Neutral Citation Number: [2024] EAT 120

Case No: EA-2023-SCO-000066-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 23 July 2024

Before :

JUDGE BARRY CLARKE

- -

Between :

COMMISSIONERS FOR REVENUE AND CUSTOMS

Appellant

- and –

LEES OF SCOTLAND LIMITED

Respondent

- -
- -

Mr Calum MacNeill KC and **Mr Alan Cowan** (instructed by the Office of the Advocate General for Scotland) for the **Appellant**
Ms Sally Robertson (instructed by Burness Paull LLP) for the **Respondent**

Hearing date: 11 April 2024

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JUDGMENT

SUMMARY

NATIONAL MINIMUM WAGE

The respondent company operated a savings scheme. Its workers voluntarily paid contributions into the fund, which were deducted from their wages, to help them save for holidays. It was a laudable purpose. The company retained those deducted sums in its main trading account, and paid them upon request to its workers so that they had a convenient lump sum to pay for a holiday. However, in the case of some of its workers, the deductions pushed their wages below the national minimum wage. The appellant, HM Revenue and Customs, served a notice of underpayment on the company requiring it to pay arrears of the national minimum wage to the workers named in the notice.

The company appealed the notice to the ET, which had to decide whether these deductions were for the company's "own use and benefit" for the purposes of Regulation 12(1) of the National Minimum Wage Regulations 2015. It decided they were not, and rescinded the notice. On appeal the EAT held that the ET had erred in law in its interpretation of Regulation 12(1) and, contrary to previous case law, in failing to adopt a purposive approach. The EAT reached the contrary conclusion: because the deductions were held in the company's main trading account, they were at its disposal and were for its use and benefit.

The EAT also overturned the ET's judgment that, when the company paid the savings to the workers, those payments constituted "additional remuneration" for the purposes of section 17 of the National Minimum Wage Act 1998, which went towards extinguishing or reducing its liability to pay them arrears of wages. Consequently, the EAT restored the notice of underpayment.

JUDGE BARRY CLARKE:

Introduction

1. Lees of Scotland Ltd is a confectionery manufacturer, based in Coatbridge, well-known for its teacakes, meringues and snowballs. I will refer to it as the company. Until recently, and for over 30 years, it operated a "holiday fund". This was a voluntary savings scheme. Its workers could choose to have a regular sum deducted from their wages and paid into the fund. There are many schemes like this around the country; they help workers save for a rainy day or spread costs for periods of large expenditure (such as Christmas) across the year.

2. In this case, the money set aside for this purpose went into the company's main trading account. There is no doubt that its intentions were benign. When its workers needed the money for a holiday, they asked for it and the company gave it to them. No one has suggested otherwise; no worker was ever short-changed in that sense. However, at least for some of the company's workers, the deductions pushed their wages below the level of the national minimum wage ("NMW").

3. An enforcement officer of His Majesty's Revenue and Customs (HMRC) took the view that, by operating the holiday fund in this way, the company was failing to comply with the legal requirement to pay some of its workers the NMW. HMRC served a notice of underpayment on the company on 22 November 2022. That notice identified combined arrears of nearly £81,000.

4. The company appealed to the Employment Tribunal (ET), contending that no arrears of wages were in fact due. HMRC (technically, its Commissioners) resisted the appeal. The main issue in the case was whether the sums held by the company in the holiday fund, properly analysed, were for its "own use and benefit". By a reserved judgment, the ET (Employment Judge Hoey

sitting without non-legal members) upheld the company's appeal and rescinded the notice. At first blush, the ET's approach may seem to accord with common sense; after all, the fund was to help the workers use their wages to save for their holidays. What, it may be asked, could possibly be objectionable about that?

5. HMRC has appealed to the EAT. It has been represented in this appeal by Mr Calum MacNeill KC. He led Mr Alan Cowan of counsel, who appeared before the ET. The company has been represented by Ms Sally Robertson of counsel, as it was before the ET. I am grateful to all advocates for their helpful submissions.

The national minimum wage

6. I begin with a brief analysis of the NMW. It is a prescribed minimum hourly rate of pay that employers must legally provide to their workers. It is the policy expression of several governments, for over a quarter of a century, in pursuit of two parallel aims. The first aim is to ensure that the lowest paid and most vulnerable workers in society receive a basic floor of income. This should be in the form of cash (rather than benefits in kind), an approach which can trace its ancestry to the Truck Acts. The second aim is to ensure that employers cannot unfairly undercut competitors based on the artificially low prices that may be delivered by paying wages below that floor.

7. A detailed statutory scheme governs when and how the NMW is paid, recorded and enforced. That scheme is set out principally in the National Minimum Wage Act 1998 (the "NMWA") and the National Minimum Wage Regulations 2015 (the "Regulations").

8. An individual worker who believes they have not received the NMW can present a claim against their employer to an ET. However, HMRC also enforces payment of the NMW on

behalf of the Department for Business and Trade, which is the government department responsible for employment law policy. HMRC may serve a notice of underpayment on an employer, following an investigation, specifying an outstanding sum and a due date for paying the workers named in the notice. This mechanism is set out at section 19 NMWA.

9. By section 19C NMWA, the employer is entitled to appeal HMRC's decision to serve such a notice to an ET. It can do so by reference to a limited number of grounds specified by statute. One of those permitted grounds is that, in fact, no arrears of wages are due to any worker named in the notice. If an ET upholds the employer's appeal, it is required by section 19C(7) NMWA to rescind the notice of underpayment.

10. A worker's basic statutory entitlement to the national minimum wage is found at section 1(1) NMWA. When providing how remuneration is to be calculated for this purpose, the accompanying Regulations identify a "pay reference period". The effect of regulation 6 of the Regulations is that a worker paid monthly has a pay reference period of a month, while a worker paid weekly has a pay reference period of a week.

11. Part 4 of the Regulations identifies what counts as remuneration for NMW purposes. Within that Part, regulation 8 provides:

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

12. These two chapters tightly prescribe what counts towards the NMW or may properly be deducted from pay without affecting the NMW. Chapter 1 is entitled "Payments from the employer to the worker". It comprises regulations 9 and 10.

13. The effect of regulation 9 is that remuneration in the pay reference period comprises the gross payments paid in that period less any deductions that do not count towards the NMW. The pay allocated to a particular pay reference period is generally either the pay received during that period, or the pay that is earned in that period but not received until the next pay reference period. In most cases, if pay is not received until after the next pay reference period, it will count in the period in which it was received. Commission is an example of when pay may be earned in one pay reference period but not paid until the next period.

