Cowan – Counsel [Instructed by Respondent]**

CORRECTED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Enforcement Notice served on the claimant on 22 November 2022 with serial number CFS-1732223 is rescinded for the undernoted reasons.

REASONS

1. The claimant was served with an Enforcement Notice in respect of alleged breach of the minimum wage legislation. The claimant sought rescission of that notice on the ground that the rules as to the national minimum wage had been properly followed and the respondent's interpretation was incorrect. The respondent argued that the claimant's approach fell foul of the legislation.

2. At a case management preliminary hearing the issues had been identified and it was agreed that this hearing be fixed to determine the legal issues arising, with a subsequent remedy hearing being fixed if necessary.

Issues to be determined

3. The issues that were to be determined were:

   a. Whether the deductions made by the claimant under the savings scheme and itemised on payslips as "Holiday Fund" were "for the employer's own use and benefit" and fall to be treated as "reductions" in terms of regulation 12(1) of the National Minimum Wage Regulations 2015; and if the sums were not for the employer's own use and benefit;

   b. Whether the payments made by the claimant to its workers in respect of the funds deducted for the purposes of the savings scheme and itemised on payslips as "Holiday Fund", amount to "additional remuneration" under section 17 of the National Minimum Wage Act 1998 and can be regarded as payments of national minimum wage arrears.

4. The parties had worked together to agree the key facts necessary to determine the issues albeit evidence was heard from Mr Simson (finance director), Ms Lambe (financial controller) and Mr Galbraith (national minimum wage compliance officer) to identify how the system worked in practice and some ancillary matters. The Tribunal was also referred to 533 pages of productions.

Facts

5. From the material before the Tribunal it is possible to make the following findings which were agreed between the parties.

The holiday fund

6. The claimant operated a holiday savings fund (the 'Fund') for the benefit of its employees for more than 30 years.

7. All employees of the claimant were eligible to participate in the Fund.

8. The claimant's purpose in operating the Fund was to provide a benefit to its employees and assist those employees who felt they otherwise were not able to save enough money throughout the year if unassisted.

9. Although the Fund was called a 'holiday savings fund', employees could take their savings out of the Fund at any time throughout the year to spend on whatever they chose. The savings were the wages that had been earned (in respect of which tax and national insurance had been paid).

10. Participation in the Fund was entirely voluntary and at the direction of the employees wishing to participate.

11. Each employee who wished to participate in the Fund was required to complete and sign a Contribution Deduction Sheet. In this Contribution Deduction Sheet, employees directed the claimant to deduct an amount of the relevant employee's choosing from their wages and contribute as the employee's savings to the Fund. The start date required to be a Thursday, which was the normal pay day for the claimant's weekly paid employees. Monthly paid employees were also permitted to participate in the scheme and their contributions were deducted from their monthly salary.

12. Employees were required to give the claimant at least two weeks' notice of their request to participate in the Fund to ensure that the claimant's payroll cut-off deadlines were met. The claimant's payroll cut-off deadline was on a Monday or the Tuesday'. The claimant's payroll run was carried out on a Tuesday, for wages to be paid to employees on the Thursday of that week. However, in practice, the claimant still accepted and actioned employees' requests set out in their Contribution Deduction Sheet, even if less than two weeks' notice was given, provided that the request was made by the claimant's payroll cut-off deadline on the Monday or the Tuesday', for the contributions to be made that Thursday.

13. The Contribution Deduction Sheet included the following provision: "I agree to abide by the rules of the Holiday Fund a copy of which I have received and

read" During the course of its investigation, the respondent requested a copy of the rules of the Holiday Fund. The claimant responded to the request by stating that it was unable to find a copy of the rules. It provided the respondent with a document based upon an employee's and management's recollection of the terms of the rules.

14. Employees could change their level of contribution to the Fund by completing and signing a Contribution Change Sheet. In this Contribution Change Sheet, employees would be required to confirm that the employee wished to change the level of their contribution to the Fund. The employee would also be required to set out the amended level of contribution they wished to make to the Fund, together with the date that they wished such change in contributions to take effect from.

15. Employees could withdraw all or part of their savings in the Fund at any time. To request the withdrawal of their savings, employees were required to complete a Contribution Withdrawal Sheet. In this Contribution Withdrawal Sheet, employees were required to state how much of their savings they wished to withdraw from the Fund and when they wished for such withdrawal to be made. The withdrawal date required to be a Thursday, which was the normal pay day for the claimant's employees. They were required to state whether they wished to stop all contributions from that date or whether they wished to maintain contributions into the Fund. If they wished to maintain contributions, they were required to specify how much they wished to continue to contribute into the Fund.

16. Employees were also required to confirm that they had sufficient savings in the Fund to make the withdrawal. To meet the claimant's payroll cut-off deadlines, employees were required to give the claimant at least two weeks' notice of any request to withdraw their savings from the Fund. However, in practice, the claimant still accepted and actioned such requests even if less than two weeks' notice was given. Provided that an employee's request was made by the claimant's payroll cut-off deadline on the Monday or the Tuesday, the employee would receive their savings from the Fund through payroll on the Thursday of that week.

Administration of holiday fund

17. Employees were required to pass their completed and signed Contribution Deduction Sheets, Contribution Change Sheets and Contribution Withdrawal Sheets to the claimant's Personnel Officer. The Personnel Officer would pass the relevant Sheets to the claimant's Payroll Administrator to administer the requests through payroll. Employees could also pass the relevant Sheets directly on to the claimant's Payroll Administrator or even to the employee's manager".

18. The claimant deducted the requested contributions from the participating employees' net wages through payroll. This deduction was shown on participating employees' payslips as 'Holiday Fund'.

19. The claimant bore all costs associated with administering the Fund Employees were not charged for participating in the Fund, nor were they required to contribute towards any of the costs of administering the Fund.

20. The claimant kept a ledger detailing the contributions deducted from each participating employee's wages and how much each participating employee had contributed and withdrawn from the Fund.

21. Employees could request details of their savings balance within the Fund at any time by contacting the claimant's payroll or finance team.

