Appeal No. UKEAT/0051/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 & 24 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

COMMISSIONERS FOR HM REVENUE AND CUSTOMS — APPELLANT

ANT MARKETING LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ASHLEY SERR (of Counsel) Instructed by: HM Revenue and Custom Services 3rd Floor South West Wing Bush House Strand London WC2B 4RD
For the Respondent	MR JAMES TUNLEY (of Counsel) Instructed by: Make UK Broadway House Tothill Street London SW1H 9NQ

SUMMARY

NATIONAL MINIMUM WAGE

The National Minimum Wage Regulations 2015 permit certain deductions to be made from wages without those deductions reducing the pay taken into account for NMW purposes. However, other deductions are treated as reductions for NMW purposes. The employer made deductions in respect of accommodation provided to some workers. That accommodation was provided by a separate property company wholly owned by the chief executive of the employer. The employer also made deductions in respect of the costs incurred in providing mandatory training for workers, but only if they left employment within the first 12 months. The question was whether these deductions should be treated as reductions in calculating remuneration for NMW purposes. The Tribunal held that the deductions for accommodation costs (the accommodation offset) were not to be treated as reductions because the accommodation was not provided by the "employer" within the meaning of Regulation 14 of the 2015 Regulations, whereas the deductions for training costs could be treated as reductions because it was expenditure "in connection with employment" within the meaning of Regulation 13. The Revenue appealed against the accommodation offset decision, and the Respondent cross-appealed in respect of the training costs decision.

Held, dismissing both the appeal and the cross-appeal, that the Tribunal had not erred in deciding that the accommodation had not been provided by the "employer" and that the deductions for related costs did not, therefore, fall to be treated as reducing the amount of pay for NMW purposes. However, the EAT noted that this conclusion had been reached as a result of the way in which the appeal had focused on the meaning of the word "employer", and that had the appeal focussed on whether the employer had been responsible for the "provision of living accommodation" within the meaning of Regulation 14, the outcome might have been different. The Tribunal had also not erred in regarding the training costs as being expenditure in

connection with employment even though the deductions were contingent on the event of leaving within 12 months of commencing employment.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. The Commissioners for Her Majesty's Revenue and Customs ("the Revenue") are the Appellant in this matter. One of the Revenue's functions is the enforcement of the **National Minimum Wage Act 1998** ("the 1998 Act") and **National Minimum Wage Regulations 2015** ("the 2015 Regulations"). It does so by issuing notices of under payments ("NOUs"), under s.19 of the **1998 Act** to employers who are considered to be underpaying workers. Three such NOUs were issued on 24 January 2018 against the Respondent company in respect of 359 workers of the Respondent, totalling arrears of over £53,000 and penalties of over £28,000. The Respondent appealed against the NOUs to the Leeds Employment Tribunal ("the Tribunal"). The Tribunal upheld the Respondent's appeal in respect of one issue relating to what is known as the accommodation offset, but dismissed its appeal in respect of the further issue relating to the recruitment and training costs for workers. The Revenue appeals against the accommodation offset decision, and the Respondent cross-appeals in respect of the training costs decision.

Factual Background

2. The Tribunal proceeded on the basis of a set of agreed facts. The following summary of the relevant facts is, for present purposes, taken from those agreed facts.

3. The Respondent is a telemarketing business. As of May 2016, it employed 258 workers across two sites. All the workers are provided with a written contract of employment to sign with their first pay and are required to complete a six-month paid probationary period.

4. Building passes are supplied free of charge. However, if a worker loses their pass, then the cost of a replacement is £5, which is contractually deducted from their pay. Deductions are also made from pay for attachment of earnings and health insurance. The company makes a

contractual deduction of £50 from pay if a worker leaves without giving or working their notice period.

Training Costs

5. The Respondent recruits hourly-paid telesales workers, known as telephone operatives, who are required to undertake training for their role. That training is provided by the Respondent. New starters are required to undertake a minimum of three days' paid induction training.

6. There is a training clause expressly incorporated into the telephone operatives' contracts. It appears that the telephone operatives are informed about the training clause on at least three occasions before the training commences, namely, when they are offered employment and invited to the induction, at the start of the induction itself, and in their statement of the main terms of employment, which they are required to sign. Some candidates, I am told, withdrew on being told about the training clause.

7. The training clause provides as follows:

> **"Training conditions:**
>
> **If you begin an induction or campaign-training programme which is conducted by the company or our clients, you agree to remain in the service of the company for a minimum period of one year following completion of the course.**
>
> **If your contract with the Company is terminated by any means (other than redundancy) within that time or you do not complete the training, you may be required to repay the training costs incurred by the company. The repayment costs for an internal programme is £350.00 for training in excess of five days and is £250.00 for programmes less than five days."**

I pause here to say that these sums are based on what is described as the Respondent's 'conservative assessment' of the costs incurred. Returning to the training clause, it states:

> **"The amount of training costs to be repaid by the following increments:**
>
> **0-6 months' service = 100% repayment**
>
> **6-9 months' service = 50% repayment**
>
> **9-12 months' service = 25% repayment**

12 months+ service = no repayment

As per your employee handbook, which forms part of your employee contract, we reserve the right to automatically deduct any other payments or clawbacks directly from wages.

By signing your induction paperwork, you are agreeing to this training clawback and for funds to be taken directly from your wages."