14. Regulation 10 identifies the pay and benefits that do not count towards the NMW. For example, loans by the employer, lump sum payments on retirement, redundancy payments, and benefits in kind do not count towards it.

15. Chapter 2 is entitled "Reductions". It comprises regulations 11 to 15. It identifies the pay and benefits that reduce the NMW and those that do not. And so we turn to the crucial provision in this appeal, which is regulation 12(1). This provides (with my added emphasis):

> **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).**

16. In this appeal, we do not need to be troubled by regulation 12(2), which deals with matters such as deductions following an advance of wages or an accidental overpayment of wages. We also do not need to be troubled by regulation 14; this deals with the complex issue of how accommodation provided by an employer should be treated for NMW purposes. Our focus is instead on regulation 12(1): any deduction made by the employer in the pay reference period which is for its "own use and benefit" is to be treated as reducing the NMW. It presents a problem where such reductions reduce the amount paid to the worker to below the NMW. As we shall see later in this judgment, this concept has been analysed previously by the EAT and

the Court of Appeal in England and Wales.

17. I need to say something about the consequences of non-compliance. A worker who has not been paid the NMW is deemed, by section 17 NMWA, to possess a contractual entitlement to arrears. This section provides:

> **(1) 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 national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—**
>
> **(a) the amount described in subsection (2) below, and**
> **(b) the amount described in subsection (4) below.**
>
> **(2) The amount referred to in subsection (1)(a) above is the difference between—**
>
> **(a) the relevant remuneration received by the worker for the pay reference period; and**
> **(b) 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 national minimum wage.**
>
> **(3) In subsection (2) above, "relevant remuneration" means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.**
>
> **(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—**
>
> **A / R1 × R2**
>
> **where—**
> **A is the amount described in subsection (2) above,**
> **R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and**
> **R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.**
>
> **(5) Subsection (1) above 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.**
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> **(6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to apply in relation to him, the amounts described in subsections (2) and (4) above shall be regarded as reduced by the amount of that remuneration.**

18. It is no surprise that the defaulting employer is required to pay its workers the arrears that are

due so that it may meet its obligations to pay the NMW. However, as section 17(1) makes clear, those arrears – described as "additional remuneration" – must be the higher of two amounts.

19. The first amount is set out at section 17(2); it is simply the difference between (on the one hand) the pay received by the worker and (on the other hand) the pay the worker would have received if the employer had paid the NMW. That is straightforward where one is looking at the most recent pay reference period, such as the last month. However, what if the arrears stretch back over a longer time?

20. This brings us to the second amount set out at section 17(4). This requires such arrears to be paid at the current rate of the NMW (that is, the rate applicable at the date when the amount of arrears was determined), on the assumed basis that this rate had applied throughout the entire time the employer was in default. In other words, where underpayment has occurred over a longer time, an uplift implements all intervening annual increases to the NMW.

21. Self-evidently, the amount of the uplift will vary depending upon when the arrears arose; the longer ago the arrears, the greater the uplift needed to rectify the underpayment. To quantify the uplift, it is necessary to identify the pay reference period in respect of which the entitlement to the NMW arose. Where underpayment has occurred over a longer time, there will be multiple pay reference periods.

22. Notably, it is not possible to "contract out" of receiving the NMW. By section 49(1)(a) NMWA, any provision in any agreement (whether a worker's contract or not) is void insofar as it purports to exclude or limit the operation of any provision of the NMWA.

23. Finally, I end this section by observing that the NMW legislation envisages that workers should be able to determine for themselves, readily and without complexity, whether they are being paid cash that is above or below the NMW. Quite apart from this being consistent with the policy aim to protect the lowest paid and most vulnerable workers in society, it is reflected in the scheme by which they have access to the employer's relevant records with an accompanying right to complain to an ET where access is refused; see sections 10 and 11 NMWA. In particular, section 10(10) defines "relevant records" as:

> **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.**

24. I now turn to the judgment reached by the ET.

The facts

25. There was no dispute about the key facts before the ET. I will draw out those that are relevant to this appeal. Paragraph numbers in this section refer to paragraphs in the ET's judgment.

26. The company's express purpose in operating the holiday 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" (paragraph 8). It met any and all costs associated with administering the fund (paragraph 19).

27. The monies that the participating workers saved in the holiday fund were drawn from their net wages (i.e., after payment of income tax and national insurance contributions), regardless of whether they were paid monthly or weekly (paragraphs 9 and 11).

28. All workers were eligible to participate in the fund. It was completely up to them whether

they participated and, if so, the amount they saved (paragraphs 7 and 10-11). Upon giving the company two weeks' notice, workers could vary the amount saved, or withdraw all or part of their saved funds, or withdraw from the scheme altogether (paragraphs 14-16).

29. The amount that the company deducted and paid into the fund was itemised on the payslips of participating workers as "holiday fund" (paragraph 18). Likewise, when workers withdrew some or all of their savings, the withdrawal was paid through payroll and the payslip itemised the payment as "holiday fund" (paragraph 22). The case before the ET proceeded on the basis that, properly analysed, these were deductions rather than payments.

30. The company maintained a record, in the form of a ledger, "detailing the contributions deducted from each participating employee's wages and how much each participating employee had contributed and withdrawn" (paragraph 20). Workers could request details of their savings balance within the fund (paragraph 21).

31. Any amounts that the company deducted from wages for the purposes of the fund were "entirely upon the direction of the claimant's employees", who were in "complete control" of the amount the company deducted and when such deductions ended (paragraph 23), and of the level of withdrawals and when they were made (paragraph 24).

32. There were no provisions to this effect in any contract of employment. The terms by which the fund operated were not set out in writing in a single document. The ET referred to documents such as a "Contribution Deduction Sheet" (paragraph 11), a "Contribution Change Sheet" (paragraph 14), a "Contribution Withdrawal Sheet" (paragraph 15). It is not clear from the judgment whether these documents were supposed to have contractual effect; understandably, the ET simply adopted the agreed position between HMRC and the company

that the company "had a contractual obligation to pay to the participating employees their savings from the fund upon the relevant employee's request" (paragraph 27). That agreed position – and therefore the judgment – did not elaborate on how the contract had been formed, whether it was part of, or supplementary to, individual contracts of employment, or what its further terms (such as the time frame for payment out of the fund) might have been.

