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NATIONAL MINIMUM WAGE AND
DEDUCTIONS TO MEET TRANSPORT COSTS
ALP position paper

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Introduction

Many labour providers provide transport which their workers can choose to use to get to and from their places of work. Historically, workers have been charged through agreed deductions from pay. Since 2007 HMRC has deemed this to be unlawful where the charge takes workers below the minimum wage, and labour providers are being faced with considerable bills to meet "arrears" of pay.

This paper argues that the HMRC interpretation is at best questionable, and that it is inappropriate for a change in interpretation or enforcement policy to be introduced at no notice and with retroactive effect.

History

Labour providers are in the business of providing large numbers of workers to a range of businesses, particularly those that require relatively low skilled workers for processes such as cleaning, picking and packing food. Most of the factories where this work is done are not in town centres but rather on industrial estates or in the countryside. Agricultural work naturally is also carried out in rural areas. There is no public transport. Labour providers therefore typically provide transport for their workers. This is always optional and labour providers would prefer not to have to provide such transport as it is expensive, requiring them to have PSV licences for their vehicles, and requiring drivers with the appropriate licences. It is also complex to administer.

Most labour providers have no choice but to charge their workers for transport as their margins do not allow them to absorb what would otherwise be a considerable cost. It is a cost competitive market and labour users do not offer charge rates that allow for this – to do so would add typically 50-75p on to hourly charge rates.

It is also equitable between workers as those workers who choose not to use the transport provided by their employers have to meet their own transport costs. In all industry sectors it is the norm for workers to meet their own cost of getting to and from work.

The normal practice has been for workers to agree in writing prior to using the service to a deduction for transport costs from their wages. This agreement has made clear that the service is optional. This is administratively convenient for the worker and for the labour provider.

Labour providers had every reason to believe that this was legitimate within the Regulations governing the National Minimum Wage. Regulation 32 deals with deductions that have to be subtracted from pay for the purpose of calculating whether the minimum wage has been paid. This includes -

(a) any deduction in respect of the worker's expenditure in connection with his employment;

(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.

It is accepted by HMRC that optional transport to work is not "in connection with his employment". However there is no legal definition of "own use and benefit", so it is open to interpretation. The guidance produced by BERR, widely reproduced by others but now removed, is that the expression "Own use and benefit" should be interpreted as meaning that "Any money goes into the employer's pocket". This in itself is fairly meaningless as it could be interpreted as meaning profit or simply income. However, it is accepted that there is scope for differing interpretations. The point is that until 2007 the interpretation as it was applied by HMRC Compliance Inspectors was that a deduction agreed by the worker for an optional service that was not a requirement of the job did not mean that the amount had to be deducted from wages for purposes of calculating whether the national minimum wage had been paid.

Labour providers were reinforced in this view by the "Code of Practice for labour providers to agriculture and the fresh produce trade" produced by the Ethical Trading Initiative and subsequently by the GLA's Licensing Standards, both as they were written and as they were applied. These standards, produced after extensive consultation within government, including with HMRC and BERR, said on this specific point: "Where deductions from wages, other than those legally required, are made eg for transport, there is evidence on file of workers' written consent". The issue was covered in an email from Stephen Moorcroft (Defra minimum wage expert) to his colleague Sean Collins on 1 December 2004. Although the comment was in the context of accommodation it is clear that it was the principle of deductions that was the issue –

> "The limits in the NMWA & AWO set the maximum that an employer can deduct from pay for accommodation without the consent of the worker. An employer may charge more than the maximum amount, especially where additional services are included such as laundry or the preparation of food, or where electricity etc is charged for in the rent. The difference between the two amounts can be collected in cash from the worker after he or she has been paid, or the parties can enter into a separate contract to deduct the additional sum from pay as provided for in s13-15 of the Employment Rights Act 1996."

The Current Position

Labour providers have noticed that there has been a change in the stance of HMRC since 2007. HMRC inspectors have now decided that all deductions from pay to meet transport costs that take the worker below the minimum wage are unlawful, and have required labour providers to make substantial payments to workers of "arrears", something which must be regarded as a bonus by the workers. The amounts that are required to be repaid are so great as to threaten the continued viability of some labour providers.

Why the Position is Unsatisfactory

There are a number of grounds for arguing that the current stance of HMRC is unreasonable in the circumstances.

1. The interpretation is open to question. While HMRC's current interpretation is understood, it is not accepted. The ALP does not accept that a payment to cover transport costs to an employer or to a service provider retained by an employer counts as a "deduction made by the employer for his own use and benefit". At various times HMRC has given other interpretations - covered subsequently.

2. The position is perverse. The purpose of the National Minimum Wage is to prevent exploitation of workers through them being paid too little. This issue has nothing to do with the exploitation of workers, and is purely a process issue, that is the question of how workers pay for transport, not whether they pay for it. HMRC's current interpretation regards manageable, auditable deductions from pay as unlawful but separate payments by workers which are not transparent and not auditable as lawful.

