EMPLOYMENT TRIBUNALS

Appellant: Grantham Manufacturing Ltd

Respondent: The Commissioners for HM Revenue and Customs

Heard at: Midlands (East) Region by Cloud Video Platform
On: 18 and 19 May 2022
Reserved to: 20 and 21 May 2022
Before: Employment Judge P Britton (sitting alone)

Representation
Appellant: Mr D van Heck of Counsel
Respondent: Mr S Lewis of Counsel

RESERVED JUDGMENT

1. The Appeal succeeds in terms of the deductions for the purposes of the lottery pursuant to Rule 12(1) of the National Minimum Wage Regulations 2015 (NMW), the deductions in relation thereto having not been for the employer's own use and benefit.

2. The Appeal in relation to the allowances issue and based upon Regulation 10(k) of the NMW fails and is dismissed, the allowances having not been consolidated into the workers' standard pay and the allowances not being attributable to the performance of the workers in carrying out the work.

3. Assessment therefore of what remains due in terms of the notice of underpayment is therefore to be further determined before this Judge at a hearing to be accordingly listed unless the parties are able to resolve what is due without further recourse.

4. To that effect, the parties are Ordered to inform the Tribunal of the proposed way forward within 21 days of the issuing of this Judgment and Reasons.

RESERVED REASONS

Introduction

1. This is an Appeal (the Appeal) by the Appellant (hereinafter called GML) against a Notice of Underpayment (NOU) served by the Respondent (HMRC) on 18

February 2021. The Notice is before me in the primary joint bundle of documents at Bp 1-59[1].

2. Essentially the Notice was issued by Mr Karanjeet Singh, who is a National Minimum Wage Compliance Officer with the National Minimum Wage Individual and Small Business Compliance Team. In passing, he gave sworn evidence before me and his evidence-in-chief was by way of a written witness statement. The substance of the Notice was essentially that GML had breached the National Minimum Wage Regulations and thus, for my purposes, in particular Regulations 10 and 12 of the NMW Regs 2015 (hereinafter called NMW Regs) in relation to eight named workers and essentially on the basis that firstly deductions from their wages for the purposes of their participation in a lottery syndicate as workers of GML had the effect of thereby reducing the wage for the purposes of the calculation of the national minimum wage at the prevailing time and because it was submitted that the deductions were for the employer's own use and benefit. Secondly engaged was the payment of two allowances to these workers which I will refer to as the attendance and the timekeeping allowances, which apropos Reg 10(k) essentially again could not therefore be seen as part of the national minimum wage. In other words, they were to be treated in that respect as not forming part of the workers' remuneration and essentially because they had not been consolidated into the workers' standard pay. The second limb being there that if they had been consolidated, they were in any event allowances which were not "attributable to the performance of the worker in carrying out the work".

2. By its Notice of Appeal to the Tribunal, which engages Section 19(c) of the National Minimum Wage Act and as to which in particular see the detailed pleading headed "Rider" which was written by Mr van Heck, it argues that, and taking matters in reverse, that the allowances were consolidated into the workers' standard pay and that as to the deductions viz the lottery, this was not for the employer's own use and benefit and in the particular circumstances in effect was tantamount to a trust. Its fallback position if that was not be held to be the case, would be that in any event these allowances were attributable to the performance of the worker in carrying out the work.

3. I should then add in that I heard from the Managing Director and in effect owner of GML, who is Mr Martin Howitt. I obviously had close regard to the witness statements of Mr Singh and Mr Howitt and to the core documentation in this case, as to which I was of course taken during the course of this hearing. There was also a supplementary bundle.

4. I have received the written closing submissions of both Counsel upon which they have then elaborated and for which I am most grateful.

5. That brings me to the core facts in this case before I then return to the determination of whether or not the Appellant has or has not as the case may be fallen foul of the two Regulations to which I have referred or either of them.