8. The Respondent made deductions from the worker's salary in respect of their training deductions which had not been repaid in accordance with the training clause. The training deduction was only made when the telephone operative left employment of his or her own accord (which accounts for the majority of the cases), or for gross misconduct, or if they failed their probation. It is agreed between the parties that training deductions were only applied when, "*The reason for leaving was voluntary or otherwise within the worker's own control*", although, at the hearing before me, there was some debate as to whether leaving for failing the probation could properly said to be something within the worker's own control. It is further agreed between the parties that the Respondent was contractually entitled to make the training deductions which were for the Respondent's own use and benefit.

Accommodation Costs

9. Some of the workers named in the NOUs were tenants of furnished residential flats owned by Mayfield Properties, a residential letting business wholly owned by Mr Anthony Hinchcliffe. I was not told the precise number of workers in that position, but it appears to be small. Mayfield Properties was incorporated in May 2012 as Mayfield Properties Limited. Mr Hinchcliffe is the director and 100% shareholder of both the Respondent and Mayfield Properties Limited.

10. Some of those workers were tenants before becoming employees of the Respondent, and others became tenants after taking up employment with the Respondent. Some of the workers requested that their rent should be deducted from their wages and paid to Mayfield Properties. This was not a requirement of their employment or tenancy. Some of the workers made their

own arrangements to pay their rent. Since the start of the Revenue's investigation, all tenants paid their rent direct to Mayfield Properties Limited.

11. The parties agreed that the accommodation was not provided on behalf of the Respondent, and tenants were not required to live in the properties in order to better perform their duties or for any other reason. The rental payments were at or under market rate for the Sheffield area.

The Issues

12. The issues in the appeal before the Tribunal were

(a) whether the deduction from wages of sums agreed by the workers as repayable in the event of termination of their contracts within 12 months of commencement fell within Regulation 12(2)(a) and/or Regulation 13(a) of the **2015 Regulations**;

(b) whether the deduction/payment of rent to Mayfield Properties/Mayfield Properties Limited fell within Regulation 14 of the **2015 Regulations,** which deals with the accommodation offset.

Legal Framework

13. Parts 1, 2, and 3 of the **2015 Regulations** deal with interpretation, the rates of National Minimum Wage ("NMW"), the pay reference period, and the calculation of the hourly rate of pay. Part 4 the **2015 Regulations**, which is split into several chapters, deals with remuneration for the purposes of NMW. 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."**

14. Chapter 1 of Part 4 entitled, "Payments from the employer to the worker", sets out all those payments and amounts which are to be treated as payments by the employer to the worker as respects the pay reference period. Regulation 10 of that part sets out the payments and

benefits in kind which do not form part of the worker's remuneration for these purposes. Regulation 10, so far as is relevant, provides:

> **"10. The following payments and benefits in kind do not form part of a worker's remuneration—**
>
> **…**
>
> **(f) benefits in kind provided to the worker, whether or not a monetary value is attached to the benefit, other than living accommodation;**
>
> **…;**
>
> **(l) payments paid by the employer to the worker as respects the worker's expenditure in connection with the employment;**
>
> **…."**

15. It can be seen, therefore, that benefits in kind are, in general, precluded from counting towards the worker's remuneration for the purposes of NMW. The sole exception to that is in respect of living accommodation, which is dealt with in Regulation 14.

16. Chapter 2 of Part 4 deals with the reductions, which have the effect of reducing the worker's remuneration. The relevant provisions in Chapter 2 for present purposes are Regulations 11 to 14 which provide:

> **"Determining the reductions which reduce the worker's remuneration**
>
> **11.— (1) In Regulation 8, the reductions in the pay reference period are determined by adding together all of the payments or deductions treated as reductions in that period in accordance with this Chapter.**
>
> **(2) To the extent that any payment or deduction is required to be subtracted by virtue of more than one provision in this Chapter, it is to be subtracted only once.**
>
> **Deductions or payments for the employer's own use and benefit**
>
> **12.— (1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and Regulation 14 (deductions or payments as respects living accommodation).**
>
> **(2) The following deductions and payments are not treated as reductions—**
>
> **(a) deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;**
>
> **(b) deductions, or payments, on account of an advance under an agreement for a loan or an advance of wages;**
>
> **(c) deductions, or payments, as respects an accidental overpayment of wages made by the employer to the worker;**
>
> **(d) deductions, or payments, as respects the purchase by the worker of shares, other securities or share options, or of a share in a partnership;**

(e) payments as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment.

Deductions or payments as respects a worker's expenditure

13. The following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—

(a) deductions made by the employer, or payments paid by or due from the worker to the employer, as respects the worker's expenditure in connection with the employment;

(b) payments to any person (other than the employer) on account of the worker's expenditure in connection with the employment unless the expenditure is met, or intended to be met, by a payment paid to the worker by the employer.

Deductions or payments as respects living accommodation

14.— (1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable, in accordance with Regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with Regulation 16, unless the payment or deduction falls within paragraph (2).

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

(a) payments made to or deductions by a Higher Education Institution, Further Education Institution or a 16 to 19 Academy (1) in respect of the provision of living accommodation where the living accommodation is provided to a worker who is enrolled on a full-time higher education course or a full-time further education course at that Higher Education Institution or Further Education Institution or on a full-time course provided by that 16 to 19 Academy;

(b) payments made to or deductions by a local housing authority or a registered social landlord in respect of the provision of living accommodation, except where the living accommodation is provided to the worker in connection with the worker's employment with the local housing authority or registered social landlord.

..."