It is for example quite legitimate for a labour provider to recover transport costs through a variable direct debit from the worker's bank account, or by making the worker an advance of pay and then recovering it from wages, or by seeking cash payments in advance for transport costs. It makes no difference at all to a worker whether he meets transport costs out of a deduction from pay or by taking it from his bank account or by paying cash. This point was seemingly accepted by Joanne Aldridge in an email dated 21 April 2009 –

> "The main purpose of the national minimum wage legislation is to provide a minimum standard of pay to workers and to protect those who are particularly vulnerable. I understand that the rules concerning deductions from minimum wage pay are frustrating for the majority of employers who treat their workers reasonably and fairly, however the law on making deductions which takes a workers pay below the minimum wage was designed to protect workers from being exploited by employers who could take unreasonable deductions without providing a choice to the worker. This is the overriding objective of the legislation and while decent employers view these rules as an inconvenience, the protection of those workers who could be exploited by an employer is a high priority for Government."

It will be noted that this email refers to deductions "without providing a choice to the worker", in contrast to the HMRC position that choice is irrelevant – a worker is not permitted to choose to have deductions.

3. The new HMRC stance is causing labour providers and their workers to incur considerable additional costs.

Deductions from pay are the simplest and most cost effective method of securing payment, and moreover are auditable by HMRC or indeed anyone else. Most labour providers have now implemented alternative methods of collecting transport to work fares. Some have moved to a cash system which requires drivers now also to be responsible for collecting and handing over fares. This leads to some wastage and probably also gives more scope to exploit workers either by employers or by their fellow workers. Other alternatives include installing ticket machines. There are even arrangements whereby labour providers advance to the worker at the beginning of a pay period a notional amount to cover transport costs, and then deduct the same amount from wages at the end of the period to meet the transport costs. Some have implemented direct debits to collect transport fares but have noted a high level, up to 25%, of failed recovery. (These devices are explained more fully in the ALP Brief which is appended.)

These are purely devices which impose significant costs on labour providers. Labour providers have, to some extent, passed these additional costs on to their workers. The impact of the HMRC's interpretation has been to reduce the take home pay of the lowest paid workers.

Alternatively, workers having to find their own way to and from places of work through other workers providing an unofficial taxi service are at risk out of necessity of making a payment that is not transparent and may well exceed the charge the labour provider would make.

4. The new HMRC stance is making it more difficult for the poorest workers to obtain work.

The administrative burden of collecting fares imposed by the new HMRC interpretation is such that some labour providers have opted out of providing transport at all, leaving workers to find their own way to and from places of work. Most labour providers are now actively favouring those workers who can make their own way to work.

Those workers who have no alternative means of finding their way to work are therefore at a significant disadvantage.

5. The new HMRC stance is putting the health and safety of workers at risk.

Workers increasingly have to find their own way to and from places of work. This is frequently done by some other workers providing an unofficial taxi service to their fellow workers. So instead of workers being transported in a minibus with a qualified driver and a PSV licence the workers are at risk of being transported in vehicles that may well not be properly maintained or insured.

Most legitimate labour providers have worked hard to remove cash from their businesses in recent years. The new HMRC interpretation has led to labour providers implementing a cash collection system for daily fares or payment of wages in part cash to facilitate collection of weekly fares. This re-introduction of cash increases the risk of attacks on drivers and administrative staff to steal this money. One case has already been reported.

6. In effect labour providers have been subject to retrospective legislation. This has been done with no consultation, no notice, and no ability to put in place new arrangements without being penalised.

The approach taken by HMRC is in sharp contrast with the approach of the regulator of labour providers, the GLA. When the issue came to light, the GLA made it clear that it did not regard this issue as exploitation of workers and would make no attempt to regard deductions from pay as a non-compliance with its licensing standards, which require the national minimum wage to be paid taking account of permissible deductions. (The minutes of the GLA's Labour Provider Group Meeting on 27 June 2007 include the following on this point: "DD/NC [GLA officers] confirmed that GLA will not currently enforce LS2.8 in relation to transport deductions.") However, the GLA, as it is obliged to, has passed on cases where it has found deductions to HMRC, which in some cases is then vigorously taken enforcement action.

7. Differential enforcement. The ALP has requested information from HMRC on the balance of its enforcement activities on this matter between GLA authorised and other businesses. However, the clear suspicion is that because HMRC is handed the information on a plate by the GLA that there is disproportionate enforcement against labour providers. It is worth here quoting the House of Commons Home Affairs Select Committee Report on human trafficking –

> "Neither the Minister nor Anti-Slavery International thought there was a need for more legislation to tackle the problem of forced labour. We agree that existing employment law, the National Minimum Wage, regulations on rented accommodation and so on should be sufficient to prevent the sorts of abuses highlighted by the Gangmasters Licensing Authority and UCATT—but only if they are enforced. It seems to us that, outside the Gangmasters Licensing Authority's sectors, enforcement is at best patchy and at worst non-existent."