[1] Bp = Bundle page

Findings of fact

6. Much of this is not in dispute.

7. The Appellant is a small business engaged in the manufacturing of packaging. Most of the employees are long-standing and there are only about twelve. There are first of all the eight named workers who were on what I might describe as hourly pay and then there is an administrative team of about four employees who were salaried. They are not the subject of the NOU. I have no doubt from hearing Mr Howitt, who I found to be an impressive and consistent and credible witness, that GML is what could be described as a good employer and perhaps not surprisingly there is a very close working relationship between Mr Howitt and this small team of workers,

8. For many years, stretching back to at least before 2003 when there was a first investigation by HMRC into the wage arrangements which did not end in the issuing of any NOU, there had been in place a pay structure for the hourly paid employees. Before I go there, I wish to make plain that issues as to whether or not the Appellant should have been informed of the outcome of the first HMRC enquiry and as to whether therefore that lulled him into a false sense of security so to speak are not pursued on his behalf.. To turn it around another way if the HMRC had flagged up issues of concern and upon which Mr Howiit would have acted there and then, are not matters before me in that this is not advanced as part of the Appeal as was made plain by Mr van Heck at the preliminary hearing which took place on 25 March 2021 (Bp 80-81) before Employment Judge Jeram. Also present at the preliminary hearing which was held by telephone was Mr Lewis.

9. Thus going back to the working arrangements as to remuneration, these can be found at Bp 392-397 and using thereat the statement of main terms of employment and thence the appendix thereto in terms of Martin Storey who commenced his employment with GML on 29 August 1989. The statement of main terms and conditions complies with that which is required as per Section 1 of the Employment Rights Act 1996. Inter alia there was the heading "REMUNERATIONS". Therein stated, and that of course would be at the time of this particular statement of main terms and conditions, was:

> "*Your wage is currently £360.00 per week by credit transfer as detailed on your pay statement. For makeup of weekly pay and overtime rates, please see Appendix 1.*"

As to appendix 1, set out inter alia was and under the first heading:

> "*Weekly pay is computed as follows:*
>
> | | |
> |---|---|
> | *Standard Hours (40 hours)* | *£7.80* |
> | *Weekly Attendance* | *£40.00 per week* |
> | *Weekly Timekeeping 9 periods* | *£2 per period* |
> | | |
> | *Gross Per Week* | *£370.00* |

Shift Work will be paid at	*£9.75 per hour*
Shift Overtime will be paid at	*£15.42 per hour*
Overtime will be paid at	*£12.33 per hour*
Saturday will be paid at	*£13.88 per hour*"

10. Thereinafter was set out under the heading "*B) Weekly Attendance Bonus*" as to how that bonus was paid and the qualifying conditions. If I put it simply, arrival late for the 7 am start carried penalties, as an example under *"i) Standard Day"* and by reference to the two parts of working day, namely 07:00 - 12:30 and then 13:00 - 16:00 Monday to Friday and 6 hours working 07:00 - 13:00 Friday:

> *"In the event of being judged not ready for work at 7.00am, for each part of 5 minutes not ready for 7.00am - 7.30am, you must extend Period 1 by a full 5 minutes.*
>
> *In the event of being judged not ready for work at 1.00pm, for each part of 5 minutes not ready from 1.00pm - 1.15pm, you must extend Period 2 by a full 5 minutes.*"

If there was no record of working in effect those extra minutes, then there was a consequent percentage loss of bonus which is set out at Bp 396.

11. Then at "***C) Weekly Timekeeping Bonus comprises of:***" was set out: "*All Grades except 4b* (a reference to trainee general production) *£18.00 per week".* Not engaged is the trainee issue.

> "*Full bonus will be received after being judged to be ready for work at the official start time of your work period/shift.*
>
> *Failure to record the above mentioned in your pay week will result in the following loss of Weekly Timekeeping Bonus:*
>
> | ***No on NON Qualifying Starts*** | ***%Loss*** |
> |---|---|
> | *1* | *20* |
> | *2* | *50* |
> | *3 and over* | *100* |
>
> *Where this is absence due to sickness or injury, personal holiday or statutory/Company holiday, a pro-rata adjustment will be made to this bonus.*
>
> ***D) The following mark up your Gross hourly rate (Gross per week divided by 40) will apply:***
>
Standard Day Overtime	*+33.33%*
Shift Work Overtime	*+66.6%*
Saturday	*+50%*"

12. Cross-referencing to the payslips which were before me and taking as a example again Mr Storey, it can been seen that in each weekly payslip there was a separate itemisation for first what I would describe as the standard week (ie the 40 hours) and which would be times the national minimum wage at the prevailing time and then separate headings for the payment of the attendance allowance and thence again separate the timekeeping allowances and underneath that (and to which I will return) itemised the deduction for the purposes of the lottery syndicate, which I will deal with as obviously a separate issue.