17. Chapter 3 of Part 4 of the Regulations deals with the amount of the accommodation offset. Currently, it provides:

"16. — (1) In regulations 9(1)(e), 14 and 15, the amount as respects the provision of living accommodation is the amount resulting from multiplying the number of days in the pay reference period for which accommodation was provided by £5.08.

(2) Living accommodation is provided for a day only if it is provided for the whole of a day.

(3) Amounts required to be determined in accordance with paragraph (1) as respects a pay reference period are to be determined in accordance with the regulations as they are in force on the first day of that period."

18. The term "employer" is not defined in the **2015 Regulations**. It is, however, defined in the **1998 Act**. Section 54 of the **1998 Act** provides:

"54 Meaning of "Worker", "employee" etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer," in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means employment under a contract of employment; and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

……"

The Tribunal's decision

19. It was accepted by both parties before the Tribunal that the deductions in respect of training costs did fall within Regulation 12(2)(a) of the **2015 Regulations**. That is to say, the deductions were in respect of the worker's conduct, or any other event, where the worker is contractually liable. The Respondent's position before the Tribunal, however, was that, if the deduction fell within Regulation 12(2)(a) then that was, effectively the end of the matter, and there was no need to consider whether the deduction also fell within another reduction provided for in Chapter 2. Before me, however, the Respondent concedes that, given the terms of Regulation 11 - under which any payment deduction which is required to be subtracted by virtue of more than one provision in Chapter 2 is to be subtracted only once - it was not wrong for the Tribunal to consider whether the deduction also fell within Regulation 13. That concession was, in my judgment, correctly made. Regulation 11 of the **2015 Regulations** clearly envisages that a deduction may fall within one or more of the relevant provisions, and, if

it does so, then the reduction is only to be counted once. The possibility of engaging multiple reductions means that one is required to consider each reduction in the Chapter to see whether it applies. It is not sufficient to stop the analysis as soon as one reduction is found to be engaged (or not, as the case may be). A deduction which does not count as a reduction because of a stipulated provision under one provision might, nevertheless, qualify as a reduction under another provision.

20. The Respondent's position before the Tribunal was that although the deduction in respect of training costs did engage Regulation 12(2)(a) (and, by virtue thereof, was not to count as a reduction), that deduction did not fall within Regulation 13(a).

21. The Tribunal concluded that where the training is a mandatory requirement of the employer imposed upon the worker, it is no different to a mandatory requirement to wear personal protective equipment (PPE), to wear a uniform, or to have relevant tools for the job. It considered that a distinction is to be drawn between purchases that are mandated by the employer in connection with the employment and other purchases, whether of goods or services. As the training in this case was mandatory, with the workers having no choice but to undergo the training if they wanted to take up employment with the Respondent, the deductions were in respect of the worker's expenditure in connection with his or her employment. The Tribunal went on to state:

> **"84 Although not treated as a reduction because of the exemption in Regulation 12 (2)(a) in my judgment the nature of the training as a worker's expenditure (mandatory for the employment in question) means that it is caught by Regulation 13(a)..."**

22. The Tribunal then dealt with the issue of accommodation costs. The Respondent's position before the Tribunal on this issue was as follows:

> **"99 The [Respondent's] case is that the landlord of the properties let to the workers is not the employer. Therefore, the accommodation offset rules are simply not engaged."**

23. That position reflected the Respondent's then interpretation of Regulation 14 as meaning that an employer could only be considered to be "providing accommodation" within the meaning of the regulations if it was also the landlord or owner of such accommodation. The

A Revenue, in its grounds of resistance, had originally resisted the Respondent's appeal on the somewhat broader basis that, on a proper interpretation of Regulation 14, "*the employer may be considered to be providing accommodation if the employer and the landlord businesses have the same owner or business partners, directors, or shareholders in common."* However, by the time the matter came before the Tribunal, the Revenue's position was that a proper interpretation of Regulation 14 meant that the term "*employer*" in that regulation should be construed more widely so as to include others, including those who own accommodation and with whom the employer had some connection or nexus.

24. In those circumstances, it is unsurprising that the Tribunal focused its analysis on this issue entirely on whether it was open to interpret "*employer*" as defined in s.54 of the **1998 Act** more broadly so as to encompass other parties such as third-party landlords with whom the employer has some financial, structural, personal, or other connection. The Tribunal was thus steered away from considering Regulation 14 as a whole to determine whether, irrespective of the fact that the Respondent was not the owner or landlord of the accommodation, it could nonetheless be said to have been responsible for "*providing*" that accommodation within the meaning of that regulation.

25. The Tribunal heard submissions from the Respondent as to the effect of Section 11 of the **Interpretation Act 1978**, ("the **1978 Act**") which provides:

> **"Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."**

26. The Tribunal held as follows:

> **"126 It follows therefore, in my judgement, that as a matter of proper construction the term "employer" in the 1998 Act means the person by whom the worker is or was employed. A specific meaning is assigned to the term "employer" which is an exhaustive definition. That term must be so construed when considering subordinate legislation unless the contrary appears. The contrary does not appear in either the 1999 or 2015 Regulations."**

27. The Tribunal rejected the Revenue's argument that the guidance in relation to the **2015 Regulations** or the **2009 Regulations** and/or the requisite purposive approach to be taken to the interpretation of this legislation could result in a wider interpretation of the term "*employer*"

A than that provided for in the definition in s.54 of the **1998 Act**. The Tribunal concluded that there was, "*little choice but to interpret the word "employer" in accordance with the exhaustive definition provided by Parliament in the 1998 Act*."