33. In respect of those workers named in HMRC's notice of underpayment, any deductions made from their wages and placed in the fund "resulted in the amounts actually paid direct to those employees during that pay reference period falling below the rates required by the [NMWA]", subject only to the amount of any withdrawals they might have made during the same pay reference period (paragraph 25).

34. The workers' contributions to the fund, drawn from these deductions, were held in the company's business current account, being its main trading account. They formed part of the total monies held in that account and were indistinguishable from the other monies held there, albeit that the amounts held were apparent from the ledger (paragraph 26). The ET noted a concession made before it by HMRC (although it was clarified before the EAT) that, if the company had chosen to place the funds in an account separate from its own bank account, there would be no concern about the NMW because the employer would have had no benefit at all (paragraph 95).

35. The ET made no express factual finding about whether the company was able to accrue and retain interest on the deducted sums that comprised the fund. However, the ET appeared to accept during its summary of the parties' submissions (or, at least, it recorded that the parties agreed) that the company was able to accrue a small amount of interest on the pooled deductions. The ET's analysis proceeded on that basis (paragraphs 86-87 and 89-91) and,

further, on the basis that the company gained a cash flow benefit by having the funds in its main trading account (paragraph 90).

36. Neither the company nor the participating workers intended that withdrawals from the fund should be treated as payments of NMW arrears. For the company's part, this was because it had not considered there to have been a breach of the requirement to pay the NMW. Consequently, there was no attempt to relate such payments to any particular pay reference periods in which the deductions had been made, and no uplift was made to the amounts withdrawn to reflect intervening increases in the rate of the NMW (paragraph 28).

37. The company closed the fund on 24 January 2020 following advice from HMRC that the operation of the fund was not legally compliant (paragraph 29). By 17 December 2020, all savings in the fund had been paid to the participating workers (paragraph 31).

The ET's judgment

38. Based on these facts, there were two agreed issues for the ET to decide.

39. The first issue was whether the holiday fund deductions made by the company were for its "own use and benefit" for the purposes of regulation 12(1). If they were, those deductions were to be treated as reducing the amount it paid its workers, pushing the remuneration of those named in the enforcement notice to below the level of the NMW. If they were not, those deductions – and the broader savings scheme under which they were made – had no impact upon whether these workers received the NMW.

40. In approaching this question, the ET decided as follows:

40.1 There was no direct case law authority on the point (paragraph 38).

40.2 The deductions were to considered as delayed or deferred wages (paragraph 91). They were "effectively ringfenced to the extent the [company] required (contractually) to repay the sums on demand" (paragraph 86).

40.3 It was necessary to look at the purpose and intention of the deduction. The fact the company had the money in its account, and could use the funds as it saw fit, was not the purpose of the deduction in any sense. It was simply a consequence of it (paragraph 92).

40.4 Parliament had intended only to prevent deductions that were "for" the benefit of an employer (the ET emphasised the preposition "for"), which required an analysis of "the purpose or intention of the deduction" (paragraph 93). Purpose and intention were to be "considered objectively" (paragraph 97).

40.5 The motive of the employer in setting up the holiday fund (that is, the overall arrangement) was irrelevant. The focus should instead be on the purpose of the individual deductions (paragraph 94).

40.6 While there was no "legal obligation" on how the company used the account into which the deductions were paid, there were "obvious legal restrictions" on its ability to use that money. In fact, the ET identified only one such restriction (at paragraph 96), namely:

> **… the sums retained *required* by contract to be repaid to the workers on demand. While the [company] could use the funds, ultimately the sums due to the workers remained due, irrespective of how the [company] 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.**

40.7 The ET found that 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 their other wages). It may have been a "practical consequence of the arrangement" that the company benefited from having the money in its account, but this was "more of [an] administrative convenience" (paragraph 100).

41. Having directed itself that the relevant test was the purpose of the deductions, and that it should take a purposive approach to Parliament's intention to preserve the NMW, the ET then set out its conclusions. To do justice to the ET's thoughtful approach, I set them out in full:

> **101. It was for convenience the [company] managed the funds in their account. True it is that the [company] 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 … applying the statutory language in a common sense way in light of the facts.**
>
> **102. Counsel for [HMRC] 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.**
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> **103. Counsel for [HMRC] 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. … the position advanced by counsel for [HMRC] 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 [HMRC] – 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 fact 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 …

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.**
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> **109. It did not matter what was in the [company's] 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.**

42. Having decided that the deductions were not for the company's own use and benefit, the ET upheld the company's appeal and rescinded the notice of underpayment.

43. The second issue for the ET to decide only arose if it decided the first issue in favour of HMRC.

44. As already noted, it was agreed before the ET that (a) neither the company nor the participating workers intended that withdrawals from the fund should be treated as payments of NMW arrears, (b) no attempt was made to relate payments from the fund to any particular pay reference periods in which the deductions had been made, and (c) no uplift was made to the amounts withdrawn to reflect intervening increases in the rate of the NMW. (In this context, I am treating "withdrawals" and "payments" as synonymous.) Nevertheless, the ET was asked to decide whether the money the company paid to its workers, by which the workers withdrew their savings from the holiday fund (or otherwise were refunded their savings when the fund closed in January 2020), extinguished (or, at least, reduced) the amount the company owed them by way of NMW arrears. As articulated before the ET, the issue was whether those payments out of the holiday fund amounted to "additional remuneration" for the purposes of

section 17 NMWA.

45. Although it was now a moot point, the ET helpfully dealt with it in the alternative, if it were wrong about the first issue. One of the points the company made to the ET was that its workers would be unjust recipients of a windfall if they got their money back from the savings fund and were still entitled to NMW arrears. Those savings, in the ET's analysis, had all along simply been delayed or deferred wages. If the company were required to pay NMW arrears to its workers at this late stage, without setting off the money it had already refunded them, they would effectively be paid twice. The company submitted that it would be an absurdity for the workers to be better off than if it had simply retained their savings in the holiday fund and ignored their requests for payment. HMRC responded that there was nothing inherently wrong with the workers being paid their savings and separately being paid NMW arrears, given that it was not possible for them to "contract out" of the applicable legislation.