13. A point in that respect is made by the Appellant to the effect that the fact that they were separately itemised could be relied upon to show that they were consolidated for the purposes of this aspect of the case. However, I would observe that under Section 8 of the ERA there is the right to an itemised pay statement and under 8(2) a requirement to itemise out each separate element of the pay. In that sense, that contention is not of great persuasion to me.

14. Second, the imposition of penalties very rarely occurred. I heard from Mr Howitt that it was only in the last two or three years that there has had to be any deductions and then in relation to two workers and they were very small; there was a third worker who was more problematic.

15. It became plain in the evidence before me, and may not actually have been in dispute prior thereto, that when it came to calculating pensions, both allowances were included in terms of the pay for the purposes of such calculation. The same applied to overtime.

16. However, whereas of course the standard rate of pay went up annually in accordance with the NMW, there was no percentage increase in the allowances and for several years there had been no increase in relation thereto, those increases being seen by Mr Howitt to be at his discretion and in terms of his correspondence with Mr Singh, and as to which see Bp 276, and which is accurately set out in his written submissions by Mr Lewis at 56(C):

> "*The attendance pay was increased "around two years ago (with no previous changes for "a number of years")*. The timekeeping pay had been "*subject to review but not necessarily changed*".

17. Thus, it follows, and here I am with Mr Lewis, that they "were treated as discrete elements and each treated different by the Company" in that respect.

18. Put simply, they can be distinguished in that sense from the standard pay in that they did not therefore increase pro rata annually. The issue becomes as to whether or not therefore the allowances can be treated as consolidated into the standard pay and as to the balancing exercise in that respect (which is of course for me) and as to which I shall shortly return in relation to factors, and as to which see the HMRC guidance in its manual on these topics on what is and what is not consolidated pay. There are two factors in that respect that could be said to go in favour of the Appellant, namely the pension and overtime increases. But conversely to be weighed in the balance is the not increasing pro rata these allowances in line with the increases in the NMW.

19. Those are the facts in this case; it is a question then of course of interpretation for me in terms of where that engages under Rule 10 of WTR and to which I shall come.

20. On the lottery issue, put at its simplest the majority of the workers (and from what I can see only about two did not participate) had for a long time played the national lottery. From my extensive experience as an Employment Judge, I am well aware of what I might describe as syndicate agreements. They are frequent in the workplace. Put at its simplest, a group of workers within the business may decide that they will jointly participate in the lottery. Therefore, they pool the amount of money that they each agree to pay into a pot with which lottery tickets are then purchased and in that sense pooled. If there is a win, then everybody shares in the win. It gets a little more complicated of course if some were putting more into the pot so to speak than others but that is the general principle. Before me is a document headed: "***SYNDICATE AGREEMENT***" at Bp 285, which again I am aware of as being something which has been issued in the past by way of the lottery organisation so that the participants in a particular syndicate can use it and thereby avoid any problems in terms of the allocation of winnings to the syndicate members.

21. Put it at its simplest, for a long time since the inception of the lottery Mr Storey had collected the contributions from each participant in what I am therefore now describing as "the syndicate". It had become somewhat burdensome in that he had of course from time to time to chivvy any individual member of the syndicate who had forgotten to bring in their contribution or was asking for extra time to pay. He then of course had the responsibility of making sure that he had everybody's contribution and then going off to the local lottery outlet, ie say the supermarket, and purchasing the equivalent number of lottery tickets and then of course being responsible should they have a win of distributing the monies. They also had a subsidiary element of this syndicate going in that they all seemed to have paid a small amount into a bonus ball fund and on the basis that if any member of the syndicate's specific lottery ticket got the bonus and even if there was not otherwise a win, then the lucky individual got the pot of the bonus ball money.

22. So, as the years went by Mr Storey was complaining to Mr Howitt that he was finding this all a bit too much for him. I bear in mind that Mr Howitt himself was also a member of the syndicate. As a consequence, Mr Howitt agreed to become the Syndicate Manager as per the Syndicate Agreement proforma to which I have referred and therefore we can see a completed Syndicate Agreement document (Bp 285) which reflected this change. The Syndicate Manager was therefore now Mr Howitt. Listed below were the names of the players and how much each was going to be contributing and therefore their pro rata share of the winnings. Listed on the Syndicate Agreement before me are eleven employees, including five of the workers in this case. That is not to say that this was necessarily the Syndicate Agreement prevailing in terms of the NOU period because the NOU seems to cover seven of the eight workers in terms of being contributors.

