EMPLOYMENT TRIBUNALS

Appellant: Ant Marketing Limited

Respondent: Commissioners for HM Revenue and Customs

Heard at: **Sheffield** **On:** **16 August 2018**

Before: **Employment Judge Brain**

Representation
Appellant: Mr J Tunley, Counsel
Respondent: Mr A Serr, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The appellant's appeal is allowed in part.
2. It is refused upon the issue of the deductions or payments applied in respect of the workers' training.
3. It is allowed upon the issue of the accommodation costs and the deductions/payment of rent payable to third parties as agreed by the workers.

REASONS

1. The right to receive the National Minimum Wage ('NMW') came into effect on 1 April 1999. It is a piece of social legislation. According to the *Income and Data Services Employment Law Handbook* on *Wages* this was the first attempt to regulate minimum levels of pay across the whole of the UK economy.

2. A worker who is not paid the NMW has the right to pursue a complaint before the Employment Tribunal. In addition to the ability of individually affected workers to take action, Her Majesty's Revenue and Customs ('HMRC') is the enforcement agency for the purposes of the NMW. It has various powers, including powers to inspect records, enter premises and interview employers. Where, on conclusion of an investigation, a Compliance Officer of HMRC believes that a worker who qualifies for the NMW has not been remunerated at a rate at least equal to it then the officer may issue a Notice of Underpayment. This will set out the arrears of NMW determined by the

Compliance Officer together with a financial penalty for non-compliance with the obligation to pay the NMW. Where the employer complies with the Notice of Underpayment then the enforcement action comes to an end. If the employer fails to pay the arrears and/or the penalty HMRC can pursue payment on behalf of the underpaid workers in the civil courts or in the Employment Tribunal.

3. The power to issue a Notice of Underpayment is vested in the Compliance Officer pursuant to section 19 of the National Minimum Wage Act 1998 ('NMWA'). Employers have the right to appeal against a Notice of Underpayment within 28 days of the date the notice was served upon them. The right of appeal is vested pursuant to section 19C of the NMWA.

4. Notices of Underpayment were issued by HMRC against the appellant in this case on 24 January 2018. The Notice of Underpayment was in respect of 359 workers alleging arrears of £53,151.06 and levying a penalty of £28,208.60. The appellant has paid neither the arrears nor the penalty.

5. The appellant's notice of appeal was presented to the Tribunal on 1 February 2018. The appellant seeks to avail themselves of all three of the statutory grounds for appeal which are: -

   (1) That no arrears were owed to any worker named in the Notice of Underpayment upon the date set out in the notice in respect of any pay reference period within it.
   (2) Any requirement in the Notice of Underpayment to pay a sum to a worker was incorrect because no sum was due to that particular worker or the sum specified in the Notice was incorrect
   (3) The Notice included a penalty which was incorrect because HMRC is prevented from imposing a penalty or the amount of the penalty has been incorrectly calculated.

6. I was presented with a bundle of documents which contains a statement of agreed facts. I also was presented with witness statements from the following witness: -

   (1) Nicholas Armitt. He is a National Minimum Wage/National Living Wage Compliance Officer employed by the respondent.
   (2) David Ainsley. He is employed by the appellant as an Account Director.
   (3) Richard Wilson. He is employed by the appellant as a Management Accountant.
   (4) Holly Fordham. She is employed by Mayfield Properties Limited as Company Manager.
   (5) Scott Simpson. He is employed by the appellant as a Call Executive.

7. I was informed that I would be hearing no live evidence and that neither party had any challenge to the witness evidence of the other. I shall therefore proceed upon the basis of the agreed facts (in the bundle at pages 152 to 157) and (where relevant) what is said by the witnesses in their witness statements.

8. The agreed facts are as follows: -

8.1. The Notices of Underpayments (NOUs) were issued on 24 January 2018 pursuant to Section 19 of the National Minimum Wage Act 1998, in respect of 359 workers totalling arrears of £53,151.06 and penalties of £28,208.60, to the registered office of the Appellant, as employer. To date Appellant has paid neither the arrears nor the penalty.

8.2. The Appellant is a Limited company. It has operated as a tele marketing business for 28 years. At the time of Mr Armitt's visit to the Appellant's premises on 6 May 2016, the Appellant employed 258 workers at two sites, Antenna House, St Mary's Gate, Sheffield S2 4AQ and 1 North Quay Drive, Sheffield, S4 7SW.

8.3. The Appellant's accounts are prepared in-house.

8.4. The Appellant's premises are open 24 hours a day Monday to Friday and either 10:00 – 14:00 or 10:00 – 16:00 on a Saturday. They are generally closed on Christmas Day and Boxing Day and may close through to 2nd January, subject to client requirements.

8.5. Workers are sometimes required to undertake extra hours and they are paid for this time. No workers are required to be on the company premises before they start work, if they do so then that is their own choice.

8.6. Workers are recruited from responses to job ads in the Job Centre, the Appellant's own website and through recruitment agencies. Each advert includes position, hours, pay and bonuses.

8.7. The recruitment department are responsible for the hiring of workers and agreeing terms and conditions. All workers are interviewed prior to appointment and if successful receives a job offer in writing and a start date.

8.8. All workers are provided with a written contract of employment to sign with their first pay. Workers are required to complete a 6 month paid probationary period.

8.9. The company does not employ voluntary workers, volunteers, students, apprentices or self-employed workers.

8.10. Most workers are paid an hourly rate multiplied by the hours that they work each month. There are 45 salaried workers employed. The lowest paid salaried worker is on £15,000 p.a. based on 37.5 hours per week. All workers working from 09:00 to 17:00 receive 30 minutes unpaid lunch break each day. Workers working longer hours than this receive a 1 hour unpaid lunch break each day.

8.11. Workers are not required to attend any team meetings or undertake any training outside their normal working hours. The company does not use rotas.

8.12. All workers record the hours that they work each day electronically and these records are used for pay purposes. If a worker forgets to record their hours then it is the manger's responsibility to notify pay section.

8.13. Workers are paid vial BACS or cheque on a monthly basis with the first working day after the 5th being payday for salaried staff. For hourly paid staff the pay reference period (PRP) is the 21st of one month to the 20th of the next with payday being the first working day after the 5th of the following month.

8.14. All workers receive a payslip which shows the exact amount of pay received. Additional hours worked are paid at a worker's normal rate. Workers do receive performance related bonuses and sales staff earn commissions.

8.15. Building passes are supplied free of charge. However, if a worker loses their pass then the cost of a replacement is £5 and is contractually deducted from their pay.

8.16. Deductions are made from pay for attachment of earnings and health insurance. The company makes a contractual deduction of £50 from their pay if a worker leaves without working their notice period.

Training Costs

8.17. The Appellant recruits hourly-paid telesales workers ("telephone operatives") who are required to undertake training for their role which is provided by the Appellant.