46. As to whether the sums paid out of the holiday fund could in principle amount to "additional remuneration", the ET decided that they could (paragraph 134):

> **The natural interpretation of this [phrase] is a sum paid by the employer to the worker. The difficulty for the [company] 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 [company] 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.**

47. The ET then considered whether the sums paid from the holiday fund could fall within section 17(5) or 17(6) NMWA. It decided as follows (at paragraphs 135-137):

> **Both [subsections] state that additional remuneration reduces the minimum wage liability for each pay reference period. The difficulty [HMRC] 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).**

> **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.**
>
> **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).**

48. The ET therefore concluded that, had it been necessary to address the issue, the sums the company paid to its workers out of the holiday fund amounted to additional remuneration that discharged its liability to pay NMW arrears, starting with the earlier pay reference period in respect of which the first outstanding liability arose. Had it not been a moot point, the ET's approach would have required a remedy hearing to decide whether, having regard to the uplift required by section 17(4) NMWA, any further sums were owing once all payments out of the fund had been accounted for.

HMRC's grounds of appeal

49. HMRC has appealed against the ET's judgment on two grounds.

50. First, HMRC has contended that the ET erred in law when concluding that the deductions made for the holiday fund were not for the employer's own use and benefit. The ET's approach (namely, that it was necessary to look at the purpose and intention of the deduction, assessed objectively, rather than the consequence of the deduction) was said to be contrary to case law authorities.

51. Second, HMRC has contended that the ET erred in law in concluding, in the alternative, that the sums paid to the workers from the holiday fund amounted to "additional remuneration".

Noting that it was a matter of agreement between the parties that the payments out of the fund were not intended to be payments of NMW arrears, HMRC has criticised the ET's approach to the lack of correlation between the payments and any pay reference period; in its submission, the ET provided no legal basis for its presumption that such payments would relate to the earliest pay reference period in respect of which there was an outstanding liability and proceed consecutively.

52. The company resisted the appeal by relying on the ET's reasoning.

Discussion: "employer's own use and benefit"

53. Before summarising the parties' submissions, I will consider the case law authority on what is now regulation 12(1). In the more than quarter-century that the NMW has been a feature of the British workplace, the concept of the "employer's own use and benefit" has generated only two appeals. The first was **Revenue and Customs Commissioners v. Leisure Employment Services Ltd** [2006] ICR 1094, which was heard in the EAT by Elias J (as he then was, when President). This proceeded to the Court of Appeal in England and Wales as **Leisure Employment Services Ltd v. Commissioners for HM Revenue and Customs** [2007] IRLR 450, where judgment was given by Buxton, Smith and Wilson LJJ. I shall abbreviate them as "**LES (EAT)**" and "**LES (EWCA)**" respectively, where appropriate, to distinguish between them. The second was **Revenue and Customs Commissioners v. Middlesbrough Football and Athletic Co (1986) Ltd** [2020] ICR 1404, which was heard in the EAT by HHJ Auerbach, which I will abbreviate as "**Middlesbrough FC**".

54. In **LES**, the company employed seasonal workers for its Butlins-branded holiday resorts. It arranged for any workers who so chose to be accommodated on site in shared caravans or chalets. Those workers were required to pay the company £6 a fortnight as a contribution

toward the costs it incurred in arranging for gas and electricity to be supplied to their accommodation. That contribution was deducted from their wages and described as "heat/light" on their payslips. On the face of it, the contribution pushed their remuneration below the NMW. HMRC issued a notice of underpayment. The ET rescinded it, deciding that the contribution was not for the company's own use and benefit, because it did not gain financially from the arrangement and there was a material benefit to both the company and its workers. HMRC appealed to the EAT. It was agreed before the EAT that the cost to the company of procuring the supply of these utilities was in fact higher, such that there was an element of subsidy in the workers' favour.

55. In **LES (EAT)**, Elias J noted that a purposive construction was required to give effect to the underlying social purpose of the legislation. He said the following:

> **40. The revenue say that the money is available to the employer to be used in any way he thinks fit. True it is that he has an obligation to pay the contractual sums he owes to the utility companies, but there is no obligation on him to use the particular monies obtained from the workers in any specific way. The employee has no direct contractual liability to any utility company … Nor can the contract between the worker and the employer create such a contract with the utility company. It is not possible to say that the employer is imprinted with a duty to make the payment in order to discharge the liability of the employee since no such liability exists.**
>
> **41. [The company] contends that the concept of "his own use and benefit" is a much broader one. It envisages a tribunal reaching a conclusion of fact as to whether the deduction is entirely or solely for the use and benefit of the employer or whether it is also for the use and benefit of the employee. If the latter, then [it] submits that the deduction will still not fall within the meaning of [the relevant regulation], provided that overall, it is for the benefit of the employee.**
>
> **42. If, on the other hand, it is obviously to the detriment of the worker, such as where the payment plainly exceeds the costs of the utilities to the employer, then it will be for the benefit of the employer. It is in this way, [the company] says, that the tribunal is able to control any potential abuse by the employer. In this case, [it] relies upon the finding of the tribunal that there was a mutual benefit to worker and employer. [It] submits that that was plainly justified on the facts and, in any event, is not challenged. On the evidence, the employer was benefiting the worker who, on average, was paying less than would otherwise be the case and the whole arrangement was much more satisfactory than using pay-as-you-go meters when, indeed, the share of any individual using shared accommodation would be impossible to identify with any precision in any event.**
>
> **43. I do not agree with [the company] that this concept is a matter of fact for the tribunal. It seems to me that the concept "the use and benefit of the employer" is**

> **a much more precise one … if the money is deducted by the employer with an obligation to account to a third party on behalf of the worker, then it is not deducted for the employer's own use and benefit. In those circumstances, it is imprinted with a trust and the employer has the obligation to pay in accordance with that trust, namely, to pay specifically to the third party. Here the worker has no liability to the utility companies at all. That is a liability of the company. (In fact it is an associated company, but it is agreed that nothing turns on that.)**
>
> **44. … I agree with [HMRC] that there is no legal limitation on the way in which the employers could use the sums received from the worker. To the extent that the accommodation agreement seeks to establish an undertaking by the employer to use the money to pay the employer's own liability to the utility company, I do not think that this helps them. This does not prevent the sums deducted or paid from the worker still being for the use and benefit of the employer. The worker could not compel the employer to use the sum partially to discharge the debt to the utility companies, and he would have no interest in so doing in any event.**
>
> **45. The employer is not simply facilitating the payment by the worker of an obligation or liability which the worker has towards the third party. Accordingly, in my judgment, whether the £6 is taken by way of a deduction or paid by the worker, it plainly falls within the terms of [the relevant regulation].**