B

The Grounds of Appeal and Cross-Appeal

28. The Revenue appealed against the Tribunal's conclusion as to the accommodation costs on four related grounds:

C

a. The Tribunal had erred in determining that the accommodation was not provided by the Respondent and that Regulation 14 of the **2015 Regulations** was not, therefore, engaged; the landlord and Respondent were, "*in reality, one and the same*";

D

b. The Tribunal failed to take a purposive approach to the interpretation of this social legislation designed to protect low-paid workers;

c. The Tribunal erred in following the case of the **Inland Revenue Commissioners v Hinchy** [1960] AC 748 which does not reflect the modern approach to statutory interpretation;

E

d. The Tribunal failed to take account of the legislative history, the reports of the Low-Pay Commission ("LPC") and the guidance in construing Parliament's true intent, which must have been that the term "employer" is to be construed more broadly so as to encompass situations in which accommodation is provided by a party having a close nexus with the employer.

F

G 29. I note here that the appeal was expressly *not* brought on the basis that the Tribunal ought to have interpreted Regulation 14 more broadly by reference to the words, "*the provision of living accommodation*"; the sole focus was on the Tribunal's failure to adopt a broader definition of the term "*employer*."

H

30. The Respondent cross-appeals against the Tribunal's decision in respect of the training costs, contending that the Tribunal misinterpreted Regulation 13(a) of the **2015 Regulations** and erred in determining that it applied to the deductions here.

31. I deal first with the Revenue's appeal against the decision on accommodation costs.

Accommodation Costs

32. Mr Serr, who appears for the Revenue as he did below, carefully took me through the legislative history of the Regulations, with particular reference to the provisions on the accommodation offset. I was first referred to the predecessor of Regulation 14, which was Regulation 31(1)(i) of the **National Minimum Wage Regulations 1999** ("the 1999 Regulations"). There are some minor differences between the two sets of provisions, but the substantive effect is the same. I was then taken to the LPCs report of 2006 ("the 2006 Report"). The LPC reports annually to Parliament on issues, and the operation of legislation, related to low pay. Amongst other things, it made recommendations for changes to legislation. Mr Serr highlighted the following passages in the **2006 Report** amongst others:

> **"4.123 We have no reason to believe that the practice of setting up a separate accommodation company to evade the offset is widespread. The evidence suggested that this activity was largely confined to a minority of employers operating in agriculture and the food processing and packing sectors. As the Government noted in its evidence, it is not clear what view an employment tribunal or court would reach on this matter. Nevertheless, we do not believe it is right for employers to seek to evade the offset rules by the device of a separate accommodation company set up specifically for the purpose, when in any meaningful sense, the employer and accommodation provider are one and the same. We believe that the Government should seek to close this loophole."**

33. In a written statement dated 14 July 2006, the then Parliamentary Under-Secretary of State for the Department of Trade and Industry, Lord Sainsbury of Turvile, noted the 2006 Report and stated that the government accepted the need to update guidance and that it agreed with the LPC's recommendation that the accommodation offset should apply in all situations, but believed that legislative measures were not required as existing legislation already covers a wide range of circumstances in which employers provide accommodation to workers.

34. The **1999 Regulations** were amended by the **National Minimum Wage Regulations 1999 Amendment Regulations 2007** ("the 2007 Regulations"). The **2007 Regulations** did not amend Regulation 31 of the **1999 Regulations** save to the extent that an exclusion was introduced in respect of the provision of accommodation to workers by local authorities and registered social landlords, except where the living accommodation is provided to the worker in connection with his or her employment with the local housing authority or registered social landlord. (A further exclusion in respect of the provision of accommodation by Higher and further Education Institutes, and 16 to 19 Academies, was introduced by a subsequent amendment.) The Explanatory Memorandum to the **2007 Regulations** noted the 2006 Report's recommendation, but stated, *"DTI does not need to introduce legislative measures since a purposive interpretation of the current regulations already covers employers providing accommodation through a separate legal entity such as a separate company."*

35. I was then taken to the DTI's 2007 guidance on the NOU and accommodation offset, ("the 2007 Guidance"). At paragraph 4.5 of the 2007 Guidance, in answer to the question, "*When is accommodation provided by the employer*?", it provides:

> "...
>
> **In line with the legislation's overall social purpose, the accommodation offset provisions are designed among other things to ensure that employers cannot avoid paying their workers the national minimum wage by levying excessive charges for accommodation.**
>
> **The Government understands that an employer may provide accommodation in a wide range of circumstances and not merely in situations where he owns the property occupied by the worker.**
>
> **The employer will be considered as providing accommodation in all the following circumstances whether or not the accommodation is let by the employer or a third party:**
>
> **• the accommodation is provided in connection with the worker's contract of employment; or**
>
> **• a worker's continued employment is dependent upon occupying particular accommodation; or**
>
> **• a worker's occupation of accommodation is dependent upon remaining in a particular job**
>
> **Where the "provision of accommodation" by the employer and the worker's employment are not dependent upon each other, the employer may be considered to be providing accommodation in circumstances where:**
>
> **• the employer is the worker's landlord either because he owns the property or because he is subletting the property; or**

• the employer and the landlord are part of the same group of companies or are companies trading in association;

• the employer's and the landlord's businesses have the same owner, or business partners, directors or shareholders in common; or

• the employer or an owner, business partner, shareholder or director of the employer's business receives a monetary payment and/or some other benefit from the third party acting as landlord to the workers.