8.18. New starters are required to undertake a minimum of 3 days paid induction training.

8.19. The training clause only applies to permanent telephone operatives and not to those engaged on a temporary contract or to salaried staff.

8.20. The Appellant made a conservative assessment of the cost of the training costs in the sums of £350.00 when training exceeded 5 days and £250.00 when it was for less than 5 days.

8.21. The training clause is expressly incorporated into the permanent telephone operatives' contracts. They were all informed about the training clause on at least 3 occasions before the training commenced; namely when they were offered employment and invited to an induction, then at the start of their induction itself and also in their Statements of Main Terms of Employment which they were required to sign. Some candidates withdrew on being informed about the training clause.

8.22. 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 cost for an internal training programme is £350.00 for training in excess of 5 days and is £250.00 for programmes of less than 5 days.

The amount of training costs to be repaid will be calculated 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 overpayments or claw backs directly from wages.

By signing your induction paperwork you are agreeing to this Training claw back and for funds to be taken directly from your wages."

8.23. *The Appellant made deductions from the workers' 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 (the majority of cases), or for gross misconduct, or if they failed their probation. Training deductions were therefore only applied when the reason for leaving was voluntary or otherwise within the worker's own control.*

8.24. *The Appellant was contractually entitled to make the training deductions, which were for the Appellant's own use and benefit.*

<u>Accommodation Costs</u>

8.25. *Some of the workers name in the NOU were tenants of properties owned by Mayfield Properties a residential letting business wholly owned by Anthony Hinchliffe.*

8.26. *Mayfield Properties was incorporated on 12 May 2012 as Mayfield Properties Ltd.*

8.27. Anthony Hinchliffe is a director and 100% shareholder of both the Appellant and Mayfield Properties Ltd.

8.28. Some of those workers will have been tenants before becoming employees of Ant Marketing and some will have become tenants subsequent to taking up employment with Ant Marketing.

8.29. 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. In some instances workers made their own arrangements to pay their rent. Since the start of the investigation, all tenants paid their rent direct to Mayfield Properties Ltd.

8.30. The accommodation was not provided on behalf of the Appellants and the tenants were not required to live in the properties in order to better perform their duties or for any other reason.

8.31. The rental payments were at or under the market rate for Sheffield.

8.32. The properties let to the tenants were furnished residential flats.

9. In summary, the appeal concerns two issues. These are:

9.1. 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 to go towards reimbursing the appellant for the costs of training; and

9.2. The deduction/payment of rent payable to Mayfield Properties/Mayfield Properties Ltd as agreed by the workers.

10. I shall deal first with the issue of training costs. It will be noted from the agreed set of facts that the appellant recruits hourly paid telesales workers (telephone operatives) who are required to undertake training for their role which is provided by the appellant. New starters are required to undertake a minimum of 3 days' paid induction training.

11. Mr Ainsley explains the reason for the introduction of the training clause (recited in paragraph 8.22 in the agreed statement of facts). In his witness statement he says:

(2) "During 2012, the company introduced a training clause into the contracts of employment of all new recruits to the roll of permanent telephone operative. The clause provides for repayment of training costs on a sliding scale if the employee leaves within the first 12 months of employment (page 430).

(3) The training clause was introduced because the company was experiencing a very high turnover amongst telephone operatives, particularly in their first year of employment. The figures for staff turnover between 2009 and 2017 are included in the bundle at page 417. At one time, we were losing 2 out of every 5 new starters within 4 weeks. The company works with big brand names such as the Economist and Royal Bank of Scotland. They criticised Ant Marketing for losing staff regularly. The reason for this is that in recent years Sheffield has become well-endowed with

telemarketing and call centres e.g.Capita, Sky, Voice, Contact Centre 33 and Webhelp so a high proportion of operators were joining our company and after being trained and gaining some experience leaving to join a competitor. The perception was that our competitors were gaining the advantage of the training our employees received. Another reason for the high churn rate was that Sheffield is a university town and some candidates saw the job as a stop gap while they looked for something else or during holidays"

12. Mr Ainsley then describes the recruitment procedure in paragraph 4. There is a process of screening telephonically followed by a face-to-face interview. A successful candidate is then sent a job offer which includes an induction pack and an invitation to the mandatory training. A copy of the offer and induction pack is in the bundle at pages 530 to 537. The induction pack includes information about the training clause (in the bundle at page 534).

13. The prospective employee will then attend training which includes an explanation of the training clause on the first day. The training clause is covered during the induction and the employee is required to confirm that it has been explained to him or her by ticking a box and signing the induction form (a copy of which is at page 456). Finally, the employee is required to sign his or her statement of main terms of employment which includes the training clause (pages 430 to 431). Mr Ainsley says at that, "*it is not uncommon for the prospective employees to leave during the first day of training after the training clause has been explained to them."*

14. He then goes on to give evidence about the training given to new telephone operatives. His evidence is that "*The majority of the training consists of transferable skills such as soft skills, data protection, treating customers fairly, vulnerable customers, complying with the rules of the Financial Conduct Authority. Other skills which are taught and are transferable across any contact centre are how to objection handle, how to speak to a decision maker and to a gatekeeper/receptionist, pace tone and language."* The basic training, he says, "*generally lasts between 3 and 4 days depending on which department the employee will be joining and then additional training is given in other areas if required for a particular campaign. Most of the training given on days 1 and 2 are transferable. Day 3 is usually campaign specific training and includes the systems we use. Even the campaign and the system specific training includes transferable skills. For example, we teach new starters how to construct a pipeline and disposition list of red, amber and green prospects. The platforms used at Ant Marketing are 'sales force' and 'ant com' which will be similar to platforms used by our competitors and customers."*

15. I now turn to findings of fact upon the issue of rent payable to Mayfield Properties/Mayfield Properties Ltd. The relevant agreed facts are at paragraphs 8.25 to 8.32 cited above.

16. Holly Fordham's evidence is that "*Mayfield Properties is a property rental business which is wholly owned by Anthony Hinchliffe."* By paragraph 8.27 of the agreed facts Mr Hinchliffe is a director and 100% shareholder of the appellant and Mayfield Properties Ltd. Mayfield Properties, according to Holly Fordham, is a trading name of Mr Hinchliffe.

17. Mayfield Properties owns both the buildings occupied by Ant Marketing, a flat in Chesterfield and a commercial property in Woodseats in Sheffield. Mr Wilson and Mr Simpson are residential tenants of Mr Hinchliffe (trading as Mayfield Properties). They rent flats above the Sheaf Quays office from which the appellant operates.

18. Mayfield Properties Ltd was incorporated on 12 May 2016 to acquire six flats at York House Sheffield. Mayfield Property Assets LLP is a limited partnership of which Mr Hinchliffe and his two daughters are the partners. Sheffield Lettings is a lettings agency for the properties owned by Mayfield Properties and is wholly owned by Mr Hinchliffe. Mayfield Properties Ltd and Mayfield Property Assets Ltd have a number of properties in their portfolio.