23. In any event, what was then set out in the Syndicate Agreement under the

heading "***SPECIAL ARRANGEMENTS***" was how this would be: "*LOTTO SATURDAY WEEKLY*" and this is the important bit under the heading: "*When payments will be collected and what happens if someone fails to contribute*" was stated to be: "*WEEKLY FROM NETT PAY*". Then set out was what would happen if someone left the syndicate; essentially there would then be a distribution of accumulated winnings according to share and the substitution of a new Syndicate agreement. It was also agreed that the winnings would be distributed when they accumulated to £280.

24. Post his becoming the syndicate manager, Mr Howitt obtained the consent of the syndicate members to deduct the contribution of each from their wages thus avoiding the need to go and individually collect the contribution and in that sense the burden as per Mr Storey. As to the deduction in terms of the hourly paid workers and thus those named in the NOU, as they were paid weekly it appears by BACS on the Friday With he monthly paid salaried workers it was the contribution for the month which was deducted. What Mr Howitt then did, and I have no evidence to contradict him and he was never asked for bank statements or records of transactions in that respect by the HMRC, is that he would, and in his words "*immediately*" which qualified was after the end of the working day, go and purchase the lottery tickets from an outlet. He did this using the GML bank debit card. GML only had the one bank account, which was not interest bearing. It did not have an overdraft. He was adamant that he would never have used these deductions for other than the purchase of the lottery tickets. To do so, as he stated to me, would have been "*theft*" and would also have been a breach of trust to the other members of the syndicate.

25. As to benefits other than financial, and to which in terms of legal discussion I will in due course return, Mr Lewis placed great emphasis in his submissions as per his paragraph 37 on various comments that Mr Howitt made before me and in his correspondence to Mr Singh (see Bp 212, 263 and 273) and to the effect that there was a benefit to GMF even if it was not financial. But I have reflected upon the evidence that Mr Howitt gave. Essentially it could be put as follows, the burden that was relieved by his becoming the syndicate manager and regularising the contributions by way of the agreed deduction from wages was essentially that placed upon Mr Storey not GMF. As to Mr Storey, his administration of the syndicate and in terms of collection of monies etc or going to buy the lottery tickets, never impinged upon his working time.

26. Therefore, it was the burden upon him of which he had complained which led to the taking over of the burden so to speak by GML. In that sense, I do not see that there is a benefit objectively to GML. The benefit is to the syndicate in terms of the collection by way of deductions because it avoids the problems of anybody failing to pay on any given week and the knock-on effect on the syndicate. That again is not a benefit to the business; it is a benefit to the syndicate of which Mr Howitt is a member. There is no benefit to the business of Mr Howitt going down to buy the lottery tickets with the monies that had been deducted; there is a burden in fact on Mr Howitt having to do so. The only real conceivable benefit to GML is avoiding disharmony that might occur within the syndicate if there was a big win and in terms of distribution of it becoming a bone of contention insofar as any member of the syndicate might have failed to pay in the given week. But, objectively, I see this as de minimis in terms of the

overall rationale behind the collection of the syndicate contributions by way of deductions rather than collection by Mr Storey. The overriding benefit was to the syndicate not GML.

27. So those are my findings of fact concentrating on the core issues.

The application of the law

The allowances issue

28. Not in dispute between Counsel is that engaged is Rule 10 of the NMW Regs. Thus;

> **"*Payments and benefits in kind which do not form part[2] of a worker's remuneration***
>
> *10. The following payments and benefits in kind do not form part of a worker's remuneration—*
>
> …
>
> *(k) payments paid by the employer to the worker attributable to a particular aspect of the working arrangements or to working or personal circumstances that are **not consolidated[3]** into the worker's standard pay unless the payments are attributable to the performance of the worker in carrying out the work;*
>
> …"

29. So, there are three limbs. Limb one neither Counsel disputes is met. That is to say the allowances paid were attributable to a particular aspect of the working arrangements.

30. It is limb two which becomes the first focus in terms of determination of the issue as to whether or not these allowances do or do not form part of the worker's remuneration for the purposes of calculating the national minimum wage at the prevailing time.