For the purposes of the accommodation offset rules, third parties will include:

• businesses and companies which are separate legal entities to the employer; and

• individuals including those who are family members of a director, business partner, shareholder, or owner of the employing business; and

• businesses or companies with a director, shareholder, owner or business partner who is a family member of a director, shareholder, owner or business partner of the employing business.

The accommodation offset will apply whenever the employer is providing accommodation regardless of whether the worker can choose whether or not to occupy the accommodation. Even if the provision of accommodation is optional, where the worker chooses to accept the offer, the accommodation offset will apply.

When enforcing the national minimum wage, enforcement officers and tribunals will look at the facts of each individual case before determining whether an employer is providing accommodation."

36. That guidance, which clearly envisages that the accommodation offset provisions will apply even where the employer is not, in fact, the owner or landlord of a property in question, has remained largely the same ever since. Apart from some minor changes in wording, the latest version of the guidance produced in 2018 is substantially to the same effect: see **National Minimum Wage Calculating Minimum Wage 2018** ("the 2018 Guidance") at pages 25 to 26.

37. Mr Serr submitted that as the LPC had not made any further call to amend the legislation since the publication of the 2007 Guidance so as to encompass third-party provision of accommodation, it may be inferred that the LPC is content with the legislative approach thus far. He further submits that, in construing Regulation 14, the Tribunal ought to have expressly considered the purposive approach relevant to this piece of social legislation and the express intention of Parliament as can be gleaned from the 2007 and 2018 Guidance and material surrounding the introduction of the guidance. He submits that the guidance cannot be

disregarded as simply not being a source of law. He said that, in the present case, the guidance is a clear expression of Parliamentary intent, which the Tribunal was wrong to ignore. He said that Parliament had clear cognisance of the existing guidance provided in amendments made to the **1999 Regulations** and prior to the enactment of the revised **2015 Regulations**. Throughout all that, the guidance and the wording of the legislation that affected the accommodation offset did not substantively change. It may be inferred from that, submits Mr Serr, that the guidance represents the settled intention of Parliament in respect of the legislation that post-dates it. He submits that the Tribunal's narrow and literal interpretation of the term "*employer*" would have the effect of undermining the purpose of the legislation by permitting any unscrupulous employer to sidestep the legislation by establishing an ostensible third-party provider for accommodation.

38. Mr Tunley, who appears for the Respondent as he also did below, submits that this is a clear case where the Tribunal was bound to interpret the term "*employer*" as it did. There is only one definition as contained in the **1998 Act**. The effect of s.11 of the **1978 Act** is that that definition also applies to the **2015 Regulations,** "unless the contrary intention appears". He submits that the contrary intention does not appear anywhere and certainly cannot be inferred from any of the guidance or the failure to change the legislation following the various reports of the LPC. He submits that, on any view, external aids to construction cannot be used to reinterpret legislation just because that may seem a desirable thing to do. I was referred to the judgment of Elias LJ in **Day v Lewisham and Greenwich NHS Trust** [2017] ICR 917 where it was held, having accepted that public-sector whistleblowing legislation should be given a purposive construction, that:

> **"…That does not permit the court to distort the language of a statute on the vague premise that action against whistle-blowers is undesirable and should be forbidden: see the observations to this effect made in *Fecitt and Others v NHS Manchester* [2012] ICR 372, paras 58-59 per Elias LJ…A court cannot simply ignore the language of the statute to achieve what it conceives to be a desirable policy objective."**

Discussion and Analysis

39. There is no dispute that, in construing the **1998 Act** and the **2015 Regulations**, which are clearly instances of social legislation, the Court should adopt a purposive approach. I was referred to the judgment of the Court of Appeal in **Revenue and Customs Commissioners v Leisure Employment Services Ltd** [2007] ICR 1056 ("LES"). In that case, the employer, which operated a holiday camp, provided free accommodation to some of its workers. However, it deducted £6 per fortnight from the workers' salaries in respect of gas and electricity charges for that accommodation. The question was whether such a deduction was, *"in respect of the provision of living accommodation by an employer"* within the meaning of Regulation 31(1)(i) of the **1999 Regulations**, the predecessor to Regulation 14 of the **2015 Regulations**. The Revenue issued NOUs, and the employer appealed. The tribunal had held that the charges for electricity and gas were not in respect of the "provision of accommodation" because such charges could only refer to the physical structure of the accommodation and not to the provision of utilities. The EAT, Elias J (as he then was) presiding, overturned that decision on the basis that the purposive approach to construction that was necessary in respect of such legislation demanded a broad interpretation of the words, *"in respect of"* in Regulation 31, and that, accordingly, the utilities charge could be said to be in respect of the provision of accommodation. The Court of Appeal refused an appeal against the EAT's Judgment. Buxton LJ, giving the leading judgment of the Court, said:

> **11. That view, and how far, if at all, the ET's understanding of "accommodation" extends beyond the limits suggested by the Employment Tribunal, is obviously capable of a good deal of debate. But Elias J was, with respect, correct to hold that that is not the relevant question. The Regulation does not speak of payments "for," or "as a charge for," the provision of living accommodation, but rather of charges "in respect of" the provision of living accommodation. It therefore on its natural meaning encompasses any charge that is levied in connection with, and certainly any charge that is levied as a pre-condition to access to, the provision of living accommodation. As Elias J put it in 36 of his Judgment:**
>
> > **"It seems to me that if a worker is under an obligation to pay a particular sum of money in order to be permitted to make use of the accommodation on offer, then the sum should properly be described as "being in respect of the provision of living accommodation."**
>
> **12. I respectfully agree, and it is difficult to see that there is more to say. The employee cannot obtain the accommodation (however in detail the latter may be defined) without agreeing to**