19. The agreed facts stipulate (at paragraph 8. 28) that some of the appellant's workers will have been tenants before becoming employees of the appellant and others will become tenants subsequently after taking up employment with the appellant.

20. Mr Wilson's evidence is that he took out a tenancy of his flat in 2012 "*long before I started working for Ant Marketing."* In contrast, Mr Simpson took up the tenancy of his flat after he commence employment with the appellant. A copy of the tenancy agreement between Mr Hinchliffe (as landlord) and Mr Simpson (as tenant) which is dated 18 June 2015 is in the bundle commencing at page 433. Mr Simpson says at paragraph 6 of his witness statement that, "*at first I paid my rent which includes services, straight out of my wages and signed a document to say Ant Marketing Limited could deduct the money from my salary. I asked for this to be done for my own convenience. It meant that I did not have to worry about the rent or services to the property."* We appear not to have Mr Scott's written authorisation within the bundle but there is an example of such an arrangement at page 416 (for someone else).

21. Mr Simpson and Mr Wilson both appear, from their witness statements, to be happy with the arrangement and with their properties. Mr Wilson adds that he does not have to live in the flat in order to do his job. Mr Wilson mentioned obtaining a rent reduction of around £15 or £20 per month as compared to other tenants because he works for Ant Marketing Limited. Holly Fordham tells us that that arises because "*there is a lot less work involved in having a tenant who works at Ant Marketing and so this can be reflected in the rent."* I refer to paragraph 10 of her witness statement.

22. The relevant legislation is the NMWA supplemented by the National Minimum Wage Regulations 2015 ('the 2015 Regulations'). These replaced the National Minimum Wage Regulations 1999 ('the 1999 Regulations') in April 2015.

23. The sponsoring government department has from time-to-time published guidance upon the operation of the legislation. For example, within the bundle (commencing at page 309) is guidance entitled *'The National Minimum Wage and Accommodation Offset'.* This was published in 2007 by the Department for Trade and Industry.

24. A further example is the guidance document entitled *'National Minimum Wage and National Living Wage'* issued by the Department for Business, Energy and Industrial Strategy dated July 2018 commencing at page 340.

25. This is said at paragraph 5.1 of the IDS Handbook to which I referred earlier: *"The government's purpose in enacting the 2015 Regulations was to consolidate the 1999 Regulations and subsequent amendments in a clearer and more workable form, with each individual regulation dealing with a single issue. The government indicated that it did not intend the 2015 Regulations to make any substantive changes to the law."*

26. Section 1 of the NMWA states that all *'workers'* are entitled to be paid the NMW provided they have ceased to be of compulsory school age and they ordinarily work in the UK. There is no issue in this case that any of those in respect of whom the Notice of Underpayment was issued in this case qualify for the National Minimum Wage by virtue of worker status.

27. In order to determine whether an individual is being paid at the National Minimum Wage it is necessary to ascertain his or her hourly rate of pay. One must then ascertain the total pay received in a relevant pay reference period and the total number of hours worked during that period. After determining the relevant pay reference period (in accordance with Regulation 6 of the 2015 Regulations) it is necessary to consider the pay received by the worker that goes towards discharging the employer's liability to pay the National Minimum Wage. Not all elements of pay received by a worker count towards National Minimum Wage pay. Similarly, deductions from worker's pay made by the employer are not necessarily taken into account when calculating whether a worker has been paid the National Minimum Wage.

28. The 2015 Regulations (and the 1999 Regulations before them) contain detailed provisions governing which elements of pay and deductions from pay should be taken into account for the purposes of calculating National Minimum Wage pay. Regulations 9 - 16 of the 2015 Regulations (formerly to be found at Regulations 8 and 9 and 30 - 37 of the 1999 Regulations) set out the rules governing whether certain payments, deductions or benefits in kind count towards National Minimum Wage pay.

29. It is necessary to set the provisions of the 1999 and 2015 Regulations; (I need to set out the 1999 Regulations because some of the case law cited to me was decided under those Regulations. I shall draw relevant comparisons between the two sets of Regulations in these reasons):

National Minimum Wage Regulations 2015

PART 4

Remuneration for the Purposes of the National Minimum Wage

8. Remuneration in a pay reference period

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.

Chapter 1 *Payments from the employer to the worker*

9. Payments as respects the pay reference period

(1) The following payments and amounts, except as provided in regulation 10, are to be treated as payments by the employer to the worker as respects the pay reference period—

(a) payments paid by the employer to the worker in the pay reference period (other than payments required to be included in an earlier pay reference period in accordance with sub-paragraphs (b) or (c));

(b) payments paid by the employer to the worker in the following pay reference period as respects the pay reference period (whether as respects work or not);

(c) payments paid by the employer to the worker later than the following pay reference period where the requirements in paragraph (2) are met;

(d) where a worker's contract terminates then as respects the worker's final pay reference period, payments paid by the employer to the worker in the period of a month beginning with the day after that on which the contract was terminated;

(e) amounts determined in accordance with regulation 16 (amount for provision of living accommodation) where—

(i) the employer has provided the worker with living accommodation during the pay reference period, and

(ii) as respects that provision of living accommodation, the employer is not entitled to make a deduction from the worker's wages or to receive a payment from the worker.

(2) The requirements are that as respects the work in the pay reference period—

(a) the worker is under an obligation to complete a record of the amount of work done,

(b) the worker is not entitled to payment until the completed record has been given to the employer,

(c) the worker has failed to give the record to the employer before the fourth working day before the end of that following pay reference period, and

(d) the payment is paid in either the pay reference period in which the record is given to the employer or the pay reference period after that.

10. Payments and benefit in kind which do not form part of worker's remuneration

The following payments and benefits in kind do not form part of a worker's remuneration—

(a) payments by way of an advance under an agreement for a loan or by way of an advance of wages;

(b) payment of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;

(c) payment of an award made by a court or tribunal or a payment to settle proceedings which have been or might be brought before a court or tribunal, other than the payment of an amount due under the worker's contract;

(d) payments referable to the worker's redundancy;

(e) payment of an award for a suggestion made by the worker under a scheme established by the employer to reward suggestions made by workers;

(f) benefits in kind provided to the worker, whether or not a monetary value is attached to the benefit, other than living accommodation;

(g) a voucher, stamp or similar document capable of being exchanged for money, goods or services (or for any combination of those things);

(h) payments as respects hours which are not, or not treated as—

(i) hours of time work in accordance with regulation 35 (absences, industrial action, rest breaks),

(ii) hours of output work in accordance with regulation 40 (industrial action), or

(iii) hours of unmeasured work in accordance with regulation 48 (industrial action);

(j) payments, in the context of salaried hours work, attributable to the hours to be reduced under regulation 23 (worker entitled to less than normal proportion of annual salary because of absence) whether directly or by reason of regulation 28(3) (where the worker works more than the basic hours);

(j) payments paid by the employer to the worker as respects hours of time work or output work in the pay reference period if—

(i) there is a lower rate per hour which could be payable under the contract as respects that work (including if the work was done at a different time or in different circumstances), and

(ii) to the extent that such payments exceed the lowest rate;

(k) payments paid by the employer to the worker attributable to a particular aspect of the working arrangements or to working or personal circumstances that are not consolidated into the worker's standard pay unless the payments are attributable to the performance of the worker in carrying out the work;

(l) payments paid by the employer to the worker as respects the worker's expenditure in connection with the employment;

(m) payments paid by the employer to the worker representing amounts paid by customers by way of a service charge, tip, gratuity or cover charge;

(n) payments paid by the employer to the worker as respects travelling expenses that are allowed as deductions from earnings under section 338 of the Income Tax (Earnings and Pensions) Act 2003.