22. Where an employee requested the withdrawal of their savings from the Fund, the requested withdrawal was paid to that employee through payroll. This payment was shown on the employee's payslip as 'Holiday Fund'.

The claimant's holiday savings fund

23. Any amounts deducted by the claimant from its employees' wages for the purposes of the Fund was entirely upon the direction of the claimant's employees. The claimant's employees were in complete control of the amount that the claimant deducted from the employees' wages, when such deductions were made and when such deductions ended. Further, there was no restriction on the ability of the claimant's employees to vary the level of

deductions. As a consequence, it was not unusual for the level of deductions made from an employee's wages to change over time.

24. With the exception of the payments made on 17 December 2020, withdrawals from the Fund were entirely under the direction of the claimant's employees. Subject to not being entitled to withdraw in excess of their savings, the claimant's employees were in complete control of the level of withdrawals and when such withdrawals were made. There was no requirement that any withdrawal made by an employee required to be at a level which corresponded to multiples of the weekly or monthly deductions made from the employee's wages. As a consequence, it was not unusual for withdrawals to be made at levels which did not correspond to multiples of the participating employee's weekly or monthly deductions.

25. In respect of those employees named in the Notice of Underpayment dated 22 November 2022, any deductions made from their wages for the purposes of the Holiday Fund during a particular pay reference period resulted in the amounts actually paid direct to those employees during that pay reference period falling below the rates required by the national minimum wage. This is subject to the amount of any withdrawals made by employees from the Holiday Fund during that same pay reference period. The balance of their wages due during that pay reference period was contributed, at the employees' direction, into the Holiday Fund. The ledger showed, for weekly paid employees, the amount(s) deducted from each participating employee's wages and the amounts withdrawn from the Holiday Fund in each week, and the balance remaining. For the avoidance of doubt, the claimant's agreement in respect of this matter is without prejudice to its arguments that the deductions do not fall to be regarded as reductions for the purposes of national minimum wage legislation, and that the subsequent payments to the employees of the amounts the employees had withdrawn from the Holiday Fund can be regarded as payments of national minimum wage arrears.

Administration of holiday fund

26. The contributions made to the Fund were held within the claimant's business current account. They formed part of the total funds held by the claimant in that account. On the face of the account, the contributions were indistinguishable from the other funds held in the account. However, the claimant kept a detailed and up to date ledger for each employee setting out the amounts deducted, and the amounts withdrawn from the Holiday Fund and the balance remaining.

27. The claimant had a contractual obligation to pay to the participating employees their savings from the Fund upon the relevant employee's request.

28. Neither the claimant nor the participating employees intended at the time that they were made that the participating employees' withdrawals from the Fund were to be treated as payments of national minimum wage arrears, as the claimant had not considered there to have been a breach of the national minimum wage regulations. The payments made to the participating employees of the amounts that they had withdrawn from the Holiday Fund were not uplifted to reflect increases in national minimum wage since the pay reference periods in which the deductions were made nor was there any attempt to relate the payments to any particular pay reference periods in which the deductions were made. The participating employees were simply paid the sums which were deducted from their wages upon the employees' direction and contributed to the Holiday Fund, which they had subsequently requested to withdraw from the Holiday Fund.

Closure of the Fund

29. On 24 January 2020, the claimant's HR and Finance team sent a memo to all employees of the claimant advising them that the claimant would stop collecting any contributions to the Fund with immediate effect. The reason given by the claimant for this was that HMRC had advised the claimant that the Fund was no longer compliant with HMRC's regulations.

30. The memo stated: "For those with funds held by Lees, we will continue to pay these back as and when you wish, until 31 December 2020.Please communicate your withdrawal in the normal way"

31. On 17 December 2020, the remaining savings within the Fund were paid to those participating employees who had wished to keep their savings in the Fund after the claimant's memo of 24 January 2020. After 17 December 2020, no savings of the claimant's employees remained in the Fund.

32. As before, payments made from the Fund subsequent to 24 January 2020 were shown on the employees' payslips as 'Holiday Fund'. It continued to be the case that, at the time that they were made, neither the claimant nor the participating employees intended that these payments were to be treated as payments of national minimum wage arrears as the claimant had not considered there to have been a breach of the national minimum wage regulations.

33. The payments of the amounts withdrawn from the Fund by participating employees were not uplifted to reflect increases in national minimum wage since the pay reference periods in which the deductions were made nor was there any attempt to relate the payments to any particular pay reference periods in which the deductions were made. The participating employees were simply paid the sums which had been deducted from their wages and contributed to the Fund on their behalf by the claimant and which they had requested to withdraw until 17 December2020, after which they were paid any sums which had previously been deducted from their wages and contributed to the Fund and not subsequently withdrawn.

34. The claimant's reason for continuing the Fund until 31 December 2020 was to enable the participating employees to continue to benefit from having their savings in the Fund if they wished to do so.

Notice of underpayment and appeal

35. On 22 November 2022, Mr Simson, Finance Director of the claimant received an email from Mr Galbraith, NMW Compliance Officer, which enclosed a Notice of Underpayment under Section 19 of the National Minimum Wage Act 1998.

36. The claimant submitted an appeal to the Employment Tribunal (Scotland) on 16 December 2022 against the Notice of Underpayment being issued.

Resolution of the issues

37. Given the way in which the case was presented it is appropriate to deal with each issue in turn, considering the legal issues, submissions and deliberation and decision.

Law in relation to the first issue: deduction for employer's use or benefit?

38. This case relates to two narrow issues in connection with interpretation and practical application of the national minimum wage law within the UK. It relates to an issue that has limited relevant authority (and no direct authority), but it is a point of important legal and practical principle. If the first issue was interpreted in the claimant's favour the second issue would not be relevant.

39. The principal statutory enactment is the National Minimum Wage Act 1998 which sets out the legal principles in this area. That measure is expressly to be subject to secondary legislation which was updated (and consolidated) by the National Minimum Wage Regulations 2015 which provide important principles and detail to assist in calculating the relevant sums to be taken into account (and not taken into account) in assessing whether the worker has received the minimum wage. The general scheme is that workers are to receive a rate for each hour worked with the rules setting out how the hourly rate is calculated, including which sums are to be included and which are to be excluded. It is a social measure to protect workers.