31. So, what is to be meant by the words "*are not consolidated into the worker's standard pay"*?

32. For the purposes of the argument, the standard pay before consideration of consolidation is the 40 hours per week times the prevailing rate of pay, which of course was the national minimum wage. But has that standard pay in effect been increased, which of course is the core point, by the allowances in that they have been consolidated? The NMW gives no definition of "*consolidated*". In terms of the jurisprudence put before me by both Counsel, none of it is on point.

[2] My emphasis
[3] My emphasis

Reliance is placed by Mr Singh on behalf of the Respondent on the National Minimum Wage Manual - HMRC Internal Manual - GOV UK, as to which I have before me commencing at Bp 407 and engaged therein comes under the heading "***What is an allowance for national minimum wage pay purposes?*** And underneath that heading, having set out Regulation 10(k) to which I have now referred to, and by reference to "*not consolidated into standard pay*" is set out, that there is no definition to determine when an allowance is consolidated into standard pay. " A view has to be taken as to whether an allowance is amalgamated into the overall pay arrangement. Indications that an allowance is consolidated into standard pay can include (but is not restricted to) circumstances when the allowance is:

- treated in line with the overall pay package such as being treated the same with regards to annual pay increases or decreases, and/or
- included in pensionable pay, and/or
- included when calculating any overtime rate."

33. In the giving of his evidence before me, Mr Singh, and in fact in terms of some questions that I asked him, accepted that bullet points two and three did apply. Therefore, should not the scales so to speak tip in favour of the Appellant because that means two out of the three indicators were met? The point Mr Singh essentially made was that he saw the fact that there had not been the amalgamations so to speak of the allowances into pro rata increase in their rates in line with the percentage increase in the national minimum wage in any given year as of most significance. In his submissions to me, Mr Lewis made the same point, observing that certainly in the world of work and where they are such as union related agreements, then it is usual that these allowances do in fact increase pro rata an increase in the standard wage rate. But conversely if they are not part of an agreement whereby this applies, then they should not as a matter of common sense and in terms of objective assessment be seen as being therefore consolidated. To turn it around another way, they are not amalgamated.

34. Conversely Mr van Heck points out to me that it is a fact that there has been the unification so to speak in terms of the increase pro rata in pension and calculation of overtime rates. Therefore, that points in terms of the balance of probabilities so to speak in favour of this being a consolidation.

35. This issue has given me considerable thought. I am well aware of the implications of any finding that I make in terms of the potential impact on this small business and to which see the emphasis on the likely severe financial impact as per Mr Howitt's statement. But I have to deal with this matter objectively and in terms of the Regulation and not weigh in the balance the impact upon GML. To assist myself, I therefore turned to the definition of consolidation in the Oxford English Dictionary and in particular as being "*Combined*". I also bear in mind that I have to take a purposive approach to the Regulation and in that sense the dicta of Elias J as he then was in ***Leisure Employment Services Ltd v Commissions for HM Revenue and Customs***, as reaffirmed in the lead speech of Buxton LJ when this case was on appeal - see 2007 IRLR 450. The EAT citation for the case being ***[2006] ICR 1094,*** thus:

> "*… The Legislation has to take a strong line to ensure that the statutory minimum wage is properly secured for workers even if that means that certain arrangements, not objectionable in themselves, cannot be permitted*".[4]

36. The tragedy is that for a been relatively low cost GML, via Mr Howitt, could have avoided this difficulty if these allowances had simply been increased by the pro rata percentage increase in the NMW. But this did not occur and this was clearly for commercial reasons, ie there is a reference by Mr Howitt to "*market forces*". The problem then is that I conclude with a considerable degree of reluctance that Mr Singh and thence Mr Lewis are correct in that the failure to increase pro rata the allowances as per bullet point one is a significant factor. If Mr Howitt and thus GMF was able to increase the overtime and pension elements pro rata then why not the allowances? It tilts the balance as it clearly points to them not being consolidated.. So that is the conclusion that I have reached.

37. That brings me to limb three because my having found that these allowances were not consolidated, then it follows that they will not form part of the remuneration of these workers for the purposes of the NMW unless "*payments are attributable to the performance of the worker in carrying out the work*".

38. In common parlance in the world of work" attributable to the performance" means such things as output or quality of work. Mr Howitt for reasons he made plain did see this as performance related because of the nature of the production operation. It takes place in one integrated building, and in order for the production process to run smoothly from the start of the process at the one end to the finish at the other, the members of the workforce need to have arrived and be on station by the commencement of each of these two parts of the day, in other words the two shifts, and to maintain regularity of attendance because if they do not it disrupts the process. On n the face of it, that could be said to be a persuasive argument. Therefore, understandably, Mr van Heck places considerable emphasis upon it and I must make plain it came out of questions that I asked Mr Howitt about the modus operandi of the manufacturing process.