Chapter 2 *Reductions*

11. ***Determining the reductions which reduce the worker's remuneration***

(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.

12. ***Deductions or payments for the employer's own use and benefit***

(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.

13. Deductions or payments as respects a worker's expenditure

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.

14. Deductions or payments as respects living accommodation

(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).

Chapter 3 *Accommodation Offset Amount*

16. Amount for provision of living accommodation

(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 [£7.00].

(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.

National Minimum Wage Regulations 1999

8. The meaning of payments

References in these Regulations to payments paid by the employer to the worker are references to payments paid by the employer to the worker in his capacity as a worker before any deductions are made, excluding–

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages;

(b) any payment by way of a pension, by way of an allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;

(c) any payment of an award made by a court or tribunal or to settle proceedings which have been or might be brought before a court or tribunal, other than the payment of an amount due under the worker's contract;

(d) any payment referable to the worker's redundancy;

(e) any payment by way of an award under a suggestions scheme.

Benefits in kind not to count as payments

9. Benefits in kind not to count as payments

For the purposes of these Regulations the following shall not be treated as payments by the employer to the worker–

(a) any benefit in kind provided to the worker, whether or not a monetary value is attached to the benefit, other than living accommodation;

(b) any voucher, stamp or similar document capable of being exchanged for money, goods or services (or for any combination of those things) provided by the employer to the worker.

PART IV
REMUNERATION COUNTING TOWARDS THE NATIONAL MINIMUM WAGE

30. Payments to the worker to be taken into account

The total of remuneration in a pay reference period shall be calculated by adding together–

(a) all money payments paid by the employer to the worker in the pay reference period;

(b) any money payments paid by the employer to the worker in the following pay reference period in respect of the pay reference period (whether in respect of work or not);

(c) any money payment paid by the employer to the worker later than the end of the following pay reference period in respect of work done in the pay reference period, being work in respect of which–

(i) the worker is under an obligation to complete a record of the amount of work done,

(ii) the worker is not entitled to payment until the completed record has been submitted by him to the employer, and

(iii) the worker has failed to submit a record before the fourth working day before the end of that following pay reference period,

provided that the payment is paid in either the pay reference period in which the record is submitted to the employer or the pay reference period after that;

(d) where the employer has provided the worker with living accommodation during the pay reference period, but in respect of that provision is neither entitled to make any deduction from the wages of the worker nor to receive any payment from him, the amount determined in accordance with regulation 36.

31. Reductions from payments to be taken into account

(1) The total of reductions required to be subtracted from the total of remuneration shall be calculated by adding together–

(a) any money payments paid by the employer to the worker in the pay reference period that, by virtue of regulation 30(b) or (c), are required to be included in the total of remuneration for an earlier pay reference period;

(b) in the case of–

(i) work other than salaried hours work, any money payments paid by the employer to the worker in respect of periods when the worker was absent from work or engaged in taking industrial action;

(ii) salaried hours work, any money payment paid by the employer to the worker attributable to the hours (if any) by which the number of hours determined under regulation 21(2) is required to be reduced under regulation 21(3) (worker entitled to less than normal proportion of annual salary because of absence from work), whether under the direct application of those regulations or the application of them required by regulation 22(5)(a);

(c) any money payments paid by the employer to the worker in respect of–

(i) time work worked by him in the pay reference period involving particular duties that is paid for at a higher rate per hour than the lowest rate per hour payable to the

worker in respect of time work worked by him involving those duties during the pay reference period, to the extent that the total of those payments exceeds the total of the money payments that would have been payable in respect of the work if that lowest rate per hour had been applicable to the work;

(ii) particular output work worked by him in the pay reference period that is paid for at a higher rate than the normal rate applicable to that work by reason of the work being done at a particular time or in particular circumstances, to the extent that the total of those payments exceeds the total of the money payments that would have been payable in respect of the work if the normal rate had been applicable to the work;

(d) any money payment paid by the employer to the worker by way of an allowance other than an allowance attributable to the performance of the worker in carrying out his work;

(e) any money payment paid by the employer to the worker representing amounts paid by customers by way of a service charge, tip, gratuity or cover charge that is not paid through the payroll;

(f) any money payment paid by the employer to the worker to meet a payment by the worker that would fall within regulation 34(1)(b) (payments by workers on account of expenditure in connection with their employment to persons other than their employer) but for the worker's payment being met or designed to be met by the employer;

(g) any deduction falling within regulation 32;

(h) any payment made by or due from the worker in the pay reference period falling within regulation 34;

(i) the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation by him to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 37, to the extent that it exceeds the amount determined in accordance with regulation 36.

(2) To the extent that any payment or deduction is required to be subtracted from the total of remuneration by virtue of more than one sub-paragraph of paragraph (1), it shall be subtracted only once.

32. Deductions to be subtracted under regulation 31(1)(g)

(1) The deductions required to be subtracted from the total of remuneration by regulation 31(1)(g) are–

(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.

(2) To the extent that any deduction is required to be subtracted by virtue of both sub-paragraphs of paragraph (1), it shall be subtracted only once.

33. Deductions not to be subtracted under regulation 31(1)(g)

The deductions excepted from the operation of regulation 32(1)(b) are–

(a) any deduction in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable;

(b) any deduction on account of an advance under an agreement for a loan or an advance of wages;

(c) any deduction made to recover an accidental overpayment of wages made to the worker;

(d) any deduction in respect of the purchase by the worker of any shares, other securities or share option, or of any share in a partnership.

Payments made by or due from a worker to be subtracted under regulation 31(1)(h)

34 Payments made by or due from a worker to be subtracted under regulation 31(1)(h).

(1) The payments made by or due from the worker required to be subtracted from the total of remuneration by regulation 31(1)(h) are–

(a) any payment due from the worker to the employer in the pay reference period on account of the worker's expenditure in connection with his employment;

(b) any payment paid in the pay reference period on account of the worker's expenditure in connection with his employment to the extent that the expenditure consists of a payment to a person other than the employer and is not met, or designed to be met, by a payment paid to him by the employer;

(c) any other payment due from the worker to the employer in the pay reference period that the employer retains or is entitled to retain for his own use and benefit except for a payment required to be left out of account by regulation 35.