> **pay the £6. Although that payment is in respect of heat and light, agreement to make the payment is still a pre-condition to the obtaining of the accommodation: just as it would be a compulsory charge for cleaning, or for the hire of furniture or a television. The payment may or may not be in respect of some things other than the provision of living accommodation, depending on how the latter is defined, but there is no doubt that, on any view of that question, it is also in respect of the provision of the accommodation.**
>
> **13. However, I add some comment on two further matters that were discussed before us. First, 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.**
>
> **14. Second, and 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. As Elias J put it in his 56:**
>
> > **"57….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 an extortionate 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."**
>
> **Again, I respectfully agree. And as President of the Employment Appeal Tribunal Elias J will have had well in mind that workers who have to seek the protection of the minimum wage provisions are likely to be in the less advantaged areas of the workforce, possibly with little job security, and unlikely to have strong trade union representation. 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."**

40. Although there is no dispute that a purposive approach is to be taken, it seems to me that Mr Tunley is correct that such an approach does not permit the court effectively to rewrite the terms of the statute, which is what it would have to do in order to construe the term "*employer*" in the way that the Revenue invites me to do. Section 54(4) of the **1998 Act** provides that an "employer" means "the person by whom the employee or worker is or whether the employer or worker, if deceased, employed". That is a definition which must, by virtue of Section 11 of the **1978 Act,** apply also to the Regulations unless a contrary intention appears. In my judgment,

no contrary intention to that meaning can be gleaned from documents such as the 2007 or 2018 Guidance or the LPC report. As stated in **Bennion on Statutory Interpretation** at 24.17:

> **"24.17. But it is equally clear that guidance is not a source of law and cannot alter the true legal meaning of a statute. In the context of statutory construction, guidance 'has no special legal status'. The judiciary, not the executive, determine the meaning of legislation. Guidance that tries to explain what the legislation means will be given no more weight than the quality of any reasoning contained in it deserves…."**

41. Even if, contrary to my view, the Guidance could be prayed in aid to support a different meaning for the term "*employer*," it could only have done so if it evinced some contrary intention to that evinced by the terms of the **1998 Act** itself. In my judgment, there is nothing in the passages in the Guidance to which I was taken that even hints at a different interpretation of the term "*employer*." In fact, the Guidance deals with the situations when the employer might be regarded as being responsible for the "*provision of the accommodation*", even though it is not the owner of the property occupied by the worker. That much is stated in terms in the Guidance:

> **"The government understands that an employer may provide accommodation in one range of circumstances, not merely in situations where it owns a property occupied by the worker."**

42. Thus, it is clear that the various examples and scenarios described thereafter in the Guidance are situations considered to amount to, "the provision of accommodation by the employer" and do not seek to take a different approach to the meaning of "employer" than that which is in the **1998 Act**.

43. It seems to me that, as a result of the way the appeal was brought before the Tribunal, the Tribunal was constrained to consider the interpretation of Regulation 14 in an unduly restrictive manner by focusing entirely on the meaning of "*employer*" and paying no regard at all to the remainder of that regulation, and, in particular, to the words, "*as respects the provision of living accommodation"*. It is quite possible (and I put it no higher than that) that had it done so, even on the basis of the agreed facts, the Tribunal might well have come to a different conclusion. (Although the parties were agreed that the accommodation was not provided by Mayfield Properties on behalf of the Respondent, it does not appear to me that that

properly amounted to an agreed fact; it is, rather, the statement of the legal position, which ought properly to have been a matter for the Tribunal to determine.)

44. However, that is not the way the matter was put before the Tribunal, nor was it the basis on which the Revenue pursued the appeal in the EAT. Having raised with counsel yesterday the possibility that the broader result which the Revenue seeks to establish could be achieved by applying a broad, purposive approach to the construction of the words "*provision of living accommodation*", rather than by seeking to distort the meaning of the **1998 Act**, Mr Serr very fairly conceded that the current approach based on the definition of the word "*employer*" could not succeed. He sought to persuade me that the appeal should, nevertheless, succeed on the basis that the Tribunal erred in its construction of Regulation 14 as a whole. However, it seems to me that short of a wholesale amendment to the appeal (which was not sought), I must determine this appeal on the basis of the grounds that were permitted to proceed; anything else would be unfair to the Respondent at this late stage, and may also be prejudicial to either party given that the approach to the agreed facts might have been somewhat different had the issue been put on that wider basis. On the narrow basis that the appeal is brought, I have concluded that the Revenue's appeal must fail. There is no warrant for interpreting the term "*employer*" in any way other than that contained in the definition in s.54 of the **1998 Act**.

45. The Revenue's appeal therefore fails and is dismissed.

46. However, I cannot leave this issue, which is likely to have important repercussions for those seeking to comply with it and those seeking to enforce the accommodation offset provisions, without saying a little more about the phrase, "*as respects the provision of living accommodation by the employer*" within the meaning of Regulation 14. In my view, had the issue in this appeal been whether or not an employer could be said to be a provider of accommodation, even though it is not the owner or landlord in such accommodation, I would have unhesitatingly answered in the affirmative. Although Mr Tunley initially sought to

maintain the position that Regulation 14 can only apply if the employer is itself a landlord, he accepted, upon reflection, that there will be situations where Regulation 14 will apply even though the employer is not a landlord or owner of the property. It seems to me that that concession is inevitable.

