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# *Recent Employment Law Developments*


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## The Areas

1. Government intervention in Non-Competition Covenants
2. Recent Developments in the Minimum Wage

# Stick or Twist?

## The reform of non-compete clauses

# The brief

- The proposal for reform
- What's the perceived problem?
- What does the future hold?

# The proposal

- 4 December 2020 launch of consultation
  - *Proposals to make non-compete clause is enforceable only when the employer provides compensation during the term of the clause, and whether they should be complemented by additional transparency measures and statutory limits on the length of non-compete clauses.*
  - *An alternative proposal to make post-termination, non-compete clauses in contracts of employment unenforceable.*

# Key questions

- What clauses are covered?
- What is meant by ‘compensation’?
- What are ‘transparency measures’?
- Wasn’t this settled two years ago with the Taylor Review?

# The perceived problem

- https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment

- *Non-compete clauses can act as a barrier by preventing individuals from working for a competing business, or from applying their entrepreneurial spirit to establish a competing business.*

# The options

- Option 1 - mandatory compensation, alongside what the paper refers to as "Complementary Measures”.
- Option 2 - the complete ban on noncompete clauses

# Option 1 in more detail

- The proposed benefits:
  - Is the clause necessary?
  - Financial disincentive
  - Longer restrictions = extra cost
  - Reduce litigation
- ’Complementary measures’
  - Disclosure in writing before employment commences
  - Statutory limit on the length of a restriction

# Option 2 in more detail

- Does not extent to IP or confidential information
- Ban would not extend to other forms of clause (unless consultation is extended to cover them)

# A brief comparative view

- Consultation paper draws on the position in California, Germany, France and Italy

# Germany

- Reasonableness test
- Need for written agreement
- Promise to pay 50% of global remuneration for period of restriction
- Paid in monthly instalments during period of restriction
- Right of set off
- 24 month ceiling

# France

- Need for financial compensation
- (Amount not specified)
- Through collective bargaining amount typically between 25% and 60%
- But should not be derisory
- Paid in monthly instalments during period of restriction

# Italy

- 3 year limit for typical employees and 5 years for senior employees
- Requirement for compensation
- Amount is not prescribed and left to the courts
- Compensation considered as part of overall enforceability

# What does the future hold?

- Wait and see…
- My prediction
  - Nuclear Option 2 unlikely
  - Nothing or modified Option 1
    - Written agreement
    - Compensation as fixed proportion of remuneration
    - Ceiling on restriction, beneath which it is left to the courts

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# QUESTIONS?

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# Developments in the National Minimum Wage

# Overview

1. The meaning of ‘deductions’ and ‘payments’
2. The ‘loan’ exemption
3. The meaning of ‘employer’

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# 1. DEDUCTIONS V PAYMENTS


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# REGULATION 12 NMWR

**(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).**

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# ANALYSIS

- NMWR creates the concept of a '*reduction*'
- That embraces on its wording '*payments*' or '*deductions*'
- Must be made '*by the employer*'
- '*Reductions*' reduce the NMW unless fall within Reg 12(2) – see next slide- or the accommodation offset.

# REGULATION 12(2) NMWR

**(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 an advance of wages;**

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

**(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.**

# FACTS OF ***HMRC-V-MIDDLESBROUGH AFC*** [2020] ICR 1404

- Match day staff permitted to buy season tickets for family members
- Wholly voluntary arrangement
- Staff repaid the cost of the ticket in instalments
- They set rate of payment and recorded in written agreement
- To staff's benefit as no credit charge
- Cost deducted from wages

# LAWFUL?


- Employment Tribunal held no:

- On appeal the club argued that the meaning of the term "payment" should be informed by a comparison with tax legislation

"56. *Mr Siddall 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."*

# CORRECT?

> *69. 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.*

# AND

*81. 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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# 2. LOAN


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# REMINDER OF REGULATION 12(2)(B)

**(b) deductions, or payments, on account of an advance under an agreement for a loan or an advance of wages;**

# MEANING?

*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.*

# AND

*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 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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# 3. MEANING OF EMPLOYER

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# REGULATION 14 NMWR

**Deductions or payments as respects living accommodation**

**14.— (1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable, in accordance with Regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with Regulation 16, unless the payment or deduction falls within paragraph (2).**

# WHO IS THE EMPLOYER?

- S54 NMWA defines employer in the same manner as to the Employment Rights Act 1996
- Does this capture third party connected entities?
- HMRC says yes in guidance
- The issue for the EAT in ***HMRC-v-Ant Marketing Ltd*** [2019] UKEAT 0051/19 where a related entity provided accommodation to the worker.

# HMRC GUIDANCE

**…The employer may be considered to be providing accommodation in circumstances where:**

- **the employer and the landlord are part of the same group of companies or are companies trading in association;**
- **the employer's and the landlord's businesses have the same owner, or business partners, directors or shareholders in common; or**
- **the employer or an owner, business partner, shareholder or director of the employer's business receives a monetary payment and/or some other benefit from the third party acting as landlord to the workers.**

**For the purposes of the accommodation offset rules, third parties will include:**

- **businesses and companies which are separate legal entities to the employer; and**
- **individuals including those who are family members of a director, business partner, shareholder, or owner of the employing business; and**
- **businesses or companies with a director, shareholder, owner or business partner who is a family member of a director, shareholder, owner or business partner of the employing business.**

# EMPLOYER

*40. Although there is no dispute that a purposive approach is to be taken, it seems to me that [counsel] is correct that such an approach does not permit the court effectively to rewrite the terms of the statute, which is what it would have to do in order to construe the term "employer" in the way that the Revenue invites me to do. Section 54(4) of the **1998 Act** provides that an "employer" means "the person by whom the employee or worker is or whether the employer or worker, if deceased, employed". That is a definition which must, by virtue of Section 11 of the **1978 Act,** apply also to the Regulations unless a contrary intention appears*.

# HOWEVER (OBITER)

*47. Even on a natural and ordinary reading of the regulation, the phrase "provision of living accommodation" can encompass a far broader range of situations than that which is limited to one where the employer is itself the landlord or owner of the property. Had the intention been to confine the scope of the accommodation offset to the latter situation, then Regulation 14 is likely to have been worded somewhat differently….*

# AND

*…The parties were not agreed as to the remaining bullet points on page 25 of the 2018 Guidance. As these matters were not fully argued before me and as this appeal was not pursued on the basis of the scope of the term "provision of living accommodation", I do not express any definitive view about these bullet points, save to say that each of the examples therein strikes me as being at least capable of amounting to the "provision of living accommodation" by the employer; whether or not it does so in a particular case may well depend on the precise facts.*

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# QUESTIONS


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