56. Elias J decided that the fortnightly contributions of £6 were properly to be described as being in respect of the provision of living accommodation. As this amount exceeded that which an employer could claim for such provision, it reduced the workers' pay below the level of the NMW. Elias J further found that the deductions were for the employer's own use and benefit because there was no legal limitation on the way it could use the sums received from the workers. Each route produced the conclusion that the notice of underpayment was properly served, and he restored it. He added (at paragraphs 57 and 58):

> **… I have sympathy for the employers in the circumstances of this case. On the face of it, this was not an unreasonable arrangement and had they left it to the workers to pay for their own gas and electricity direct to the utility companies, they would not be liable to reimburse these payments. Moreover in this case the employers were not, it seems, charging too much for the services offered (at least when assessed across the board; individuals may have had to pay more than they used). However, it seems to me that there is no way of regulating the employer who does seek to give what are, in effect, benefits in kind and who charges a distortionate price. The legislation has to take a strong line to ensure that the statutory minimum wage is properly secured for workers even if this means that certain arrangements, not objectionable in themselves, cannot be permitted.**
>
> **[The company] submits that the abuse could be controlled by the employment tribunal determining that in those cases where excessive payments were charged, the deduction or payment could be characterised as for the use and benefit of the employer and not for the benefit of the employee at all. However, for reasons I have given, I do not accept that the concept of "use and benefit" can be interpreted in that way, nor do I see on**

> **what basis it can, as a matter of construction, be limited to the situation where the employer alone benefits or where both employer and worker do, but the employer benefits disproportionately to the worker. I think that the approach urged upon me by the Revenue, which I have accepted, better reflects the statutory language and is more likely to achieve the objectives of this particular legislation.**

57. The company appealed again, but the Court of Appeal in **LES (EWCA)** upheld the EAT's judgment. Noting Elias J's reference to the need for a "strong line", Buxton LJ said this about the company's accommodation arrangements (at paragraphs 13 and 14):

> **… it is nothing to the point that the employee has a free choice whether to apply for accommodation in the first place. The issue with which we are concerned arises out of the fact of the provision of accommodation, and it is only that fact that enables the employer to make any deduction at all. The legislator was careful to write the rules on that basis, and not to limit them to the type of case, of which he must have been aware, where an employee such as a caretaker is required to live on site.**
>
> **… quite apart from the wording of the Regulations, a further strong policy objection to LES's argument is that to permit an employer to levy charges that are not controlled by the legislation, because they are not subject to the accommodation limit, leaves open serious possibilities of abuse. It was argued that tribunals would be astute to check such instances. But before they could do that, evidence would be needed of whether the charge was reasonable, or was indeed in relation to a real benefit obtained by the employee. Take the present case. It is accepted that LES themselves are not open to this criticism, because the £6 charge is less than would be incurred if the employees made their own arrangements. That fact has been established through meters installed in some caravans or chalets by LES, in a voluntary step that the Revenue is in no position to investigate. But say that an employer declined to enter into such calculations, and said that the Revenue and the court must rely on his integrity. It is very doubtful whether the tribunal could compel further evidence, whether of the type adduced in this case or more widely in respect of market charges. And if a tribunal were asked to go down that road, it would or should be asking itself at an early stage why it was becoming embroiled in elaborate investigation, and possibly market and economic arguments, when it was administering a detailed statutory scheme that was designed to provide a simple answer to the simple question of whether the worker was receiving his minimum wage … Broad but simple rules, not leading to elaborate arguments of law when those rules have to be enforced, are likely to be the protection for them that the legislator has thought necessary.**

58. The company submitted to the Court of Appeal, as it had before the EAT, that a payment had to be entirely for an employer's use and benefit before it could be properly be said not to count towards the NMW. Buxton LJ briefly dismissed that submission, stating (at paragraph 17):

> **If the Regulations required the payment to be made for the sole benefit of the employer they would have said so.**

59. The company also submitted that the reality of the situation was that the workers benefited

from the arrangement since they obtained the gas and electricity services at a subsidised price and avoided the trouble of sorting them out personally. On that point, Buxton LJ said this (at paragraph 26):

> **There are two reasons why that argument is not open to [the company]. First, the question, specifically limited by the Regulations, is whether the deduction is for the use and benefit of the employer. The question is not whether the arrangement in the context of which that deduction is made benefits the employee. That is why we have to concentrate on the effect on the employer's position of his making the deduction. Second, and more generally, it is not surprising that the Regulations exclude this line of argument. For reasons already indicated, the legislator will have wanted to avoid endless debate about the general equity and the benefit of arrangements made by the employer, and the legislator has done that by drafting the Regulations in specific and limited terms.**

60. In his judgment, Buxton LJ dealt with a submission by the company that it had no right to retain the £6 fortnightly contributions but was obligated, by a clause in the accommodation agreement signed by its workers, to hand them on to the relevant utility providers. He then said this (at paragraph 29):

> **The shortest explanation would appear to be that the wording [of the clause] excludes both the case where the employer retains the payment for the *employee's* use and benefit (for instance, in a savings scheme); and the case where the employer transfers the payment to a third party for that purpose.**

There is no further analysis of the position of a savings scheme, but the mention is notable.

61. Further on in the Court of Appeal's judgment, and in agreement with Buxton LJ, Smith LJ said this (at paragraph 35 and 36):

> **… the focus of the statutory provision is on the deduction or retention of part of the wages and not on the overall arrangement. The only party to benefit from the deductions was LES, as, if the deductions had not been made, it would have had to pay the whole of the supplier's bill instead of only part of it. This situation is to be contrasted with the position where an employer deducts a sum from wages, for example, to pay a trade union subscription or a donation to charity, at the request of the employee and on his/her behalf. In such circumstances, the employer has no interest in whether the payment is made; it is done by him only as a matter of administrative convenience.**
>
> **I am satisfied that this conclusion is in accordance with the policy objective behind this legislation. As Elias J said, the policy is to ensure that the statutory minimum wage is properly secured. Permitted deductions should be clearly defined and recognisable. The question whether a deduction is or is not permitted should not be a matter of**

> **calculation; 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.**

62. The Court of Appeal agreed unanimously with Elias J that the fortnightly contributions of £6 were properly to be described as being in respect of the provision of living accommodation and reduced the workers' pay below the level of the NMW. That was sufficient to dispose of the company's appeal. On the "own use and benefit" point, Buxton and Smith LJJ agreed with Elias J. However, Wilson LJ dissented; he memorably described HMRC's arguments as "Jesuitical", saying at paragraph 52 that the "natural conclusion" (which "every reasonable worker would be likely to concede") was that the sums retained by the company were neither for its use nor its benefit.