(2) To the extent that any payment is required to be subtracted by virtue of more than one sub-paragraph of paragraph (1), it shall be subtracted only once.
Payments not to be subtracted under regulation 31(1)(h)

35. Payments not to be subtracted from under regulation 31(1)(h).

The payments excepted from the operation of regulation 34(1)(c) are–

(a) any payment in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable;

(b) any payment on account of an advance under an agreement for a loan or an advance of wages;

(c) any payment made to refund the employer in respect of an accidental overpayment of wages made by the employer to the worker;

(d) any payment in respect of the purchase by the worker of any shares, other securities or share option, or of any share in a partnership;

(e) any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a

requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment.

36.Amount permitted to be taken into account where living accommodation is provided

(1) The amount referred to in regulations 30(d) and 31(1)(i) is whichever is the lesser of the following–

(a) the amount resulting from multiplying the hours of work done in the pay reference period (determined in accordance with regulations 20 to 29) by 50p, and reducing that product by the proportion which the number of days (if any) in the pay reference period for which living accommodation was not provided bears to the total number of days in the pay reference period; or

(b) the amount resulting from multiplying the number of days in the pay reference period for which living accommodation was provided by £2.85.

(2) For the purposes of paragraph (1), living accommodation is provided for a day only if it is provided for the whole of a day from midnight to midnight.

30. Regulation 8 provides that the remuneration in the pay reference period is the payments from the employer to the worker for the pay reference period determined in accordance with chapter 1 but less the reductions determined in accordance with chapter 2 of Part 4 (of the 2015 Regulations). Certain deductions by the employer will count towards National Minimum Wage pay. Some deductions or reductions will not.

31. Regulation 9 of the 2015 Regulations (formerly Regulation 8 of the 1999 Regulations) then sets out those payments and amounts which are to be treated as payments by the employer to the worker as respects the pay reference period.

32. Regulation 10 of the 2015 Regulations (formerly Regulations 8 and 9 of the 1999 Regulations) then sets out those payments and benefits in kind which do not form part of a worker's remuneration.

33. By Regulation 10(f) and (g) (formerly Regulation 9) benefits in kind do not count towards satisfying the employer's obligation to pay the National Minimum Wage. The one exception to this is that provided at Regulation 9(1)(e) (formerly Regulation 30(d)) which relates to accommodation provided by the employer in respect which deductions are permitted under Regulation 14.

34. Therefore. the statutory scheme of Part 4 of the 2015 Regulations (as set out in Regulation 8) works by firstly determining pay (in order to ascertain whether the National Minimum Wage has been paid) by taking into account payments from the employer to the worker by reference to the provisions of chapter 1 of Part 4. As we have seen, Regulation 9 sets out the payments as respects the pay reference period which will count and form part of a worker's remuneration. Regulation 10 exempts certain payments from the employer that will not count towards pay for the purposes of calculating whether obligations to pay the National Minimum Wage have been met.

35. By Regulation 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. These have the effect of reducing the worker's pay and thus the employer must ensure that deductions do not have the effect of reducing pay below the level of the National Minimum Wage. That is the general position subject to the exceptions in Regulation12(2) and Regulation 14 of the 2015 Regulations.

36. Thus, the deductions from wages carved out by those exemptions in Regulation 12(2) and Regulation 14 will not have the effect of reducing the amount of wages that a worker has received for the purposes of the National Minimum Wage. Therefore, if the worker would have been remunerated at an hourly rate at least equal to the National Minimum Wage but for the employer making one of the deductions set out in Regulation 12(2) or Regulation 14 then the employer's liability to pay the National Minimum Wage will have been discharged. Otherwise, it will not.

37. Regulation 13(a) of the 2015 Regulations provide that certain specified deductions have the effect of reducing the amount of the National Minimum Wage pay received by the worker. Therefore, the employer must ensure that making these deductions does not reduce the worker's pay below the prevailing National Minimum Wage hourly rate. Regulation 13 applies to deductions in respect of the worker's expenditure in connection with his or her employment. The latter may, for example, be in respect of deductions for a worker's tools or uniform. It also applies if the worker makes a payment to the employer for such expenditure.

38. This statutory scheme mirrors that of the 1999 Regulations. Regulations 12(1) and 13(a) of the 2015 Regulations was to be found at Regulation 32(1) of the 1999 Regulations. The exceptions to be found at Regulation 12(2) of the 2015 Regulations have their equivalent in Regulation 33 of the 1999 Regulations. Regulation 14 of the 2015 Regulations had as its equivalent Regulation 31(1)(i) of the 1999 Regulations.

39. The statutory scheme covers not only deductions made by the employer that may or may not count towards National Minimum Wage pay. The legislation provides that certain payments made by the worker do not have the effect of reducing the amount of National Minimum Wage pay that the worker has received. Therefore, if the worker would have received the National Minimum Wage in respect of each hour worked but for the fact that he or she made one of the payments set out in Regulation 12(2) or Regulation 14 then the employer's liability to pay the National Minimum Wage will have been discharged.

40. Regulation 12(2)(a) – (e) sets out those payments by a worker that will count towards National Minimum Wage pay. The equivalent in the 1999 Regulations was to be found at Regulation 35(a) - (e). Similarly, any payment made in respect of the provision of living accommodation that is permitted under Regulation 14 (formerly Regulation 31 of the 1999 Regulations) is covered by this exemption. Therefore the treatment of payments made by employees or workers to the employer mirrors the statutory scheme where the employer makes a deduction from wages.

41. In this case, we are concerned with deductions made by the employer from the workers' wages for the cost of reimbursing the appellant for the expenses incurred in training the workers. We are also concerned with the deduction of payment of rent payable to Mayfield Properties and/or Mayfield Properties Ltd. Regulations 12(2)(a) and 14 are therefore central to the issues raised in this appeal. I shall start with the training costs deductions issue

42. The appellant accepts that the training deductions were for its own use and benefit. There is also no issue that the workers were contractually liable for the sums deducted and that the deductions were only made when the reason for leaving was voluntary or otherwise within the worker's control.

43. But for the exemption in Regulation 12(2)(a) of the 2015 Regulations the deduction in respect of the training cost (being for the appellant's own use and benefit as it was a reimbursement of its costs) would have the effect of reducing the amount of pay received by the worker possibly below the prevailing National Minimum Wage hourly rate.

44. However, the exemption at Regulation 12(2)(a) of the 2015 Regulations will (if applicable) not have the effect of reducing the amount of wages that a worker has received for the purposes of the National Minimum Wage. That is because deductions or payments in respect of the workers' conduct, or any other event, where the worker has a contractual liability will not have the proscribed effect of reducing pay for the purposes of the National Minimum Wage. If the worker would have been remunerated at an hourly rate at least equal to the National Minimum Wage but for the employer making a deduction in the circumstances covered by that exemption then the liability to pay the National Minimum Wage rate would have been discharged.