39. But, Mr Lewis has put before me, in the sense that it is in the bundle of authorities, the Judgment of the EAT presided by His Honour Judge Peter Clark in ***Aviation & Airport Services Ltd[5] v Mrs A M Belfield & others EAT/194/00***. This Judgment was delivered on 14 March 2001, and it goes to the status in effect of an attendance allowance. In that particular case, the relevant workers were engaged to provide facilities for transporting disabled people around an airport. Their terms and conditions included an attendance allowance. Doubtless the reason for that would be that it would be important that they were on duty on time and with regularity of attendance in order to not leave such as disabled people unable to be conveyed to their flight . In that sense, it could be seen as being very much relating to performance in terms of the modus operandi. And this was argued on behalf of the Appellant in that case, ie

[4] See paragraph 14 of the Buxton LJ judgement.

[5] I will refer to this as the Aviation case.

Aviation, by no less than Mr Underhill, QC (as he then was) and who of course became a member of the Court of Appeal and in terms of the then NMW Regulations 199 and Regulation 31(1)(d) which very much mirrors in that sense Regulation 10 and for my purposes 10(k):

> *"He submits that full attendance at work in an integral part of the employee's performance. The DTI Guide is wrong to suggest at paragraph 92*, *that an allowance paid for regular prompt arrival at work does not count towards the NMW*".

40. At paragraph 33, the EAT said:

> "*… we find ourselves in agreement with the tribunal's construction. It seems to us that "an allowance attributable to the performance of the worker in carrying out his work" properly refers to his performance whilst at work. It covers things like a production bonus, payable on the achievement of a specified quality/quantity target. This attendance allowance does not fall within the exception. It therefore falls to be deducted from the total remuneration paid to the applicants for the purpose of calculating the NMW payable*."

41. But of course understandably Mr van Heck relies upon the modus operandi at GMF, to which I have now referred, and that it can be distinguished from that in the Aviation case. Mr Lewis on the other hand refers on the judgment and that I should follow it and that the reality in the world of work is that "*related to performance*" speaks for itself. In other words, it goes to such things as quality and quantity. I conclude that I must follow the EAT in ***Belfield*** on this point, bound as I am by a decision of the EAT if it is essentially on all fours on a particular point. I am driven to the conclusion that in respect of the attendance allowance issue, it is not so different as to mean that I am not bound by it. In any event in my extensive judicial experience, "*related to performance*" speaks for itself in terms of it is exactly the kind of working arrangements that were referred to by HHJ Peter Clark and his tribunal panel and therefore reflected in their Judgment.

Conclusion on the allowances issue

42. It follows that I conclude that as per limb 3, the attendance and timekeeping allowances are not attributable to the performance of the worker in carrying out the work. It follows that I therefore conclude that the appeal must fail on the allowances issue.

Back to the syndicate issue

43. Not in dispute is that engaged is Regulation 12. Also not in dispute that only engaged is 12(1). It states thus:

> "***12.***—*(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference*

*period, **for the employer's own use and benefit**[6] are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation)."*

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

(Suffice it to say that the parties agree that none of those are engaged.)

44. Dealing here of course with deductions not payments, the issue is in relation to the deductions whether or not "*for the employer's own use and benefit*" applies. If it does, then the syndicate deductions do not form part of the pay for the purposes of the national minimum wage with obviously consequent knock-on effects in terms of the sums sought in that respect by HMRC within the NOU including the penalty.

45. In this respect, I have been referred to the jurisprudence as per the bundle of authorities.

46. They are in effect two cases. The first is ***Revenue and Customs Commissioners v Leisure Employment Services Ltd***,[7] and first the report of the EAT with Elias, J as he then was again presiding ***[2006] ICR 1094 onwards*** and to which I have already briefly referred. Then before me is the report of the appeal in the matter, the lead speech being given therein by Buxton LJ and reported at ***[2007] IRLR*** and to my purposes the relevant passage commencing at page 453.

