National Minimum Wage – Deductions, Reductions and Loans.

Important EAT Guidance as to Procedure and the Scope of Regulation 12 of the National Minimum Wage Regulations 2015 ("NMWR")

Nicholas Siddall QC analyses the recent decision of the EAT (HHJ Auerbach) in ***HMRC-v-Middlesbrough FC*** [2020] UKEAT/0234/19 and comments on the clarification therein provided as to matters of EAT procedure and also the proper scope of the obligation to pay the National Minimum Wage ("NMW").

The Facts

Middlesbrough Football Club ("MFC") offered an option to its employees to purchase season tickets for family members. It operated a scheme whereby the employees (if they so chose) received the season ticket at the start of the football season but could pay for the same over the course of the year. To the uninitiated this might be felt to raise no issue of NMW compliance, as it was simply an indulgence afforded to staff, but HMRC considered otherwise. This was on the basis that the sums for the season ticket were deducted at source by MFC from the employee's wages and thus were considered to fall foul of NMWR.

The Relevant Provisions of the NMWR

The relevant provisions of the NMWR are found in Regulation 12 which (materially) provides as follows:

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

(2) the following deductions and payments are not treated as reductions-

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

The Employment Tribunal Decision

The Employment Tribunal found that it was able to construe the meaning of Regulation 12(2)(e) NMWR to include a deduction at source. It did so on the basis that the earlier Regulations contained different wording and on that basis Elias J's construction of their effect in ***Leisure Employment Services-v-HMRC*** [2006] ICR 1094 was non-binding.

HMRC appealed and at the EAT MFC was obliged to concede that the Employment Tribunal's decision in that regard could not stand as a result of the subsequent decision of the Court of Appeal in ***Royal Mencap Society-v-Tomlinson-Blake*** [2019] ICR 241.

However MFC asserted that the meaning of deduction in the NMWR was informed by a parallel with tax legislation. It also cross-appealed on the basis that the Employment Tribunal had erred in finding that other limbs of Regulation 12(2) NMWR were not satisfied.

In an illuminating decision of the EAT HHJ Auerbach analysed the arguments and made a series of helpful comments about EAT procedure and the proper scope of Regulation 12 NMWR

Procedural Guidance

(a) Scope of cross-appeal

HMRC sought to argue that MFC's cross-appeal was not such as it sought to uphold the judgment but argued that the Employment Tribunal had erred in rejecting its alternative arguments as to why the arrangements fell within Regulation 12 NMWR. The EAT concluded that MFC's arguments were properly a cross-appeal in reliance on the earlier decision of the EAT in ***Wolfe-v-North Middlesex University Hospitals NHS Trust*** [2015] ICR 960. The EAT said this

> *"36. … 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) did not apply. They raise issues of law as to the construction of those provisions, of wider interest. Further, they concern routes through these provisions that – so it was argued – provided an 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).*

(b) Post Argument/Pre-judgment submissions

Between the conclusion of oral argument and the provision of a draft judgment the Government issued fresh guidance as to the correct enforcement approach to the NMW. MFC contended that this was relevant to the appeal and sought the permission of the EAT to make additional submissions. HMRC resisted this application. The EAT agreed that it had jurisdiction to entertain the same. It said

"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."

Guidance as to Regulation 12 NMWR

(a) Meaning of Deduction

MFC argued that as a matter of tax law that a direction that money be used from an employee in a certain manner to their employer amounted to a 'payment'. It was argued that such a construction equally was to be read across to the NMWR and informed the meaning of the term payment therein. The EAT rejected that argument saying this:

"71. … 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 "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."

Equally MFC argued that an analogy with the unlawful deductions regime under the Employment Rights Act 1996 informed this issue. The EAT was unpersuaded as to this approach.

"*80. …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."*

The EAT concluded that a conscious policy decision of Parliament dictated that payment in Regulation 12 NMWR should be given its ordinary meaning.

> *"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 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."*

(b) Use and Benefit

MFC sought to argue that earlier decisions of the EAT and Court of Appeal were *obiter* as regards the meaning of the term 'use and benefit' in Regulation 12 NMWR. The EAT did not determine that argument but stated that nonetheless it agreed with the opinions expressed in previous decisions.

> "*97. …The Tribunal properly found that the Club benefited: this arrangement was the mechanism by which it got paid for the season cards. It 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…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."*

(c) Any other Event

Once again MFC sought to argue that earlier decisions of the EAT were not binding on the meaning of the term 'any other event' in Regulation 12(2)(a) NMWR. The EAT disagreed and went on to opine in greater detail than previously as to the scope of this provision. Its essential conclusion was that the provision could not apply in a case of a previously existing contractual obligation.

> "*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…

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

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

(d) Loan

MFC finally argued that the agreements properly understood amounted to a loan of the season card and that the Employment Tribunal had erred in construing Regulation 12(2)(b) to require a loan of money. Once more the EAT rejected that argument stating:

"124. …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 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."

Conclusion

The decision of the EAT clarified the scope of the NMWR in a number of important respects and addressed for the first time the meaning of the loan provisions in the Regulations. In the absence of further guidance from the Court of Appeal it is likely to be the key authority on the construction of Regulation 12 NMWR for the foreseeable future.

Nicholas Siddall QC has a particular interest in the National Minimum Wage and advises employers of all sizes as to NMW compliance. He appeared for MFC in the EAT.

A link to the EAT judgment shall shortly follow.