45. The predecessor of Regulation 12(2)(a) was considered by the Employment Appeal Tribunal in **Commissioners for Revenue & Customs v Lorne Stewart plc (UKEAT/0250/14**). A copy of this judgment was helpfully provided to me by the parties (and is to be found at page 300 – 308 of the bundle).

46. Lorne Stewart (LS) paid for employees to attend courses on condition that they signed an agreement to repay all or part of the cost of the course if they left within 2 years and agreed for the money to be deducted from their final salary payment. This had the effect that the final salary payment made by LS to a number of its employees who resigned within 2 years fell below the minimum wage. HMRC issued a Notice of Underpayment. LS appealed. The issue was whether the money deducted came within Regulation 33 of the 1999 Regulation (being the equivalent of Regulation 12(2)(a) of the 2015 Regulations).

47. The Employment Tribunal allowed the appeal. HMRC appealed. The EAT upheld the Employment Tribunal's decision that LS's appeal against the Notice of Underpayment should be allowed. It was held that while the 'event' for the purposes of Regulation 33 must have some relationship to conduct for which the worker is responsible it does not have to be something akin to

misconduct. The EAT held that a voluntary resignation or, for example, damage to property for which the worker is responsible comes within the concept of "*any other event"* within the relevant statutory provision. The EAT said that a dismissal forced upon a worker (such as for a redundancy) would not fall within the exception as that is something for which a worker will not be responsible.

48. On the facts, LS had agreed to provide a training course for an existing employee who had requested to attend upon it. On the face of it, this would appear to be a distinguishing feature from the instant case in that the training provided by the appellant was a mandatory precondition of employment with the appellant. In ***Lorne Stewart*** attendance on the course was voluntary and not mandatory. Workers in our case were informed at the outset that the training was mandatory and of the obligation to repay the costs (whole or in part) of the provision of training in the event of termination of the contract of employment (other than for redundancy).

49. In the respondent's amended Grounds of Response to the appeal (in the bundle at pages 136 – 149) HMRC pleaded this distinguishing feature in aid of their argument that the appellant's appeal should be refused. It was pleaded that in ***Lorne Stewart*** the voluntary training was not in connection with the employment in that case.

50. Mr Tunley on behalf of the appellant submitted that the fact that the worker in ***Lorne Stewart*** asked for training was not a determining factor in HHJ Shanks' deliberations. No distinction between the incurring of expenditure for mandatory or non-mandatory training is made in the legislative provisions. What was decisive was that the exemption permitting a deduction in respect of an event applies in circumstances where the worker is in control and has a contractual liability.

51. In his submissions, Mr Serr accepted that for the purposes of Regulation 12(2)(a) the mandatory or non-mandatory nature of the training is irrelevant. He clarified that the relevant passage of the amended grounds of response to the appeal (about the mandatory nature of the training) is relevant not to Regulation 12(2)(a) but rather to Regulation 13(a) and the question of whether or not the deduction made by the appellant for the mandatory training is a deduction in respect of worker's expenditure '*in connection with [his or her] employment.'* The respondent accepted that Regulation 12(2)(a) saved the appellant upon the training cost issue but that the appellant was then caught by Regulation 13(a).

52. By way of reminder, this Regulation 13(a) of the 2015 Regulations (formerly Regulation 32(1) of the 1999 Regulations) provides that certain deductions have the effect of reducing the amount of National Minimum Wage pay received by the worker. Mr Serr's submission was that by reference to the statutory scheme it is necessary to look at each of the regulatory provisions sequentially and disjunctively. One therefore must consider firstly Chapter 1 of Part 4 and look at the payments made from the employer to the worker. One then moves on to Chapter 2 to look disjunctively at the deductions or payments from the worker to see whether or not they count towards National Minimum Wage pay. He submitted that it is incorrect in principle not to look beyond a deduction or payment permitted by Regulation 12(2).

53. Mr Tunley submits that the provision in Regulation 13 of the 2015 Regulations cannot have the effect of reversing a provision (in Regulation 12(2)) that a deduction made by an employer or a payment made by a worker counts towards National Minimum Wage pay. Mr Tunley asked rhetorically why Regulation 13 would have the effect of reversing an exemption already granted by Regulation 12(2)?

54. Mr Serr's answer to that is to be found at paragraphs 17 – 21 of the amended grounds of response to the appeal. He argues that in **Lorne Stewart**, the training was not mandatory for the worker to perform the job. It was training that the worker had volunteered to undertake. Therefore, it could not be said that the training in that case was 'in connection with employment' *per* Regulation 13 and which was thus not engaged (or, more accurately, its predecessor in the 1999 Regulations was not). He goes on to argue that in the present case in contrast the deduction refers to the mandatory training that the workers undertake to be able to perform the job. Therefore, the training is to be considered to be *"in connection with the employment".* Mr Serr argues therefore that it is was deduction (or payment) for a worker's expenditure and is caught by Regulation 13.

55. At paragraph 19 of the amended grounds of resistance the respondent cites a passage from 'Harvey on Industrial Relations and Employment Law' as follows: -

"Under NMWR…Regulation 13(a) deductions made by the employer (or payments made by or due from the worker) 'as respect the worker's expenditure in connection with his employment' reduce National Minimum Wage pay. So, for example, deductions from pay for safety clothing or for tools or uniform are subtracted from National Minimum Wage pay, thereby ensuring that the employer must pay the National Minimum Wage in addition to any costs connected with the job. Deductions for Police checks or 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."

56. The Respondent says in paragraph 20 of his pleading that, *"Regulation 13 prevents the employer passing costs onto the worker such as mandatory training. If the training is mandatory (and therefore "in connection with the employment") the costs are the responsibility of the employer, not the worker. Otherwise workers could potentially suffer countless deductions for all mandatory/essential training, essential equipment, essential uniforms etc".*

57. The Respondent says in paragraph 21 that, *"A deduction or payment may fall under Regulation 12(2)(a) and therefore not constitute a reduction for the purposes of that Regulation and still constitute a reduction under Regulation 13. That is because the two Regulations are separate and disjunctive."* That is made clear, he says, by Regulation 11 (in particular at

Regulation 11(2)) which provides that to any extent that any payment or deduction is required to be subtracted by virtue of more than in provision in Chapter 2 of Part 4 of the 2015 Regulations then it is to be subtracted only once.