63. The only other occasion when "own use and benefit" in this context has been considered upon appeal was in **Middlesbrough FC**. The employer in that case was the operating company behind the eponymous football club. Staff employed in its hospitality and clerical functions agreed, on a voluntary basis, that their wages would be reduced each week by a sum that would fund a season ticket for use by their family members. The effect of that reduction, unless permitted, was to push their remuneration below the NMW. It was accepted that this was not the employer's intention.

64. The ET decided that the reductions were for the employer's own use and benefit, but it rescinded the notice of underpayment on the basis that the workers were paying for goods and services, a category found at regulation 12(2)(e) of the Regulations. On appeal, part of the argument concerned whether the reduction in wages represented a payment to which regulation 12(2)(e) would apply, or a deduction to which it would not apply. HHJ Auerbach decided that it was a deduction, such that regulation 12(2)(e) did not apply. This left the

question of whether the ET had been right to decide that the sums deducted were for the employer's own use and benefit and so went to reduce pay for the purposes of the NMW. The EAT held that it was right so to decide (at paragraphs 96 and 97):

> **… I can detect no error in the present tribunal's reasoning on this point. The findings of fact were plainly properly made, and the tribunal's approach was entirely in line with the guidance in *LES*. Mr Siddall's arguments drawing on the fact that the season tickets were for the use of family members do not get off the ground. The memo signed by each employee … plainly bespeaks an agreement between the employee and the club for the purchase of a season ticket. The fact that it was for the use of a third party does not alter that. There is no mention in the memo of who will use the ticket, and indeed it is referred to as "my season ticket".**
>
> **It was not suggested that the club was expected to pay anything to anyone else, or have any dealings with the card user; nor that there was any evidence about whether, in a given case, there were any obligations as between the employee and the family member. The analogies contended for by Mr Siddall cannot be sustained. The tribunal properly found that the club benefited: this arrangement was the mechanism by which it got paid for the season cards. It properly found that the club had no obligation to give any monies deducted to a third party, or to spend them in any particular way … this was in fact an even more compelling case of a deduction for the employer's use and benefit than the facts of LES.**

65. As the ET had been right to conclude that the sums deducted were for the employer's own use and benefit, but wrong to conclude that they were a payment for goods and services, the EAT restored the notices of underpayment.

First ground of appeal: the parties' submissions

66. I intend the parties no disservice by summarising their submissions briefly.

67. On the first ground of appeal, Mr MacNeill KC for HMRC contended that the ET erred by applying a test of whether, objectively assessed, the purpose or intention of the deductions was that they would be for the company's own use and benefit. Regulation 12(1) does not mention purpose or intention and there is nothing in the case law authority to suggest that they are relevant; further, they introduce complexity to what is intended to be a straightforward matter. He said that the ET erred by improperly disregarding the presence of those funds in the company's main trading account as a simple administrative convenience of the sort

envisaged by Smith LJ at paragraph 35 of **LES (EWCA)**. The ET dismissed this as a mere consequence of the deductions that cast no light on their purpose, but it was, he argued, an integral part of the arrangement.

68. Mr MacNeill KC contended that the ET had wrongly sought to distinguish the two **LES** judgments and the **Middlesbrough FC** judgment (the ET said in its judgment, at paragraph 88, that they did "not particularly assist"). The ET sought to distinguish the LES judgments on the basis that the workers' contributions reduced the cost the employer had to pay to the supplier of gas and electricity such that it was obviously for its benefit. However, Mr MacNeill KC said that it was a misstep for the ET to ignore what was said by Buxton LJ about the need to focus not on relative levels of benefit but, as per paragraph 25 of **LES (EWCA)**, on "the effect on the employer's position of his making the deduction". The ET sought to distinguish the **Middlesbrough FC** judgment on the basis that the employer received the funds for the season ticket and could use the money as they saw fit but, as Mr MacNeill KC said, this was precisely the position the ET was deciding in the instant case. The money was in the company's main trading account; it was able to earn interest and have a cash flow advantage. A contractual obligation to pay the workers their savings at a future date, when an employee submitted a request for payment out of the fund, fell far short of the protection the NMW legislation was intended to provide. One example he gave was that the money would be lost if the company became insolvent.

69. In response, Ms Robertson for the company said that the ET's judgment was clear and methodical, consistent with standard principles of statutory construction and dealt fully with the competing submissions it heard. The ET was entitled to distinguish the judgment in both **LES** cases and the **Middlesbrough FC** case: one reduced the rate the employer paid its utility suppliers and the other was the mechanism by which the employer was paid for season tickets,

and both were entirely different from the sort of savings scheme in this case, and to which Buxton LJ had alluded in his judgment as being something that obviously benefited workers. Furthermore, she said, Buxton LJ's focus on "the effect on the employer's position of his making the deduction" was, in context, to be understood as a reference to the arrangement as a whole and not the individual deductions. Buxton LJ's praise for "broad but simple rules", at paragraph 14 of **LES (EWCA)**, was also about something different: the situation of an employer seeking to levy charges that were not controlled by the NMW legislation.

70. As a result, Ms Robertson contended, the ET was right to consider it a strain on the language for a savings scheme of this sort to contravene the NMW legislation, which would cause unfairness to the company. Indeed, she said, a blinkered focus on the consequences of these deductions (rather than on what they were "for" in the first place) resulted in absurdity: taking a common sense view, they were obviously not, in any shape or form, of benefit to the company. As she put it, if Parliament had intended regulation 12(1) to be limited in the way HMRC suggests, the residual category of "employer's own use and benefit" would be empty and without purpose, because all diversions of pay, howsoever described, would reduce the remuneration paid for NMW purposes unless expressly exempted by the Regulations or paid into and kept in a separate bank account and held in trust. Ms Robertson took comfort from the reference made by Buxton LJ to savings schemes at paragraph 29 of **LES (EWCA)**, which suggested he saw no difference between retention of funds by an employer and payment to a third party for the same purpose. She said that, if it had been intended that payment to a third party on behalf of the worker was required to avoid a deduction being for the employer's own use and benefit, regulation 12(1) would have been drafted differently.