HMRC argue that there has been no recent change in interpretation on this matter. This is not the point. What matters is enforcement action not interpretation. It would be of no consequence if HMRC held to its present interpretation provided it did not enforce retroactively. The issue is that there has been a clear change in enforcement activity on an issue where there is legitimate doubt as to the meaning of the provisions with no warning. This is in sharp contrast to the way that a similar issue - charging for accommodation – was handled. There was a formal consultation on guidance, six months notice before the new guidance was applied and an assurance that arrears would not be enforced relating to the period prior to the introduction of the new guidance in respect of the area covered by the guidance. This gave labour providers the chance to give notice to their workers and dispose of the properties they owned.

The ALP has requested copies of relevant documents from HMRC and will be able to update this report if these are received. However, for the moment the ALP can put forward the following evidence for a change of stance on interpretation or enforcement by HMRC –

- Labour providers that deducted transport costs from pay had HMRC inspections prior to 2007 without the issue being raised; the ALP is not aware of any labour provider that faced enforcement action on this point prior to 2007.
- A compliance inspection report for a labour provider dated October 2003 in which the HMRC Compliance Officer stated under the heading Deduction for Transport. "The deduction appears to count towards National Minimum Wage as it is optional whether the worker uses his own method of transport or the buses provided by the Company. However if at any point this deduction becomes compulsory or workers are required to use your transport, then this deduction will not count towards national minimum wage."
- A letter received by an ALP member earlier this year from a National Minimum Wage Compliance Officer included the following: "My understanding of travel and accident cover deductions changed when I received a memoranda dated 12 March 2007. I have been advised that due to confidentiality I cannot provide you with internal memoranda."
- In May 2006 Leicester City Council Employment Support Unit formed a steering group whose main purpose was to protect vulnerable workers from exploitation. This was going to be achieved by raising workers' awareness of low pay issues. The Employment Agencies Inspectorate, HMRC and the GLA were all represented on this group. The publication that the group agreed included the following on the issue of deductions from pay –

" **<u>Deductions from the Minimum Wage</u>**

Employers can only make deductions from your wages if:

- you have agreed in writing beforehand to the deductions being made
- your contract with your employer allows the employer to make the deductions
- the deductions are required by law.

You can expect your employer to make the following deductions:

- Tax and National Insurance: - In most cases your employer will deduct money from your wages for tax and national insurance contributions
- Accommodation: - If accommodation is provided for you, the maximum that can be taken from your pay is £4.15 per day or £29.05 per week. This doesn't mean that you can't be charged more, but this amount only, can be taken off your pay before working out whether you are getting the minimum wage. Any increase will be made in October.

- Payments for Goods and Services: - If you choose to use any goods like meals or transport, which is provided from the agency then deductions can be made from your wages. If, however, you are not given a choice, the deductions made cannot result in your hourly rate of pay falling below the rate of minimum wage".

The labour provider member of this steering group is now being pursued by HMRC for arrears of minimum wage in direct contradiction of the point made in the previous sentence.

There is also evidence of a completely different - and an even more restrictive interpretation - by a compliance officer. John Donnachie, NMW Compliance Manager, recently provided the following information in an email to an ALP member -

> "Thank you for contacting the NMW Helpline. Further to our recent conversations I have spoken with a number of agencies including the HMRC NMW Compliance, Employment Agency Standards and Gangmaster Licensing about the scenario you have described.
>
> It is the agreed opinion that either taking cash from the workers to pay for transport (on the bus or by selling bus tickets) or using a loan scheme to pay for the transport to the place of work could both be considered as **'illegal deductions from wages'** under the current minimum wage legislation (assuming that the deduction brings the workers wages below the minimum wage level). As the agency, and therefore the employer of the workers, if either of these practices were to be implemented and then investigated by the HMRC they would likely result in the agency being found non-compliant with minimum wage and liable for repaying arrears of wages to the workers and the subsequent penalty to HMRC. It should be noted that in NMW cases of investigation that arrears of wages can be awarded by HMRC dating back up to 6 years."

This email put the labour provider in an impossible position and directly contradicts what HMRC has previously said.

Proposed solutions

The ALP's immediate concern is to deal with the current enforcement activity. The ALP believes that there has been sufficient uncertainty on this issue (exemplified by the stance that the GLA has taken and the evidence cited in the previous section) for it to be subject to the same procedure as for accommodation, that is proper notice of an agreed interpretation – say to come into effect on the next common implementation date – and no requirement to pay arrears in respect of periods before that date.

The second proposal is for the substantive issue to be revisited. The ALP believes that the regulations are capable of being interpreted in a way that would allow deductions with consent, if necessary with a cap of an amount per mile based on public transport costs. This would be in line with Joanne Aldridge's email of 21 April.