47. Finally, the Judgment of HHJ Auerbach of much more recent time and which does relate to the NMW Regs 2015 as does this case. The earlier reports to which I have referred engage the predecessor NMW 1999 Regs. The case presided over by HHJ Auerbach is ***Commissioner for HM Revenue and Customs (Appellant) v Middlesbrough Football and Athletic Company [1986] Ltd (Respondent)***. It is to be noted that HHJ Auerbach in his Judgment refers to the LES case extensively and I therefore do not need to rehearse much of LES before Elias J or thence as per the lead speech of Buxton LJ.

48. But first I can distinguish the facts in those cases from that before me because they are different. In the LES case, seasonal workers essentially working at Butlins could avail themselves of accommodation provided by the Respondent. If they did, then they had deducted from their wages an accommodation rate, which would fit in respect of the then NMW Regs with the applicable deductible allowance for the purposes of the NMW. But they were also required to pay for, or at least a contribution towards, the gas and electricity consumed. There would be more than one seasonal worker being accommodated in any given chalet. Those monies were deducted from their wages. The issue then became as to whether that deduction was for the employer's own use and benefit within the Regulation. I stress it does not have to be only for his benefit a point made by Elias J and again referring to there needs to be a purposive

[6] My emphasis

[7] I refer to this as the LES case.

approach to the Regulation because of the need to ensure that workers get the minimum wage.

49. The Regulation then engaged, 32(1)(b), was slightly wider than the Regulation as it now is at Regulation 10 because it said:

> "*(b) any deduction made by the employer for his own use and benefit (and accordingly not attributable to any amount paid or payable by the employer to any other person on behalf of the worker), except one specified in regulation 33.*"

50. There was a lacuna so to speak because when it came to Regulation 34(c) under the heading: "*Payments made by or due from a worker to be subtracted …*" as opposed to Regulation 32 it was stated at (c):

> "*(c) any other payment due from the worker to the employer in the pay reference period that the employer retains or is entitled to retain for his own use and benefit except for a payment required to be left out of account by regulation 35*."

51. So the words in parenthesis at 32(b) were not present at 34(c). Suffice it to say that Elias J said that they need to be imported across in order for that Regulation to have the consistency with Regulation 32(1)(b), a point agreed by Lord Justice Buxton. Interesting though the debate before me as to the significance of their exclusion in term of regulation 12(1) of the 2015 Regs, I agree with Mr Lewis that I must apply the Regulation and which was put before Parliament as the preamble makes clear. But obviously, if GMF via Mr Howitt is obliged to pay the lottery deductions and in the way that I have found it di and with immediacy, does that not establish that it was not ***for the employer's own use and benefit***[8] *?*

52. Reverting to LES, the issue in that case was whether these deductions for gas and electricity were in fact such as the employer was obliged to pay the same to any other person on behalf of the worker. It was concluded that there was no such obligation on the facts of that case. Put at its simplest, it was because those deductions were not because there was specific electricity bills for any given group of occupiers of a chalet as employees but went towards the overall energy bill that LES as the operator would have had in relation to the Butlins site, and of course in the interim until the bill came in, it was free to deal with the money in any way it wished, ie pay other creditors.

53. When it comes to the Middlesbrough Club case, this was a scenario in which employees of the football club could purchase season tickets in advance and thence had a weekly sum deducted from their wages over it seems about 14 weeks in terms of paying for said season ticket. The point made by HMRC in that case is that the Respondent gained the benefit of that money because as it was getting the payments in advance; it was free to deal with the monies in

[8] My emphasis

any way it wished and it was not under any obligation to pay some third party on behalf of the relevant worker.

54. In neither case was it submitted, or a point in argument, that the word "*benefit*" extended to other than the financial so, it not being an issue, it was not adjudicated upon.

55. As I have already pointed out, the principal thrust of HMRC in the case before me and as is so obvious from the extensive correspondence that took place between Mr Singh and Mr Howitt prior to the issue of the NOU was as follows, as to which see heading: "*Deduction*" (Bp129-130) in the following passage:

> "*The deduction would be classed as a deduction for the employer's own use and/or benefit. A deduction is made for the employer's own use or benefit where the deduction is made by the employer and the employer is free to* ***use that money***[9] *in any way they wish. It does not matter;*
>
> - *whether the employer makes a profit from the transaction or not,*
> - *if the deduction is made from gross or net pay.*
> - *if the deduction is made under an agreement entered into with the worker,*
> - *or whether or not the worker benefits from the arrangement.*"