First ground of appeal: analysis and conclusion

71. I extract below the key points that emerge from the previous authorities and especially the

two **LES** judgments.

72. The NMW legislation is an archetype of a social policy measure, seeking to achieve the policy aims referred to at the start of this judgment. It must be interpreted and applied purposively. It is not desirable to carve out specific chapters or provisions within the NMWA or the accompanying Regulations, or specific factual circumstances, that are more deserving than others of this purposive approach; it applies to all four corners of the legislation. To adopt Elias J's clear steer, a "strong line" is needed to secure the NMW for workers even if this would preclude arrangements that are otherwise unobjectionable or produce outcomes in individual cases that may seem unfair to employers. To adopt the similar steer from Buxton and Smith LJJ, a purposive approach should strive for "broad and simple rules" that avoid "endless debate".

73. Taking that approach, the issue of whether a payment or deduction is for the employer's "own use and benefit" is not to be answered by reference to a factual comparison of whether it is the employer or worker who, in relative terms, benefits more from it. A "balance sheet" analysis of this sort invites complexity. It would detract from the simplicity and certainty needed to ensure that the NMW is properly paid.

74. Similarly, the issue of whether a payment or deduction is for the employer's own use and benefit is not to be answered by reference to the purpose or intention (which may be benign) that an individual employer may have in delivering a non-cash benefit of some kind to its workers. That would leave open the possibility that a similar arrangement could be abused by a different employer, whose intentions may be different or which may change, resulting in a decision to decline to pay the money out of the fund or delay in doing so.

75. Simplicity is achieved by focusing on the effect of the payment or deduction on the employer's position; that is the clear meaning of **LES (EWCA)** which, while not formally binding the EAT in Scotland, is highly persuasive (and no party in this appeal suggested I should depart from it). The answer to determining whether a payment or deduction is for the employer's own use and benefit comes from asking a simple question: whether the employer can use the money paid or deducted, avoiding the distraction of looking at the purpose of the payment or deduction. That enquiry will usually focus on the employer's financial position, but I do not rule out the possibility that there might be a non-financial impact.

76. As Elias J said in **LES (EAT)**, if there is no legal limitation on the way that the employer can use the money paid or deducted, it will be for its own use and benefit. I would add that the contrary is not necessarily true; the presence of a legal limitation on the employer does not thereby mean that the payment or deduction ceases to be for its own use and benefit. I have in mind here the suggestion that an employer bears a contractual obligation to pay the money deducted to its worker, or the suggestion that the arrangement is imprinted with a trust of some sort (where, in any case, different considerations will apply in Scotland). These would not be "broad but simple rules" that enable a worker readily to determine whether they are receiving the NMW in cash or receiving the correct amount of arrears. Workers in a vulnerable position should not be expected to understand or enforce rights that may exist under contract or trust law to ensure that they receive the NMW. If any further emphasis is needed, it comes from Mr MacNeill's point about the consequences of an insolvency: the workers would become creditors of the company in respect of money held in the savings scheme, but they would face complexity and uncertainty when seeking to demonstrate their preferential creditor status and/or when seeking to recover the unpaid wages from the National Insurance fund.

77. Applying these points to the case, I am persuaded by HMRC that the ET erred in law in

deciding that the deductions in this case were not for the company's own use and benefit.

78. Specifically, the ET's attempt to assess objectively the purpose and intention of the deductions, while superficially attractive, was contrary to authority and led it astray from the need to focus upon the effect of the deductions on the company's position. The process of investigating objective purpose and intent reintroduced the concept of motivation that the ET earlier in its judgment declared to be irrelevant. In this case, to look at the purpose of a deduction separate from the purpose of the overall arrangement was a distinction without a difference. It was driven by the ET's wish – explicitly articulated in its judgment – that certainty should not result in unfairness to the company.

79. The ET described the deducted funds in this case as "effectively ringfenced", but that could not be correct as a matter of law; by their presence in the company's account, they were at its complete disposal. On the agreed facts, no effort was made to alienate those funds. They were not protected from the company's creditors. They were at risk in the event of insolvency. As noted by the ET, the company even earned interest on them.

80. There is nothing on the face of the NMW legislation which supports the concept of delayed or deferred wages. The social purpose of that legislation is in fact achieved by the precise opposite: cash in hand for an easily identifiable pay reference period.

81. The company's best point was that the existence of a contractual obligation to pay the money upon demand meant that its ability to use the money as it wished was limited by law. However, as noted, a tribunal must strive to ensure that a "strong line" is taken to ensure payment of the NMW. The ability of a worker to demand the sum does not assist the company's argument, because – however benign its own intentions – a less scrupulous employer could decline or

delay such payment. A contractual obligation is worthless if it is not honoured. A purposive approach must have regard to the possibility that another employer could use such a scheme for improper ends; for example, to present a false impression of its cash health which boosts its ability to discharge its debts as they fell due, or taking other steps that could increase the risk that the money was not paid to the workers and the NMW not secured.

82. The ET noted a concession by HMRC that, if the company had chosen to place the funds in an account separate from its main trading account, there would be no concern about the NMW because the employer would have had no benefit at all. Mr MacNeill KC clarified that this was not a reference to a "number 2" account in the company's name, allowing the funds to be more readily ascertained. Such funds would still be available to assist the company in the discharge of its debts, jeopardising payment of the NMW to its workers. The concession, as MacNeill KC clarified it before the EAT, was that a deduction from wages that redirected the sum to an account held by a third party would not be for the employer's own use and benefit. In that situation there would have been a full alienation of the funds. In my judgment, that concession was properly made. There are numerous such schemes available to employers in the marketplace, involving building societies, credit unions and the like, with the added advantage that the savers themselves accrue the interest.

83. I acknowledge that Buxton LJ appeared in his judgment to indicate that a more permissive approach could be taken to savings schemes. Ms Robertson understandably placed reliance on it. This, again, is what he said:

> **The shortest explanation would appear to be that the wording [of the clause in the accommodation agreement] excludes both the case where the employer retains the payment for the *employee's* use and benefit (for instance, in a savings scheme); and the case where the employer transfers the payment to a third party for that purpose.**

84. On the one hand, Buxton LJ's use of the word "both" makes clear that he was talking about

two different situations: retention of the payment for the employee's use and benefit and transferring the payment to a third party. On the other hand, use of the phrase "for that purpose" links them. But his comment was a passing one, and strictly *obiter* because it did not arise for determination on the facts of the case. The Court of Appeal did not refer to any argument it heard about how savings schemes can be variably structured. In my judgment, deductions made from wages and redirected to a savings scheme would not be for an employer's own use and benefit where there was a full and effective alienation of the funds, usually achieved by entering into an arrangement with a scheme provider. In this case, where there was no such alienation and the money was in the company's main trading account to do with as it pleased, both the simple approach and the purposive approach compel the same answer: the deductions were for its own use and benefit.