40. The parties had agreed that a number of general points can be made regarding the law in this area. One of which was that a purposive approach should be adopted to the construction of the legislation - **Revenue and Customs Commissioners v Leisure Employment Services Ltd** [2006] ICR 1094 at paragraph 30. The policy objective is expressed by Lady Justice Smith in **Leisure Employment Services Ltd v Commissioners for HM Revenue & Customs** [2007] IRLR 450 at paragraph 36 where she said that

the policy is to ensure the statutory minimum wage is properly secured. The purpose of any deduction should be obvious "*on the face of the transaction*".

41. Judge Auerbach (in the Employment Appeal Tribunal) in the **Revenue and Customs v Middlesborough FC** 2020 ICR 1404 at paragraph 80 observed, in the context of the purchase of goods and services from the employer: '*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'*.

42. The primary policy objective of the legislation is to provide protection to low-paid workers by avoiding exploitation by employers who, in the absence of legislation, could undercut competitors by paying unacceptably low wages.

43. It is also the case that to achieve its policy objective, 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" – **Leisure Employment** *ibid* at paragraph 57 in the Employment Appeal Tribunal.

44. Further. when applying the legislation, it is important to recognise that the "*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*". With that in mind, "*[b]road 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 thought necessary*." – **Leisure Employment Services Ltd** Ibid, per Buxton LJ at paragraph 14.

45. The legislation has been drafted "*in specific and limited terms*" in order to avoid "*endless debate about the general equity and the benefit of the arrangements made by the employer*" – **Leisure Employment**, per Buxton LJ at paragraph 26.

46. Workers (and employers) are not allowed to contract out of the legislation – section 49 of the 1998 Act and where possible the legislation envisages that

workers ought to be able to determine for themselves whether they are being paid less than minimum wage rates. Thus section 10 of the 1998 Act provides workers with the right to access "relevant records" in the event that they have reasonable grounds to believe that they are being underpaid. "Relevant records" is defined as meaning "such parts of, or such extracts from, any records as are relevant to establishing whether or not the worker has, for any pay reference period to which the records relate, been remunerated by the employer at a rate which is at least equal to the national minimum wage".

47. The first key principle in this case that requires to be considered relates to how the sums an employer takes from wages that would otherwise be paid to the worker are to be treated (reductions). The Regulations explain how different sums are to be treated.

48. Regulation 8 provides that a worker's "remuneration in the pay reference 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".

49. Regulation 9 sets out the payments and amounts which are to be treated as payments by the employer to the worker as respects the pay reference period. It also deals with the timing of payments. In general, payments are treated as being payments by the employer to the worker in the pay reference period in which they are made [regulation 9(1)(a)], or in the following pay reference period [regulation 9(1)(b)]. Regulation 9 does not provide for payments being treated as payments in earlier pay reference periods unless the requirements in paragraph (2) are met.

50. Regulation 12 is headed "Deductions or payments for the employer's own use and benefit". The parties agreed that to determine the first issue, this was the only relevant provision that the Tribunal should consider with regard to the first issue.

51. That regulation states that "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." There are then some express exceptions (ie situations that would otherwise amount to a reduction). The parties agreed that none of the exceptions applied in this case and the only issue was whether or not the sums in question fell within the ambit of regulation 12(1) (that is, whether the sum amounted to a reduction or not, being a deduction for the employer's own use and benefit). If the sum is to be treated as a reduction this means the sum is not to be included in the total sums paid for the purposes of calculating whether or not the worker received the national minimum wage.

52. Guidance as to the meaning of "for the employer's own use and benefit" is provided by the Employment Appeal Tribunal and Court of Appeal in the **Leisure Employment** case, and by the Employment Appeal Tribunal in the **Middlesbrough** case. Whilst the **Leisure Employment** case involved consideration of the National Minimum Wage Regulations 1999, the 2015 Regulations was consolidating legislation, and was not intended to change the effect of the prior regulations (**Royal Mencap Society v Tomlinson-Blake** [2021] ICR 758 per Lady Arden at paragraph 10)

53. The **Leisure Employment** case concerned workers at a holiday resort who lived in accommodation provided by the employer. The workers agreed that utilities would be supplied to them at a subsidised price of £6 per fortnight. The £6 per fortnight was deducted from their wages and took them below the minimum wage (if the sum was to be treated as a reduction). One of the issues in the case was whether the deductions were "for the employer's own use and benefit" in terms of the predecessor legislation (which was not substantively changed when the law was consolidated).

54. The Tribunal considered the arrangements to be for the "mutual benefit of the worker and the employer," and rescinded the enforcement notices.

55. The Employment Appeal Tribunal, President Elias (as he then was, presiding) allowed the employer's appeal. That case dealt with a number of issues (not all of which are relevant to the current case) and should be viewed in that context. Elias P sets out the law in an exemplary way at paragraphs 11 to 20 (expertly summarising the complex regulations and calculations).

56. One of the important issues was whether the sums that were deducted (the £6) were "for the employer's use and benefit". The case dealt with the provisions around living accommodation which are complex and carefully set out (to ensure workers are protected where employers seek to deduct sums from wages to cover accommodation costs). In that case Elias P found that the sums in question were properly in respect of the provision of living accommodation which dealt with one of the key issues in that case.

57. The relevant issue for the current case was whether or not the deduction was made for "the employer's use and benefit" or which the employer was entitled to retain for his own use and benefit. At paragraph 43 Elias P noted that the concept of being for the employer's own use and benefit is a precise concept, the meaning of which can be gleaned from the words used. So regarded if the sum was deducted with an obligation to account to a third party the deduction could not in any sense be for the employer's own use and benefit. On the facts he found that there was no such obligation, and the sums were for the employer's own use and benefit.

58. At paragraph 57 Elias P expressed sympathy for the company given the arrangement did not appear to be unreasonable and the company could have left it to the workers to pay for the utilities themselves and the sums in question appeared to be reasonable. However, he noted that there was no way to regulate the issue (and protect against unscrupulous employers). He noted that: *"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*."