58. Mr Tunley sought to meet this point. He said, in paragraph 18 of his skeleton argument that, *"The respondent says at paragraph 16 of its amended grounds of response (page 144) that "the proper interpretation is to look at Regulation 12 and the exception under Regulation 12(2) but if the exceptions under Regulation 12(2) are "in connection with employment" then Regulation 13 will apply." That is not reflected in the wording of the Regulations and is inconsistent with Regulation 12(2)(e)."*

59. Regulation 12(2)(e) provides that *"payments as respects the purchase by the worker of goods or services from the employer",* are not treated as reductions unless *"the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment."* The underlined words to which I have given emphasis are omitted from Regulation 12(2)(a). Mr Tunley submitted this to be significant as the omission of those words from Regulation 12(2)(a) meant that Regulation 13(a) could not then be engaged. His submission was that once Regulation 12(2)(a) applied and the deduction went towards the national minimum wage it was out of account and absent express words such as in Regulation 12(2)(e) could not be brought back in as a deduction not counting towards national Minimum wage pay by another provision.

60. Mr Tunley submitted that the passage in Harvey relied upon by Mr Serr makes no reference to the situation which presents in this case of a worker freely entering into a contractual liability to repay training costs in certain events. Mr Tunley did accept that Harvey may be correct in that Regulation 13(a) may cover a situation where an employer sends a worker on a mandatory course but that is a different scenario than the situation that faces us in this case where the training is undertaken before employment and as a condition of it. Mr Tunley acknowledged that the National Minimum Wage Act and the Regulations made under it is a piece of social policy legislation aimed at the protection of vulnerable workers. Whilst acknowledging that, he submits that the deduction made by the appellant does not offend the legislative purposes in the circumstances.

61. Mr Tunley also argued that the focus upon the wording of Regulation 13(a) (in particular the reference to the connection with the employment) by the respondent is a flawed analysis. He says that given the relationship is that of employer and worker it is most likely that any deduction or payment will have a connection with the employment anyway. Furthermore, he cites (at paragraph 16 of his submissions) the examples in respondent's own guidance to the Regulation 12(2)(a) exemption.

62. The relevant examples to which he refers are of a worker failing at the end of employment to return personal protective equipment given free of charge at the start of employment and a worker refusing to attend a mandatory course upon which he or she was obliged to attend. In both cases, there is misconduct (by reference to the failure to return the personal protective equipment and failure to attend upon a course) and charges rendered

against the worker by the employer for these events would have the effect of not reducing National Minimum Wage pay.

63. Mr Tunley argues that both these instances are in connection with employment, the worker in question breached his or her contract of employment and therefore Regulation 12(2)(a) applies notwithstanding the absence of the words *'in connection with employment'* from that provision. He argues that the respondent's own guidance does not go on to say that Regulation 13(a) would catch a payment or deduction made exempt by Regulation 12(2)(a).

64. In short, he says that the proper approach must be that if the deduction or payment is exempt under Regulation 12(2) and counts towards remuneration then that cannot be reversed elsewhere unless the wording expressly states that that is the case.

65. He also says that the training deductions made by the appellant are not expenditure and thus caught by Regulation 13. He accepted that workers are not purchasing goods or services from the appellant (which will be exempt under Regulation 12(2)(e) unless they are a requirement imposed by the employer in connection with the worker's employment: in that eventuality the expenditure will be in connection with employment and be caught by Regulation 13(a)).

66. Rather, Mr Tunley submits, the deduction is a conservative assessment of the cost to the appellant to providing the training (the majority of which consisted of transferable skills not limited to the appellant's business) and was introduced to try and compensate for the high turnover of staff within a short time of the training being provided. There is evidence of the high staff turnover in the bundle at page 147.

67. I agree with Mr Serr that the correct approach is to look at the regulatory heads of reduction disjunctively. That was the approach taken by the Employment Appeal Tribunal (the Honourable Mr Justice Elias as he then was) in **Commissioners for HM Revenue & Customs v Leisure Employment Services Ltd (UKEAT/0106/06)**. This is in the bundle at pages 272 – 299. (This case was later heard by the Court of Appeal: A2/2006/0880 which dismissed the employer's appeal).

68. In that case, **LES Ltd**, a subsidiary of Bourne Leisure Limited which operates three Butlins Holiday Resorts and a further 35 holiday resorts under the Haven and British Holidays brand, paid its seasonal workers the National Minimum Wage and if they made use of their free accommodation applied an accommodation offset. The accommodation offset was in accordance with the statutory scheme. However, HMRC argued that LES Ltd was not entitled to deduct a further £6 per fortnight for gas and electricity as this took the workers below the National Minimum Wage.

69. The Employment Appeal Tribunal held that the utility charge was levied *"in respect of living accommodation"* under Regulation 31(1)(i) of the 1999 Regulations (now to be found at Regulation 14(1) of the 2015 Regulations). This was because the workers could not obtain the accommodation without paying the charge.

70. An alternative route pursued by HMRC was that this was a deduction made by the employer for the employer's own use and benefit under Regulation 32(1)(a) (where a deduction was levied) and Regulation 34(1)(a) (where a payment was required): (these are now of course to be found in Regulations 12(1) and 13(a) of the 2015 Regulations). In short, it was held by the Employment Appeal Tribunal (which judgment was upheld by the Court of Appeal) that the deduction and/or payment was caught by both provisions. As I say, this therefore supports Mr Serr's submission that it is not appropriate to simply stop at whichever happens to be the first applicable provision when working through the statutory scheme and that it is apt to read the provisions disjunctively and sequentially.

71. It is my judgment that the presence or absence of the words *"in connection with employment"* in the relevant provisions (at Regulation 12(2)(a) and 13(a)) is not decisive. As Mr Tunley says, those words do not appear in Regulation 12(2)(a) but nonetheless according to the respondent's own guidance a contractual liability incurred by an employee in connection with employment in respect of which an employer makes a deduction or requires a payment from the worker will not be treated as a reduction for the purposes of the National Minimum Wage. He is right in my submission to say that given the relationship is that of employer and worker it is most likely that any deduction or payment will have a connection with the employment anyway.

72. The first example given in the respondent's guidance of the worker failing to return personal protective equipment given to him or her free of charge by the employer at the outset does not engage Regulation 13(a). This is because the PPE was given free of charge and therefore the worker was not incurring expenditure in connection with the employment when it is provided. The issue in that instance was the failure upon the part of the worker to comply with the contractual obligation to return the PPE so undoubtedly, that is conduct or another event for which the worker is contractually liable to reimburse the employer. The worker was not required to pay for the items by the imposition of a charge made by the employer.

73. A more difficult analysis is in relation to the other example in respect of payment made by the worker to go on a two-week course. As I read the example, the worker was contractually obliged to go on the course and faced penalties if he or she did not do so. One can readily see from that example that Regulation 12(2)(a) would be engaged. The example does not go on to engage with the crucial question that arises in this case as to whether or not a payment or deduction is caught by Regulation 13(a). However, I can see that Regulation 13(a) would not apply as the employer in that example is not making the employee or worker pay for the course or make a deduction for going on it. Whether the course was mandatory or not, the worker only became liable because of a refusal to go on it. That is quite different from being made to pay (one way or the other) to go on a course in connection with the employment. The worker was in control of events and was in breach of contract by not going (by refusing to obey a reasonable instruction to attend).

