

# **Car rental payments decision has NMW implications**

The Employment Appeal Tribunal has ruled that car rental payments were 'in connection with the employment' and reduced pay for National Minimum Wage, writes Dorothee Giret.

In a recent case, Augustine v Data Cars Ltd, the Employment Appeal Tribunal (EAT) considered the correct test for assessing what expenses reduced pay for National Minimum Wage (NMW) purposes. The EAT agreed with the Claimant taxi driver's arguments that car rental payments and a payment for uniform were 'in connection with' his employment and reduced his pay for NMW purposes. This decision may have ramifications for many employers.

## **Facts of the case**

Mr Augustine worked for Data Cars Ltd (DC) as a taxi driver. He pursued a number of claims against DC, among these were claims for a failure to pay the NMW.

In particular, Mr Augustine argued that a number of expenses he paid during his employment with DC (for example, equipment rental fees, car lease payments and payments for uniform) were 'in connection with the employment' and reduced his pay below the NMW (NMW Regulations 2015 regulation 13(b)).

## **ET & EAT Decisions**

The Employment Tribunal (ET) agreed that costs paid by Mr Augustine to DC in respect of a 'circuit fee', equipment rental fee and equipment deposit fee to access DC's systems, reduced pay for NMW purposes because he was required to make these payments to perform his job.

However, in respect of other expenses, the ET acknowledged there was little caselaw on the application of the NMW Regulations and applied HMRC's guidance from their NMW Manual.

HMRC's guidance set out that expenses must be a 'requirement' of the work to reduce pay for NMW purposes and not something paid by the employee by choice.

Applying HMRC's guidance, the ET found that that costs in respect of insurance, cleaning and fuel would also reduce pay for NMW purposes.

However, the ET found that the Claimant was not required to rent a vehicle from DC or an associated company and only needed a uniform if he wished to do certain types of work, which was optional. Therefore, the ET found that these expenses did not reduce pay for NMW purposes.

Mr Augustine appealed to the EAT on a number of grounds, including that the ET was incorrect in the approach taken to the car rental payments and uniform payments.

The EAT agreed with Mr Augustine. The EAT stated that the ET had not applied the correct test and had “decided the matter on a different and irrelevant basis” being HMRC’s guidance. The EAT stated that the correct test was merely whether it was ‘in connection with the employment’ and that the employee’s choice was not relevant. The EAT found that, based on the facts, had the ET applied the correct test it would have found that these payments were in connection with employment and reduced pay for NMW purposes.

## **Implications for employers**

The EAT’s judgment may worry employers who have relied on HMRC’s guidance, but the decision provided little guidance on what expenses are ‘in connection with the employment’ outside of the context of the facts before it. This case does demonstrate that it is broader than previously envisaged by HMRC but gives little more.

While based on specific facts, the EAT’s decision will be binding upon ETs and it is possible that arguments could be made for a number of expenses that employees incur that could be said to be ‘in connection with the employment’. In light of this judgment employers should carefully consider what payments they require their employees to make and whether this would reduce pay.

Further, the EAT’s decision demonstrates a clear willingness to disregard HMRC’s guidance and apply the wording of the Regulations. This is a reminder for employers that whilst HMRC’s guidance is useful, it is not legally binding.

• **Dorothee Giret, Director, Employment Legal Services, KPMG Law**