47. Even on a natural and ordinary reading of the regulation, the phrase "*provision of living accommodation*" can encompass a far broader range of situations than that which is limited to one where the employer is itself the landlord or owner of the property. Had the intention been to confine the scope of the accommodation offset to the latter situation, then Regulation 14 is likely to have been worded somewhat differently. In any event, the broad purposive approach to construction, which is appropriate in relation to this piece of social legislation, would warrant the inclusion of certain situations where the employer does not own the property in question and/or is not the landlord. It may be said that the Guidance sets out some examples of those types of situations. As to the first three bullet points of the 2018 Guidance (see paragraph 35 above), both parties were in agreement that the situations there described would properly fall within the meaning of Regulation 14. The parties were not agreed as to the remaining bullet points on page 25 of the 2018 Guidance. As these matters were not fully argued before me and as this appeal was not pursued on the basis of the scope of the term "*provision of living accommodation*", I do not express any definitive view about these bullet points, save to say that each of the examples therein strikes me as being at least capable of amounting to the "*provision of living accommodation*" by the employer; whether or not it does so in a particular case may well depend on the precise facts.

48. That analysis of Regulation 14 may also explain the Government's position as set out in the explanatory memorandum to the **2007 Regulations,** where it was considered that the purposive interpretation of the current regulations "*already covers*" employers providing accommodation through a separate legal entity such as a property company. The purposive

A interpretation to which the memorandum refers probably applies to the question of provision, rather than the identity of the employer.

B **Training Costs**

49. As I mentioned above, both sides accept that the deduction for training costs falls within the exception provided for by Regulation 12(2)(a) of the **2015 Regulations**. That is to say, the deduction is in respect of an event where the worker is contractually liable. The event in the present case is departure from employment within the first 12 months of employment. Such departure means that the employee would incur, on a decreasing scale over time, a liability to pay the employer a proportion of the costs incurred in providing the training. The obligation to pay is set out in the worker's terms and conditions of employment, and is notified prior to the commencement of the employment. This deduction does not serve to reduce the amount of pay in the pay reference period for the purposes of calculating NMW.

50. Where the parties disagree is in relation to the Tribunal's conclusion that the deductions also fell within the scope of Regulation 13(a) of the **2015 Regulations**. Regulation 13, I remind myself, provides:

> **"13. The following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—**
>
> > **(a)deductions made by the employer, or payments paid by or due from the worker to the employer, as respects the worker's expenditure in connection with the employment;**
> >
> > **..."**

51. Deductions falling within the scope of Regulation 13 are therefore treated as reductions for the purposes of calculating remuneration paid during a pay reference period. There is no dispute that deductions are made by the Respondent. These are made at the end of employment in accordance with the decreasing scale mentioned above. The question is whether the deduction is "*as respects the worker's expenditure, in connection with the employment*".

52. Mr Tunley submits that the deductions were not in respect of worker's expenditure in respect of employment as there was no expenditure by the worker at the time the training is provided. He says that this is a contingent, contractual liability in respect of training costs and is not expenditure as would be the case if a worker was required to purchase PPE, or a uniform, and in respect of which the employer made deductions from salary.

53. The first point to note is that the training here is mandatory. The worker cannot obtain employment without agreeing to undertake it. If the employer sought to recoup all or part of the cost of that training by means of a deduction from worker's wages during employment, there could be no doubt that such a deduction would be caught by Regulation 13(a). Such "*expenditure*" on the training would be directly akin to compulsory expenditure on uniforms or essential tools to perform the job. As stated in **Harveys on Industrial Relations and Employment Law** at D[202]:

> **"[202]**
>
> **Under NMWR SI 2015/621 reg 133(a) deductions made by the employer (or payments made by or due from the worker) 'as respects the worker's expenditure in connection with his employment' reduce national minimum wage pay. So, for example, deductions from pay for safety equipment or for tools or uniform must be subtracted from national minimum wage pay, thereby ensuring that the employer must pay the national minimum wage in addition to any coasts connected with the job. Deductions for training are treated in the same way. This element of the legislation is often overlooked by employers, who make deductions for, say, uniform without realising the implications for the national minimum wage. If it transpires that the national minimum wage is not being paid then the employer has a choice – he must either stop making the deduction or increase the hourly rate." (Emphasis added)**

54. I agree with that analysis. Does it then make a difference that the deductions are only made if the worker leaves for any reason save for redundancy within the first 12 months of their employment? In my judgment, that does not change the position. The deduction is still in respect of expenditure on training, which, given its mandatory nature, cannot be anything other than "*in connection with employment*". The fact that the employer, in seeking to provide workers with an incentive to remain, chooses not to make any deductions if the employer leaves *after* 12 months, does not change the essential character of the deduction; it remains an expenditure which the worker has to incur in order to be employed.

55. I do not consider that the contractual character of the deduction takes the situation outside the scope of Regulation 13; the Regulation also includes payments *due from* the worker to the employer. A payment that is "due from" the worker can be so because of a contractual liability.