56. He then recited from Regulation 12, which need not concern me, but his whole point was that this was a financial benefit: nothing was said about the wider concept of benefit now relied upon. But put at its simplest, it is submitted by Mr Lewis that even if this was not a financial benefit, and in that sense on the facts in the case before me as I found them so to be now of course, it can be distinguished from LES and Middlesbrough, that the word *"benefit*" has this wider concept. But, cross-reference to the actual Regulation and it only says "*benefit*" and then go back to the jurisprudence to date and the clear emphasis is on financial benefit. Doubtless that is of course why it was referred as such to by Mr Singh in the exchange to which I have now referred which then brings me across to the guidance on this issue for the purposes of the HMRC Manual, which is NMWM11020 as commencing at Bp 494 before me and specifically at page 405 as follows:

> "***Employer's own use or benefit***
>
> *A deduction is* ***made for the employer's own use or benefit*** *where the deduction is made by the employer and the employer is free to use that* ***money***[10] *in any way they wish. …*"

57. So this wider interpretation of the meaning of the word "*benefit*" for the purposes of the NMW and the Regulation which I am engaged with is certainly not being contended for in the manual or prior to the actual hearing before me in the contentions advanced by the Respondent.

[9] My emphasis
[10] My emphasis

58. So the wider meaning contended for by Mr Lewis namely that benefit can extend to such things as a practical benefit for the Appellant, ie avoiding the potentiality of a problem within the syndicate of employees were there to be a win and one of the syndicate had failed to make their as per the current jurisprudence or indeed the guidance of the HMRC to itself or indeed the contention as per the exchange which I have referred to and in particular Mr Singh.

59. It follows that on the facts in this case, I exclude that the deductions were for the employer's own use and benefit. There was in effect, and here I am with the contentions of Mr von Heck as to which see his submissions and preceding that the rider to the notice of appeal, that there is to be implied in here a trust and which would flow to that extent with the authorities that he has relied upon and which I do not intend to rehearse because they are in his submissions and indeed that of Mr Lewis and then to the extract before me from Smith and Monkcom: The Law of Gambling - Third Edition commencing at Legal Rights and Liabilities. Thence moving on to in particular to rights and liabilities between syndicate members and then the passages relating to the construing of what can be a trust. In that respect particular emphasis being placed by Mr von Heck on the passages starting at 21.16 and referring to a Canadian case namely Taylor and Smith. Suffice it to say that on my findings of fact, I conclude that at all times Mr Howitt saw himself as being the trustee so to speak of the syndicate and handled the monies deducted at all times accordingly. They only notionally went through the only bank account and in effect straight out for the purposes of purchasing the lottery tickets and, insofar as it matters, but it goes to integrity in terms of the syndicate, whenever there was a win, and they were modest sums, the cash received at the outlet was placed in the safe back at the business and by agreement, as to which see the syndicate agreement to which I have referred, when the sum reached £250 it was distributed pro rata the contributions.

60. It follows that this case turns on its own facts.

Conclusion

61. It thus follows that I find that the deductions were not for the employer's own use and benefit. For the avoidance of doubt, I do not construe the Regulation in the context of the jurisprudence and indeed the HMRC's own approach up to until now as being capable of saying that there is nevertheless a benefit engaged if it is not financial.

62. Finally, in any event I conclude that any benefit to the Respondent and the GMF for the reasons I have given was de minimus. What was happening here is that Mr Howitt was relieving a burden upon Mr Storey and with very little, if any, benefit at all to the Respondent; at best, the possibility of heading off the hypothetical in due course should there be a large win and a member of the syndicate had not paid their contribution with the potential impact upon worker relations.

Overall conclusion

63. Thus, it means that I find as follows:

6.1 The appeal on the syndicate issue succeeds.

6.2 The appeal on the allowances issue does not succeed.

6.3. The next stage of course will therefore be for me to have to determine, (and which I was not asked to do at this juncture) as to what then becomes the shortfall in the national minimum wage and that will require revised calculations from the parties and in that respect how that then impacts upon whatever penalty would thus be due.

6.4 The way forward is obviously as indicated by both Counsel that the parties will first reflect upon this Judgment and Reasons and then write into the Tribunal with their proposals as to way forward.

6.5 It thus follows that I am Ordering that they do the same within 21 days of the publication of this Judgment and Reasons.

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Employment Judge P Britton

Date: 15 June 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE