

HMRC score winner over Middlesbrough FC

Gary Brothers and Paul Rippon question the wisdom of the recent overturning of a National Minimum Wage ruling by the Tribunal

On 20 March 2020, the Employment Appeal Tribunal decided that the voluntary payroll deductions Middlesbrough FC had been making to allow their staff to purchase season tickets by instalments had the effect of reducing their pay for National Minimum Wage purposes.

Background

A number of Middlesbrough FC employees approached the club to request if they could pay for their season ticket by instalments, and have the cost deducted from their wage over a number of weeks. These employees were employed in clerical and hospitality roles and their wages were paid in accordance with, and in some cases above, the rate then in force for National Minimum Wage.

Following these deductions being made, the employees' 'take home' wages fell below the rate then in force for National Minimum Wage.

Regulation 12 of the National Minimum Wage Regulations 2015 (deductions or payments for the employer's own use and benefit) allows for certain deductions, which can be made from an employee's wage without it being affected for National Minimum Wages purposes. This includes:

- deductions (or payments) relating to an employee's conduct, or any other event;
- deductions (or payments) following an advance or loan to the employee;
- deductions (or payments) following an accidental overpayment to the employee;
- deductions (or payments) for the purchase of shares or securities by the employee;
- payments by the worker for goods or services from the employer, unless the purchase is made to comply with a requirement imposed by the employer.

Middlesbrough FC took the view that these deductions were acceptable and within the bounds of the National Minimum Wage Regulations. The employees were not contractually obliged to purchase the season tickets, and indeed agreed to the deductions of their own free will.

Original decision

Following the hearing in February 2019, the Employment Tribunal ruled in Middlesbrough FC's favour, reasoning that the wording at Regulation 12 had an overarching effect, meaning that deductions or payments for goods or services paid to the employer were allowable for National Minimum Wage Purposes.

The judge also took care to note that the employees were not required to purchase the season tickets in connection with their employment, but chose to do so; and simply exercised their freedom of choice.

New decision

HMRC appealed this decision, which the Employment Appeal Tribunal allowed. The view taken by Tribunal in this instance was more prescriptive of the legislation, and that the original decision was flawed by taking such a purposive view.

Wider implications

As tax practitioners, this decision can be considered as a backward step. The original decision came as a beacon of hope, that moving forward the legislation was going to be applied in the way we believe it was intended.

We understand the reasoning behind the NMW legislation as we believe it was intended when introduced. There are undoubtedly employers operating in the UK, who, almost like a throwback to the old Victorian workhouses, would deduct a large proportion of a worker's salary for room and board in their own premises, leaving very little disposable income.

There are, however, many employers who do wish to implement this service to their staff with no ulterior motive, and do so out of ease, efficiency and care for their workforce. The latest decision looks to suppress the worker's autonomy and free choice to even request deductions to be made at their own discretion – but only if they are a low earner.

This may be an area that HMRC's policy team wishes to investigate, and consider updating their guidance accordingly. Clearly at the moment it is not being implemented in the spirit of the legislation, and employers are being issued with punitive 200% penalties on top of the wages HMRC have determined they underpaid.

Referring to Middlesbrough FC once more, their representing Counsel argued that Notices of Underpayment issued by HMRC would effectively mean that the underpaid employees received season tickets free of charge. By extension, the employer is also effectively giving away goods that they could have sold elsewhere.

In our view, as long as the employee is not coerced, and is making their choice of their own free will, then such deductions should be allowable and not be taken into account for National Minimum Wage purposes. Such measures would be simple for the employer to record and maintain, and would allow for the existence of such schemes that have clear benefit to both employer and employee.

We feel that an appeal against the Notices of Underpayment on the above basis would certainly be worthwhile. There is evidently confusion and disagreement concerning how the legislation should be interpreted and applied in these circumstances. It would also demonstrate that tax practitioners consider the legislation is not a 'one size fits all' set of instructions, and there are other factors and nuances concerning those employees affected by the National Minimum Wage.

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