59. In the Court of Appeal made it clear that in determining this issue the fact the deduction might benefit the worker did not mean the deduction could not be for the use and benefit of the employer.

60. Applying that approach, the court held that the employer was the debtor of the utility companies, and that the £6 payments enabled it to discharge part of its debt. The deductions were therefore held to be for the use and benefit of the employer.

61. Buxton LJ stated it was not relevant that the worker had free choice as to whether to apply for the accommodation (i.e. the event leading up to the deduction) – the legislation considered only that the deduction had been made for living accommodation.

62. Buxton LJ rejected that the regulations required any deduction to be entirely for the employer's use and benefit to be caught. There is no need for it to be for the sole benefit of the employer.

63. At paragraph 26, Buxton LJ stated: "…*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… The legislator wanted toa void endless debate about the general equity and benefit arrangements made by the employer and the legislator has done that by drafting the Regulations in specific and limited terms*".

64. Smith LJ, whilst accepting that the overall arrangements were for the mutual benefit of employer and worker, stated that "*the focus of the statutory provision is on the deduction or retention of part of the wages and not on the overall arrangement*" – see paragraph 35.

65. Smith LJ found that the deductions were for the employer's use and benefit because it was the employer who was liable to pay the suppler. The employer was liable to pay the supplier's bill and the employee could not have been liable to the supplier. While the benefits were mutual (since the employees received a favourable rate) the focus of the statutory provision is on the deduction and not the overall arrangement. The only party who benefited was the employer since otherwise the employer would have had to pay the full amount. That was to be contrasted with deductions made at the employee's behalf, perhaps to a trade union or charity where the employer would have no interest in whether the payment was made and was done by the employer only as a matter of administrative convenience.

66. Smith LJ also agreed that the regulations applied once an employee had opted to take the accommodation and that this was the case even though it was being provided at a "bargain rate". The fact that an employer may be deterred from doing so and just requiring the employee to pay directly for the utilities provided (which would cost the employee more) does not alter matters as "*The intention was to have a clear rule that all charges made in respect of the provision of accommodation should be taken into account, whether beneficial or not*".

67. At paragraph 36 she stated: "*Permitted deductions should be clearly defined and recognisable. The question whether a deduction is or is not permitted should not be a matter of calculations; it should not be dependent upon the assessment of the value of a benefit derived from the provision of a service for which a deduction is made; nor should it be reliant on the inferring of a trust. It should be obvious on the face of the transaction*."

68. Wilson LJ in the minority on the point did not find that the deduction of £6 flat fee for heat and light was properly for the "use and benefit" on these facts by virtue of a natural construction of the phrase and facts. He found the argument that the deductions were for the employer's use and benefit to be "too Jesuitical" and opined that the natural conclusion, which he said every reasonable worker would concede, was that the deductions were neither for the use nor benefit of the employer.

69. In the **Middlesbrough** case, the deductions were made under arrangements by which it was agreed that the costs of season tickets for family members would be met by weekly instalments. Again in that case the Judge had to determine some issues that did not apply in the present case but one issue which was determined was whether or not the sums deducted from the worker's wages to pay for a season ticket amounted to deductions for the employer's use and benefit (even although the workers received a season ticket for the club as a result of the deductions).

70. The Tribunal concluded that the deductions were for the use and benefit of the club. It did so on the basis that the deducted sums were paid into the

club's bank account, that they were not used to discharge any particular debt to a third party, and that they were not paid into a separate account but were generally available for the club to use as it saw fit. The Tribunal also held that as the deducted wages could be used to pay any debts owed by it, the club not only had use of the money but also that it benefited from the use of the money.

71. On appeal the Employment Appeal Tribunal held that the Tribunal was right to conclude that the deductions were for the use and benefit of the club. It was satisfied that the tribunal had properly found that the club benefited on the basis that the arrangement was the mechanism by which it got paid for the season tickets.

72. In short, weekly instalments were deducted from wages of the worker which allowed the family member to make use of a season ticket. None of the workers were obliged to buy season cards or make use of the scheme. Each worker entered into individual arrangements.

73. Having noted that there was no sole benefit requirement, the Employment Appeal Tribunal concluded that on the facts the Tribunal was correct to find that the "club benefited" as "this arrangement was the mechanism by which it got paid for season cards. It properly found that the club had no obligation to give any monies deducted to a third party or spend them in any particular way. Auerbach J said this was in fact an even more compelling case of a deduction for the employer's use and benefit than the facts of **Leisure Employment Services Limited**.

74. There were a number of other complex issues determined in that case which do not apply to the current case.

75. There were no other authorities identified as relevant to the current issue.

Submissions

76. Both parties had provided detailed written submissions and had the ability to comment upon each other's submissions and supplement their submissions

as necessary with responses given to questions from the Tribunal. Each of the submissions was fully taken into account even although not fully reproduced in this judgment.

Claimant's submissions in relation to the first issue

77. The claimant's submission was essentially that the Tribunal should focus on what precisely the reason for the deduction was and ask whether or not it was for the employer's use and benefit, rather than focussing upon the end result. The context of the deduction should be carefully considered. Counsel noted that there was no authority in this area since both cases deal with a different point – one where the worker received the benefit of accommodation and utilities (which were paid via an agreement between the employer and supplier) and one where the employer received funds for its own benefit (issuing a season ticket which it would otherwise have sold). The fact the funds were available to be used by the employer was not material to the key issue which was that the employer benefited from the deduction in both cases. Subjective intention was irrelevant, but the Tribunal should look at the objective intention and what was intended.

78. The purpose of the deduction and the person who would benefit from the deduction should be objectively considered. On the facts the sums were clearly contractually required to be repaid on demand and the deduction was not objectively for the employer's use or benefit.