56. The next question is whether, as Mr Tunley submits, the contingent nature of the contractual liability means that Regulation 13(a) does not bite. An employer may have many reasons to incentivise workers to remain for long enough to make it economic for it to incur certain irrecoverable costs. For example, an employer may recruit workers to perform work requiring face masks. Once used by the worker, it may not be possible, for reasons of hygiene, to reissue the mask to another person. A high turnover rate might mean that the employer would incur a significant cost in issuing new masks each time there is a new recruit. In order to incentivise workers to remain longer and to reduce the cost of a replacement mask, the employer could introduce a contractual obligation to pay the cost of the mask if the employee leaves within a few months. Expenditure on masks would, in those circumstances, be the worker's expenditure in connection with the employment, and the deduction in respect of that expenditure would be caught by Regulation 13(a). (The deduction might also be exempt under Regulation 12(2)(a) as being an amount payable in respect of an event for which the worker is contractually liable. However, as discussed above, exemption under one provision of Chapter 2 does not afford the employer immunity against a deduction amounting to a reduction under another.) There does not seem to me to be any difference in principle between that system of applying costs in respect of masks, and that which applied in respect of the training costs in the present case.

57. Mr Tunley submits that the Respondent here was not simply deducting the costs of training but what was, effectively, an agreed level of compensation payable in the event of something occurring that is within the worker's control. It seems to me that the fact that the

amount payable only amounts to a proportion of the costs incurred by the Respondent, does not mean that the cost is not expenditure. There is no requirement under the Regulations that the amount deducted must reflect fully or precisely the amount of expenditure. All that is required is that there is a deduction "*as respects the worker's expenditure in connection with employment*". As we have seen from the Court of Appeal's analysis in **LES** the term "*as respects*" (or "*in respect of*", which was the term actually considered in **LES**, but which, to my mind, is no different in meaning to, "*as respects*") is to be given a broad construction consistent with the social policy objectives of the legislation. A deduction that bears a connection with the expenditure of the worker will suffice, even if it is not precisely reflective of the actual costs incurred. In the present case, in any event, the agreed facts are that the deduction is based on a "*conservative assessment of the cost of training in the sum of £350 when the training exceeds five days and £250 when the training is less than five days*". The suggestion, therefore, that this is really some sort of compensation that is not reflective of or related to expenditure on training cannot be accepted.

58. Mr Tunley's next submission is that the Tribunal wrongly distinguished the examples taken from the Revenue's manual in relation to Regulation 12(2)(a), and that it ought to have recognised that the situation at hand was no different from the one in those examples. The first example considered by the Tribunal concerned PPE that was issued to a worker free of charge but was not returned upon departure from employment. The worker's contract stipulates that the equipment must be returned in good condition at the end of employment or the worker must bear the cost. That situation clearly does fall within Regulation 12(2)(a) because the worker's action in not returning the equipment is misconduct in respect of which the worker is contractually liable. The Tribunal found that this example did not engage Regulation 13(a) because the PPE was given free of charge, and the worker was not, therefore, incurring any expenditure in connection with the employment when the equipment was provided. Mr Tunley

submits that that is also the case here in that there is no charge for the training at the stage at which it is provided. I do not agree with that submission; whilst the worker in the present case does not incur any immediate financial outlay when undertaking the course, they are well aware, due to the documents provided to them, that a sum of up to £350 may be deducted from their wages should they leave within a certain period of time. That sum is, therefore, potentially due from him from the moment he embarks on the training. However, once the training is undertaken, the worker is not in a position to, "return" the training as would be the case with physical items such as PPE equipment. The potential financial liability cannot, therefore, be avoided, at least for the first 12 months of employment.

59. As for the second example considered by the Tribunal, this involved a situation in which the employer paid for the worker to go on a mandatory two-week training course. The worker was contractually obliged to go and faced penalties if he did not. The employee only attended the first week and then refused to attend any further. Once again, this is a situation that clearly falls within Regulation 12(2)(a) because there was misconduct in that there was a failure to attend and there is a contractual liability to pay a penalty due to non-attendance. Mr Tunley submits that there are parallels between that example and the present case, in particular in relation to the mandatory nature of the training and the fact that the matter giving rise to liability is one which is within the worker's control. It seems to me, however, that the key difference between that example and the present case is that, in the example, there is no deduction in respect of expenditure. There is nothing in the example to suggest that there was a deduction to recoup all or part of the costs of the training course; instead, there was a contractual penalty for misconduct, or, as the Tribunal found, a refusal to comply with a reasonable instruction to attend.

60. The final point made by Mr Tunley in relation to this ground is that it is simplistic to say that, because the training is mandatory, the deductions amounted to expenditure in connection

with employment. I do not agree with that submission. I accept that the expenditure need not be mandatory in order for it to be in connection with employment, and, indeed, a broad range of expenditure may be considered to be as such. However, the fact that it is mandatory, and that employment cannot be secured without it, means that the expenditure is all the more likely to be regarded as being in connection with employment.

61. For these reasons, I am satisfied that the Tribunal did not err in coming to the conclusion that the deductions in respect of training costs were caught by Regulation 13(a). Therefore, they are to be treated as reductions in pay during the pay reference period.

62. There is an additional point to be made here and that is this: these provisions are intended to protect the position of low-paid workers. Although not this case, many low-paid workers' circumstances will be precarious and may require them to remain particularly mobile and move from job to job. The work may be seasonal and short-lived. For such workers to face the prospect of a substantial reduction should they leave the employer within a period of 12 months as a result of having obtained something which is mandatory, may cause particular hardship or anxiety. That seems to me to provide a further reason for treating the Tribunal's decision on this issue as being correct. The Respondent's cross-appeal, therefore, fails, and is dismissed.

Conclusion

63. For the reasons set out above, both the appeal and cross-appeal are dismissed.