85. It may be of scant comfort to the company for me to say that the purpose of the holiday fund – encouraging its workers to save – was entirely laudable. There can be no suggestion that the savings scheme offended the other policy aim of the NMW legislation, namely to prevent undercutting of competitors. I recognise that the company may not appreciate a judgment being reached on the basis that other employers might act less honourably than it has done. Nevertheless, HMRC's appeal on the first ground succeeds.

Second ground of appeal: the parties' submissions

86. Given my judgment on the first ground of appeal, the second ground of appeal is no longer moot. I must next consider whether the ET was correct to decide that the payments to the workers (by which they withdrew their savings from the holiday fund or received them when the fund closed) reduced the amount the company owed them by way of NMW arrears. Again, I will summarise the parties' submissions briefly.

87. For HMRC, Mr MacNeill KC said that the starting point should have been the factual position, agreed between the parties, that the payments were simply what they were intended to be: sums that satisfied the company's obligation to pay the workers their savings upon request. Instead, the ET wrongly characterised them as delayed or deferred wages additional to what the workers would otherwise receive in that pay reference period. This, he said, was contrary to the scheme of the NMW legislation, which does not envisage the notion that wages can be deferred by any period, let alone a period of indeterminate length envisaged by an open-ended savings scheme.

88. Treating them as arrears, as the ET did, introduced the complexity of attributing them to specific pay reference periods; that step was needed to calculate the running balance of NMW arrears and any uplifts required by section 17(4) NMWA. That process, Mr MacNeill KC reminded me, is tightly prescribed by regulation 9. As noted above, the pay allocated to a particular pay reference period is generally either the pay received during that period, or the pay that is earned in that period but not received until the next pay reference period. Given its decision that the payments out of the fund were NMW arrears, the ET had to square this circle; it did so by the staged, consecutive refund mechanism described at paragraphs 135-137 of its judgment. Mr MacNeill KC said that this approach had no basis in the legislation and was the antithesis of the "broad but simple rules" that would allow workers to ascertain readily, and with appropriate access to records, whether they were receiving the NMW and for what period.

89. Mr MacNeill said that the ET rather brushed under the carpet the challenge of ensuring that payments out of the fund would reflect any intervening uplift in the NMW rate for the purposes of section 17(4) NMWA. The company would need to record this properly to give effect to its legal obligations. In his submission, the purposive approach demanded by the

NMW legislation should not tolerate retrospective relabelling of payments of this sort so as to discharge the obligation to pay the NMW; it was, therefore, an error of law for the ET to characterise them as "additional remuneration".

90. For the company, Ms Robertson contended that the ET was right to characterise these payments as deferred wages. As she put it, the company was simply returning to the workers the wages it had retained; those wages were, and remained, their pay all along. She described it as a simple process of "number crunching". The ET's approach was not objectionable and accorded with the policy aim of ensuring that the workers received their wages, albeit at a later date. Insofar as refunds did not fully offset intervening increases in the rate of the NMW, it was accepted that further arrears may be due.

Second ground of appeal: analysis and conclusion

91. I prefer Mr MacNeill KC's submissions. I concluded above, at paragraph 80, that the notion of delayed or deferred wages is contrary to the social purpose of the NMW legislation, which requires cash in hand for an easily identifiable pay reference period. It was an error of law for the ET to characterise the savings scheme deductions as nothing more than the temporary retention of wages for deferred payment, such that their return could similarly be characterised as the payment of additional remuneration. That approach has no basis in the legislation.

92. Another reason to reject the ET's approach to the issue of NMW arrears is that it would introduce complexities and uncertainties that weaken the protection this legislation is intended to provide. It undermines the important link needed between pay and the reference periods to which that pay relates. It would be difficult, if not impossible, for a worker to be sure that the money they had received by way of withdrawn savings accommodated some or all of the uplift that may be required by section 17(4) NMWA. It would also frustrate the efforts of

HMRC to enforce the legislation. The company's acceptance that further money may be due to give effect to intervening changes in the rate of the NMW undermines its contention that the refund process was consistent with the statutory scheme for the payment of NMW arrears. Put bluntly, if the company were not correct on the first issue for the ET to decide, it is difficult to see how it could be correct on the second issue for the ET to decide.

93. There is no disagreement over the quality of the records that the company maintained to keep account both of the savings that had been deducted with the workers' agreement and of the amounts it then paid out of the fund upon request. Mr MacNeill said that HMRC was content to describe those records as meticulous. The problem is that they did not enable the workers to ascertain whether they were receiving the NMW, most especially the correct amount of the arrears that were legally required. The ET accepted it was "additional remuneration" in the sense that it was "additional to the sums originally paid and it was remuneration since it referred to wages for work that had been done", but that does not reflect the carefully calibrated mechanism set out at section 17 NMWA.

94. Accordingly, I conclude that the ET erred in law in characterising the payments as "additional remuneration" for the purposes of section 17 NMWA, and in circumventing the problem of the absent link between a payment and a pay reference period by presuming that each payment related to the earliest pay reference period in respect of which there was an outstanding liability. This was an understandable attempt to avoid unfairness to the company, but in so doing the ET improperly departed from the purposive approach needed to give effect to all four corners of the NMW legislation. The result of its approach was less, not more, certainty.

95. Like the ET, I have considerable sympathy for the company. Ms Robertson said that it will be required to pay its workers twice: having paid them their savings, it must now pay them NMW

arrears. This was characterised as a windfall. She also suggested that there may also be an element of double taxation involved. I make no comment about the tax issue; liability to tax in this context is a separate matter between the company and HMRC (outside of its NMW enforcement function). Ms Robertson may or may not be right to say that the company would now be better off it if had chosen not to pay the money out of the savings scheme at all. I have already said that it may be scant comfort to the company for me to note that its intentions were benign. However, the possibility of an unintended windfall in this case should not distract the courts and tribunals from outcomes that properly secure the NMW for the lowest paid and most vulnerable workers across all parts of society.

Disposal

96. I allow the appeal and restore the notice of underpayment.