Respondent's submissions in relation to the first issue

79. Counsel for the respondent observed that the deducted funds were not paid or transferred into a separate bank account or holding of funds. They were simply retained in the claimant's business current account. The deducted funds formed part of the totality of the funds held in the account. There was no suggestion that the claimant was under any legal limitation on how it used the funds in its account. As a matter of law, it was free to use those funds, including the deducted funds, as it saw fit. On that basis, the deductions were for the claimant's "own use and benefit".

80. In addition, a small amount of interest on the pooled funds was gained by the claimant. Whilst the interest attributable to the deducted funds may have been very modest, the presence of those funds in its current account represented a benefit to the claimant. The deducted funds also provided the claimant with additional funds to deal with any unforeseen financial difficulties which it may have encountered. Whilst Mr Stimson insisted that the holiday funds were "ring-fenced", he eventually accepted that he could not rule out the possibility of the funds being used.

81. Counsel for the respondent argued that the question of whether a deduction was for an employer's own use and benefit could not be answered without knowing the running totals of the funds held in the employer's bank account and the deducted funds during the whole of the period in which the deduction was held in the bank account if the claimant's position was to be preferred. That information would be required because it would only be if the total funds held in the account were, at all times, in excess of the total of the deducted funds that it could be said that the deduction had never been used. If, at any time, the total of the deducted funds fell below the total funds then, on the claimant's approach, it could no longer be said that the deduction had not been used. Further, the claimant's approach would require this exercise to be undertaken for each and every deduction during the respective periods in which those deductions were held in the employer's account. In the circumstances, the claimant's approach would risk enforcement of the legislation becoming unworkable.

82. Further, it would be wholly contrary to the intention of the legislation that employees should be able to determine for themselves whether they are being paid less than minimum rates. It would also mean that under section 10 of the 1998 Act, employees would be entitled to access to their employer's bank records as such records would be necessary to establish whether they were being underpaid.

83. In any event, it was submitted that the claimant's approach ignores the reality of bank accounts. When funds are deposited into an account, they become indistinguishable from the other funds held in the account. It makes no sense

therefore to speak of specific funds, such as the deducted funds, being used or not used. What is used are the funds in the account, of which the deducted funds form part.

84. In a nutshell the respondent's submission was that the correct approach to regulation 12(1) is that if deducted funds are retained in the employer's bank account, it follows that the deductions are "for the employer's own use and benefit". Such an approach results in a "broad but simple" rule which is likely to provide employees with the protection intended by the legislation. It also ensures that the question of whether the deductions are permitted is "obvious on the face of the transaction". Whilst it may mean that arrangements which would not otherwise be objectionable, such as the Holiday Fund, cannot be permitted, that is simply a consequence of the need to take "a strong line to ensure that the statutory minimum wage is properly secured for workers".

Decision in relation to first issue

85. The parties agreed that the first issue is determined by assessing whether or not "the deduction was for the employer's use and benefit". The fact the deduction benefited the workers was not the issue and the assessment is of the deduction (and not the scheme or arrangement that led to the deduction).

86. The parties disagreed as to the approach to be taken. The claimant argued the Tribunal should look at the objective purpose of the deduction which showed that it was obviously a deduction that did not benefit the claimant at all. The interest received was minimal and the sums were effectively ringfenced to the extent the claimant required (contractually) to repay the sums on demand. The claimant's position was that a natural interpretation of the words, viewed with the mischief of the legislation, resulted in it being clear that the deduction in this case was not for the employer's use and benefit.

87. The respondent's position was similarly straightforward. They argued the claimant received two obvious benefits from making the deduction in the way they did – interest was received on the sums (however small) and the claimant was able to use the funds as they wished, not least to improve cash flow. The fact there was a benefit from the deduction was, in the respondent's

submission sufficient to result in the deduction being for the employer's use and benefit.

88. The authorities in this area do not particularly assist in applying the law to the facts of this case. That is because in both cases the deduction was for a specific and different purpose and benefit compared to the current case. In **Leisure** the employer benefited from the reduction of the cost they had to pay to the supplier (since the deduction reduced their liability to the provider of the utilities). In **Middlesbrough** the employer benefitted since they received the funds for the season ticket and could use the money as they saw fit. In both cases the sums that were deducted self-evidently benefited the employer and so the deduction was obviously for the employer's use and benefit.

89. It is important, as both parties agreed, to adopt a purposive approach to interpreting the legislation in this area which has important social purposes, ensuring all workers are paid the minimum wage for each relevant hour worked. The employer in this case deducted sums the workers requested be deducted and repaid the sums upon request. The purpose of the deduction was to avoid paying the sums at one point in time to the workers, deferring payment to a later point in time. While one might question the benefit of so doing (given the absence of interest) the issue is whether the deduction was for the claimant's use and benefit (not its staff).

90. The Tribunal does not accept the assertion by the respondent that the matter was easily resolved by determining that where the claimant derived *any* benefit from the deduction (such as interest and the benefit of cash flow) the deduction was for the claimant's use and benefit. The Tribunal did not consider that to be the intention or mischief of the legislation, to capture any benefit consequent upon a deduction. The purpose of the legislation is to ensure workers receive the minimum wage (and the law is as clear and easily understandable). The fact the employer receives some consequential benefit from a deduction did not prevent the worker from being paid the minimum wage.

91. The deduction in this case was not, in any sense, for the claimant's benefit. The deduction was to ensure workers had money available when required. It was in essence delayed wages. Tax and deductions had already been dealt with and the deduction was a way for workers to delay receipt of their money. The fact that the claimant secured some interest was not (in any sense) the purpose of the deduction. It was a consequence of the deduction. To benefit from interest was not why there was a deduction.

92. The fact the claimant had the money in their bank account and could use the funds as they saw fit (subject to the contractual and accounting restrictions) was also not a purpose of the deduction in any sense. It was a consequence of the deduction. The ability to remit the funds was not why the deduction was made.

93. The aim in determining this issue is to identify what Parliament intended, interpreting the words Parliament used in light of the social purpose underpinning the legislation. Using the words of the statute it is clear that in this particular case Parliament intended to prevent deductions that were intended to benefit the employer from counting as part of minimum wage pay (even if the intention was also to benefit the worker) which is why reference is to a deduction "for the benefit or use of the employer". The specific words used – **for** the benefit or use (the Tribunal's emphasis) – is important. In cases where the purpose or intention of the deduction (ie *the* deduction) was for the employer's use or benefit, the sums should not be included in the calculation for the purposes of minimum wage. Conversely where the intention of the deduction (ie *the* deduction) was not for the employer's use or benefit, objectively assessed, the sums are not to be included. That is because if the sum deducted was not intended to benefit the employer or be for the employer's use, there would be no reason (for the purposes of this provision) to include such sums in the calculation at this juncture.

94. The motive of the parties in setting up the arrangement is not relevant in assessing whether or not the deduction was for the employer's use or benefit. The matter requires to be objectively assessed in answering the question as to whether *the deduction* was for the employer's use and benefit. As the

respondent's agent submitted, the purpose of the fund *per se* was to benefit workers but that is not relevant. The only question is whether the deduction was for the employer's use and benefit.

95. The parties accepted in submissions that if the employer had chosen to place the funds in an account separate from the employer's bank account there would be no issue (as the employer would have no benefit at all). Counsel for the respondent conceded that the issue arises because the sum was retained in the employer's account and could thereby be used by the claimant, even although there was a legal obligation to repay to the workers (and account for the benefit to the workers). But the issue is not what the purpose of the scheme was. Rather the issue is whether the deduction was for the employer's use and benefit.

96. While counsel for the respondent was correct to say there was no legal obligation on how the claimant used the account into which the money was placed, there were obvious legal restrictions on the claimant's ability to use the worker's money. The sums retained *required* by contract to be repaid to the workers on demand. While the claimant could use the funds, ultimately the sums due to the workers remained due, irrespective of how the claimant used the funds in their account or whether or not interest accrued on the sums while awaiting the worker's decision on when to seek repayment.

97. The Tribunal does not take account of the fact that the account was always in surplus and there was no intention to use the funds. That is not relevant in assessing what the purpose or intention of the deduction was, considered objectively.

98. The deduction in the present case contrasts starkly with the deduction in **Leisure** which was patently to discharge an obligation to a third party (and thereby reduce the employer's liability). That was self-evidently a deduction for the employer's use and clear benefit, reducing their liability. In **Middlesbrough** there was no doubt the employer in deducting sums for the season ticket again self-evidently had as its sole purpose benefiting the

employer since the employer retained the sums deducted and could use them as they wished. The fact the workers received a benefit was not relevant.

99. In both those cases the purpose and intention, objectively analysed, of the deduction was to benefit the employer or for the employer's use. The deduction was obviously for the employer's own use or benefit.

100. The existence of a third party or the provision of a benefit in return for the cash with the ability to retain the funds as the employer saw fit shows the fundamental difference in the current case where the sole purpose and intention of the deduction was to ensure the workers had sums set aside when they required them (as opposed to having them paid at the same time as the other wages). There was no suggestion whatsoever that the parties considered the deduction to be for the employer's benefit or use. Whilst that may have been a practical consequence of the arrangement, it was more of administrative convenience of the type foreshadowed by Lady Justice Smith at the end of her judgment in **Leisure**.

101. It was for convenience the claimant managed the funds in their account. True it is that the claimant could use the money provided it repaid the sums as required and that marginal interest was received. Those are benefits but they are consequences of the deduction and were not in any sense why the deductions were made. The deduction was not for the employer's use and benefit, in contrast to the reported cases, applying the statutory language in a common sense way in light of the facts.

102. Counsel for the respondent correctly submitted that the legislation does not refer to the intention of the parties and the question is not what the purpose or intention of the parties was, at least not explicitly. Equally it is not correct that the legislation refers to the "end result" in assessing the issue. The legislation makes it clear that the only question is whether the deduction was "for the employer's own use and benefit". In other words where the deduction is for the employer's use and benefit, it should not count towards minimum wage pay. It would be a strain on language to interpret that as meaning that any deduction which was beneficial to an employer in some way must

necessarily be caught. The purpose or mischief of the legislation is to protect against deductions that are for the employer's use or benefit from being included in minimum wage pay. This naturally means deductions that are for the employer's use or benefit and not that deductions that just happen to result in there being some benefit to the employer where such benefit was not in any sense part of the reason for the deduction. Where the benefit to the employer is entirely unconnected to the deduction, in the sense of not in any way intended by the parties as the reason for making the deduction, the deduction cannot be said to be for the benefit or use of the employer.

103. Counsel for the respondent argued that intention is irrelevant. The question is whether or not the deduction was for the employer's use and benefit. If the consequence (the benefit the employer enjoyed) was neither party's intention (objectively viewed) and was something that did not feature in any sense as a purpose for the deduction, that would not result in the deduction being "for" the employer's use and benefit (adopting the purposive interpretation). Certainty is important but it is equally important to ensure the legislation is interpreted in a way that Parliament intended. Simply saying all deductions which end up in some way benefiting an employer must be caught does not by itself create certainty since there would still be an argument as to whether or not in fact the employer did benefit or it was for the employer's use and whether or not there was a *de minimis* rule. The important point is to achieve a result that Parliament intended in interpreting the words used in light of the facts of this case. Applying the strictly literal approach does not achieve Parliament's intention.

104. In reality the position advanced by counsel for the respondent does not achieve the certainty suggested. This is because there would be no way of workers knowing about any interest on accounts where the money is held or what (if anything) the employer can do with the funds without further enquiry. Those further enquiries are not materially different from the further enquiries needed to determine whether or not the deduction is for the benefit or use of the employer in the sense interpreted in this judgment. It is important to ensure a uniform approach is identified and certainty achieved but that must

be done with the intention of Parliament in mind. The approach in this judgment seeks to achieve certainty whilst respecting the intention of Parliament in interpreting the statutory provisions.

105. There is no evidence to support the assertion, given the social purpose of this legislation, that the draconian step of requiring every deduction which happens to end up with a benefit to the employer to be covered. That does result in certainty but does not achieve the purpose of the legislation, a social measure, to ensure workers receive minimum wage. Such an interpretation strains the natural words and ends up with certainty but unfairness. It is not uncommon for there to be provisions Parliament has set out that create a degree of uncertainty, given the intention of Parliament requires to be determined, with as much certainty in proactive as possible, but not at the expense of straining the language and intention of the legislature.

106. If there is any evidence, objectively analysed, that the employer's benefit or use was linked to the deduction (such that the deduction was for the employer's use or benefit), that would clearly support the assertion contended by the respondent – that the deduction was for the employer's use and benefit (even if in fact there was no actual benefit to the employer or the deduction was not in f act used for the employer's use). Each case needs to be assessed on its merits in deciding whether or not the deduction was for the employer's use and benefit as the law requires. Having a blanket rule that any benefit accruing to the employer results in the deduction being for the employer's benefit is not what the legislation intended from the material before the Tribunal.

107. The Tribunal did not consider that the simple fact of there being some benefit for the employer consequent upon the deduction must *necessarily* result in the deduction being for the employer's use and benefit. The statutory wording, as interpreted by the Court of Appeal and Employment Appeal Tribunal, make it clear that a purposive approach to the legislation in cases such as these is needed. The Tribunal must consider what Parliament intended in each case. The Tribunal did not consider Parliament intended the legislation to result in every deduction that led to a benefit to an employer (whether or not intended

or considered by the parties) to be sums that should not be included in minimum wage pay. While that is superficially attractive as a certain solution (and legal certainty is important), it is an unnatural strain on the language and contrary to the intention of Parliament.

108. Rather Parliament intended deductions to count for the purposes of minimum wage pay where *the deduction* was *for* the employer's use or benefit. The deduction itself should be for the employer's use or benefit. In determining the question Parliament set out it is necessary to work out the aim of the deduction objectively – to ascertain whether it was *for* the employer's use or benefit. If the deduction was not *for* the employer's use or benefit, just because it did create a benefit for the employer or was in some way used by the employer, did not thereby mean it was a deduction for the employer's use or benefit. The deduction had to be "for" the employer's use or benefit, which implies the purpose in some way being to benefit the employer. If the benefit is entirely ancillary and unrelated to the reason for the deduction, the deduction is not for the employer's use or benefit. In this case the deduction was not for the employer's use or benefit.

109. The Tribunal did not consider the respondent's assertion that it would be necessary to know about the respondent's bank account to determine whether or not the purpose or benefit was for the respondent. The matter can be viewed objectively by the parties. Looking at matters objectively the question is whether or not the deduction was for the benefit or use of the employer. It did not matter what was in the bank account since that was where the funds were deposited. The amount in the bank account did not affect whether or not the deduction, in this case, was for the employer's use or benefit. The matter can be determined by looking at the deduction in context, from the facts known to the parties, and assessing, objectively, whether the deduction was for the employer's use or benefit. No other details were needed. On the facts of this case the deduction was not for the employer's use or benefit.

110. On that basis the enforcement notice is rescinded. The deduction was not for the employer's use or benefit.

Second issue: Payment of deducted funds

111. While not necessary to do so, for completeness the Tribunal considered the second issue. This was the claimant's secondary position in the event the sums deducted were not to be taken into account as wages.

112. The parties agreed that the issue was to be determined by applying the law found in section 17 of the Act (headed "Noncompliance: worker entitled to additional remuneration").

113. Subsection 1 says that if a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the minimum wage the worker shall at any time (the time of determination) be taken to be entitled under his contract to be paid as remuneration in respect of that period whichever is the higher of the amount in subsection 2 and the amount in subsection 4.

114. Subsections 2 and 4 determine the relevant amount. Subsection 2 says the amount referred to is the difference between the relevant remuneration received by the worker for the pay reference period and the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the minimum wage. Relevant remuneration means remuneration which falls to be brought into account.

115. Subsection 4 days the alternative amount is that determined by a formula where the amount determined by subsection 2 is divided by the minimum wage rate and multiplied by the rate that would have been payable during the period.

116. Subsection 5 states that subsection 1 ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.

117. Section 17(6) states that "Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection

1 has not ceased to apply to him the amounts described in subsections 2 and 4 above shall be regarded as reduced by the amount of that remuneration."

118. What this section does is apply an uplift to reflect any intervening increase in the minimum wage. In order to identify the extent of the uplift, it is necessary to identify the pay reference period in respect of which the entitlement to additional remuneration arose. Only then can the appropriate rate be determined.

Claimant's submissions

119. Counsel for the clamant argued that this ground turns on whether any payments made from Holiday Fund, which is itemised on the payslips, can be regarded as payment of arrears. In plain English, can they be deducted from, the alleged unlawful deductions of wages so that the workers do not receive a windfall and are protected only to the extent of the minimum floor on wages intended by Parliament.

120. Counsel argued that if the enforcement notice was upheld the amounts saved by each worker would be paid twice. The savings are from net pay. No further tax or insurance would be due: the net payments are simply being returned on the worker's request to withdraw an amount of their own savings. Any ordinary use of English would see this payment of the sums withdrawn as a repayment, returning an amount of the sum the worker had decided to save in the Holiday Fund.

121. It was submitted that there is nothing that specifies in the statute that it has to be referred to as 'arrears' for minimum wage. It is submitted that it is therefore simply a factual question for this Tribunal to determine. In this case there is an obvious correlation between "Holiday Fund" deduction and a repayment of things under that very same title, "Holiday Fund";

122. Counsel submitted that although the phrase "Where any additional remuneration is paid to the worker <u>under this section</u>" (emphasis added), may be seen to support an argument that the remuneration has to be paid *because* of an alleged breach of national minimum wage and perhaps specify that

point, that is arguably not the purpose of this provision. As the purpose is to "reduce by the amount of that remuneration", specifying a payment as expressly being for 'arrears is unnecessary.

123. If it covered only expressly acknowledged arrears of wages for minimum wage there may be little point in making any 'part' payment, the employer would always have to pay the remainder and may as well hold back until a complete determination. "Under this section" means no more than that the payment has to factually relate to the disputed deduction. So, for example, paying additional remuneration by virtue of a bonus or something else could not offset a deduction made when contributing into the worker's holiday fund.

124. It was finally submitted that the above was Parliament's intention as to what protection is required for a worker. The respondent's interpretation would give the worker more. It is absurd that the workers would in fact be better off, in a better position, than they would have been had Lees retained all the funds and not paid out on the workers requests.

Respondent's submissions

125. Counsel for the respondent noted it was agreed the sums repaid were not intended (at the time) to amount to repayments given it was savings. If the claimant breached the minimum wage rules, there is nothing inherently wrong with the workers being repaid their savings and separately being paid the minimum wage deductions. It is not possible to contract out of the minimum wage rules.

126. Counsel for the respondent noted that the payments made were simply the same sums as had previously been deducted from the workers' pay; the payments were not uplifted in terms of section 17(4) and were not attributed to any particular pay reference period. Having deducted funds for the purposes of the Fund, the claimant was contractually obliged to pay those sums upon being requested to do so. The Fund payments made by the claimant were accordingly payments in satisfaction of an obligation independent of the employees' entitlement in terms of section 17(1). The claimant would have been obliged to pay the deducted funds regardless of

whether there had been any underpayment. The Holiday Fund payments cannot, at the same time, be both what they were intended to be, namely paying the employees their savings, and what they were not intended to be, namely payment of arrears.

127. Counsel for the respondent also argued that if, as the claimant contends, the Fund payments are to be regarded as payments of arrears, that would give rise to significant complexities. In the first place, such an approach would apply to all Fund payments made to employees from the time of the scheme's inception. Secondly, in order to calculate the running balance of arrears, and also the appropriate uplifts to be applied in terms of section 17(4), it would be necessary to identify the pay reference period to which each Fund payment related. However, the Fund payments made by the claimant were not attributed to any particular pay reference period. Further, there was not necessarily any correlation between the payments and the deductions, or the payments and the running balance of arrears.

128. Thus it was argued that to calculate the running balance of arrears and the appropriate uplifts, it would be necessary to make assumptions as to which pay reference period each of the payments related. The legislation does not provide any guidance as to the assumptions to be made. Indeed, as already mentioned, regulation 9 assumes that payments are to be treated as payments by the employer to the worker in the pay reference period in which they were made, or the following pay reference period. There would therefore be scope for dispute between employer and employees as to the correct assumptions to apply if there was to be an attempt to allocate payments to earlier pay reference periods.

129. Counsel noted that in construing the legislation, such complexities ought to be avoided as they weaken the protection afforded to already low-paid workers. It would make it much harder for employees to determine for themselves whether they were owed additional remuneration, and, if so, to calculate how much they were due. It would also render it significantly more difficult, if not practically impossible, for HMRC to enforce the legislation.

130. Counsel also argued there was no windfall since employees will receive will be payment of their savings and additional remuneration in terms of section 17(1). As a matter of law, they are entitled to both. It is of note that in the **Middlesbrough** case, there was no suggestion that the employees would receive a "windfall" as a result of being paid arrears and retaining the season tickets. In any event, any windfall is of the claimant's own making. It arises as a result of its failure to comply with the legislation.

Decision in relation to second issue

131. This issue would only be of relevance where the sums deducted were considered for the employer's use and benefit. In such a situation the next issue would be whether the sums that the claimant paid to the workers (the repayment of the sums within the fund as requested by the workers) was sums which reduced or discharged the claimant's liability to pay minimum wage. The Tribunal considered this issue as an alternative and for completeness.

132. The respondent's position is that unless the sums being repaid are identified as repayment of minimum wage liabilities, they cannot be regarded as such (and reference in the legislation to "additional remuneration" supports that approach). The claimant's position is that looked at objectively the claimant had deferred paying the workers their wages. It would be absurd for such sum not to be taken into account.

133. Section 17 entitles a worker to additional remuneration to "top up" the sums paid to ensure the relevant minimum wage rate is paid.

134. The first issue to consider is whether the sums repaid could in principle amount to "additional remuneration". The natural interpretation of this is a sum paid by the employer to the worker. The difficulty for the claimant is that the sums paid to the worker was not remuneration as such but deferred remuneration or savings from the sums the claimant retained for the worker's benefit. On balance given the sums being paid to the worker are paid by the claimant as deferred wages (sums the workers had earned which had been retained by the claimant) the sums could in principle be additional

remuneration, in the sense it was additional to the sums originally paid and it was remuneration since it referred to wages for work that had been done.

135. The next issue was whether the sums paid could fall within section 17(5) or (6). Both state that additional remuneration reduces the minimum wage liability for each pay reference period. The difficulty the respondent identifies is that by not identifying the sums at the time as payment of minimum wage liability there is no correlation with any pay reference period, and it is not possible to identify the liability (as minimum wage rates change).

136. The Tribunal did not consider that issue to be insurmountable as a natural interpretation of the legislation was that each payment went to discharge the earliest pay reference period first continuing until the liabilities were fully discharged. There was no requirement any payment had to have an identifiable pay reference period. To give the legislation effect the earlier pay reference period in respect of which there was an outstanding liability would be discharged first continuing with each payment until the liabilities were fully discharged.

137. That interpretation ensures that each pay reference period is dealt with consecutively and fully. It allows creates certainty as it is possible to identify for the particular pay reference period what the outstanding liability is and the relevant sums due at the date of payment (given the uplift that is applied at the date of determination).

138. On balance, had it been necessary to interpret this section, the Tribunal would have found that the sums repaid to the workers by the claimant did amount to additional remuneration which would have gone towards discharging minimum wage liabilities for each pay reference period which had outstanding liabilities (starting with the earlier pay reference period in respect of which there was an outstanding liability first). That would have resolved the second issue and the matter would have been remitted to a hearing to determine what, if any, outstanding liabilities there were, in the absence of the parties reaching agreement.

Summary

139. For the above reasons, the Notice is rescinded.

Employment Judge: **D Hoey**
Date of Judgment: **11th July 2023**
Entered in register: **12th July 2023**
and copied to parties