74. In my judgment, a course which is mandatory for an employee to attend as part of his employment (whether during the course of employment or as a condition precedent to commencement of employment) is caught by Regulation 13(a). The passage in Harvey cited at paragraph 19 of Mr Serr's amended grounds of response to the appeal is pertinent.

75. I can see how a worker who asks to go on a course which is not mandated by the employer (as in **Lorne Stewart**) may not be caught by Regulation 13(a). A worker in that circumstances voluntarily attends a course and freely enters into a contract (whether at the outset or during employment) to reimburse the employer should the worker leave within a specified period of time cannot complain if the employer makes from salary a deduction or requires payment from the worker. However, that is a different circumstance to one where it is a mandatory requirement upon the part of the employer for the worker to be trained by attending a mandatory course.

76. I cannot see how if the training is a mandatory requirement of the employer imposed upon the worker it is any different to a mandatory requirement to wear PPE, to wear a uniform or to have available tools for the job and pay for those items.

77. My judgment is reinforced by the wording of Regulation 12(2)(e). A deduction for payments by the worker for goods and services from the employer will not be treated as a reduction unless it is made to comply with a requirement imposed by the employer in connection with the worker's employment. A distinction is thus drawn between purchases that are mandated by the employer in connection with employment and other purchases. It is the case that the words 'in connection with the worker's employment' feature in Regulation 12(2)(e) and do not feature in Regulation 12(2)(a). Those words could have been added to the latter to put the issue beyond doubt.

78. However, I am satisfied that the distinction to be made is between expenditure pursuant to obligations freely entered into by the worker over which the worker has control and mandatory expenditure imposed by the employer and/or worker's expenditure in connection with employment. The latter is inserted into the Regulations by Regulation 13(a). The distinction is between matters over which the worker has control (such as voluntary attendance on a non-mandatory course, failing to obey a reasonable management instruction, being careless of the employer's property) and those which the worker does not have control (such as having to pay for mandatory equipment or training) and which is a requirement of the employment.

79. Mr Tunley has submitted, as I have said, that the training deduction does not arise as an expense as such either at the time the training takes place or upon termination but is a conservative estimate of the cost of the provision by the appellant of the training. It is thus not *'expenditure'* for the purposes of Regulation 13(a). I agree with Mr Serr that this is not a convincing analysis. The appellant is incurring the cost. That it provides the course in-house rather than by the provision of external training does not detract from the point that a cost is being incurred. The appellant has to employ those who are providing the training and provide the

accommodation and facilities in order to host the training sessions. It has incurred expenditure in the provision of the in-house training by dint of its salary costs.

80. I accept that the skills taught in the training sessions may (in the majority of instances) be transferable and is an understandable business concern. Why should the appellant incur the cost of training workers for them simply to then go and work elsewhere with the benefit of the training paid for by the appellant but not be able to recover the cost of that training which will benefit others? That is a legitimate business concern but may be countered by the fact that doubtless some of those who do work for the appellant have had training from other organisations from which the appellant benefits. There is therefore an element of "swings and roundabouts".

81. Whatever the rationale for the appellant's attempts to recover the costs of training I have to take into account that this is, as I have said several times now, a piece of social legislation. I also have to construe the legislation purposefully and in accordance with the wording of the relevant provisions.

82. The legislative scheme is designed to protect vulnerable workers from exploitation. The plain fact of the matter is that workers do not and cannot take up a post with the appellant without undertaking the training. It is therefore mandatory. The mischief at which Regulation 13(a) is directed is to prevent the employer contractually passing costs onto the worker which are properly the responsibility of the employer. There is much merit, in my judgment, in Mr Serr's point that were it not for Regulation 13(a) workers could potentially suffer countless deductions for all mandatory and essential training, essential equipment and essential uniforms. To stop at Regulation 12(2) as the appellant submits would be to open the door to the very mischief that Regulation 13(a) is there to counter.

83. Therefore, I agree with Mr Serr that Regulation 13(a) is *"the beginning and end of it".* (as he put it). The training is mandatory. The workers have no choice but to undergo it if they want to take these jobs. It is therefore a worker's expenditure in connection with his or her employment because without it the worker cannot work for the appellant. The case is distinguishable from ***Lorne Stewart*** as there the employee volunteered to undergo the training and it was thus not in connection with employment. The costs incurred by the hypothetical workers in the examples in the guidance were because of events in the workers' control and not in connection with employment (in the sense of being a requirement of it). As I read it, Lorne Stewart did not consider Regulation 32(1)(a) (the equivalent of Regulation 13(a)). This was, I presume, because the feature of it being mandatory training was absent.

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). It is the correct approach to work through the statutory scheme *per* **LES Limited**.

85. I now turn to the issue of the accommodation. The point at issue between the parties is the meaning of the word *'employer'* in the context of Regulation

14. Where the employer provides accommodation to the worker it is entitled to count a notional amount of providing this benefit, known as the '*accommodation offset'* towards discharging its National Minimum Wage liability in respect of the worker. However, any amount requested from the worker in respect of the living accommodation that exceeds the accommodation offset would reduce the amount of total earnings for National Minimum Wage purposes.

86. This is provided for by Regulation 14(1) of the 2015 Regulations (formerly Regulation 31(1)(i) of the 1999 Regulations). In other words, the worker must still be left with at least the National Minimum Wage once any excess has been deducted. The mischief at which this provision is aimed is to prevent employers from discharging their National Minimum Wage liability simply by levying excessive accommodation charges. Accommodation therefore is the only benefit in kind that can count towards National Minimum Wage pay. Where the employer charges more than the accommodation offset limit (which is currently £7 per day) the amount charged over and above the level of the offset reduces National Minimum Wage pay.

87. The accommodation offset rules apply where the employer provides accommodation to the worker where:

- 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 or accommodation is dependent upon remaining in a particular job.

The rules may also apply (according to the IDS Handbook on *Wages* at paragraph 5.76) *"where there is no direct link between the provision of the accommodation and the worker's employment, for instance, where the employer is the worker's landlord or where the accommodation is provided on behalf of the employer through a third party.'* That this is the case appears not to be in dispute between the parties. I was referred to paragraph 4.5 of the April 2007 guidance to which I have referred (in particular at pages 332 and 333 in which this principle is set out).

88. The appellant'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.

89. The appellant refers to the statutory definition of *'employer'* in section 54(4) of the 1998 Act. This is helpfully produced for me at page 216. Section 54(4) provides that, *"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."* Mr Tunley places emphasis upon the word '*means'* as indicative that the definition in section 54(4) is exhaustive. The reference to "*employment"* in section 54(4) should be read in conjunction with section 54(5) which provides that for the purposes of the 1998 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" should be construed accordingly.

90. Mr Tunley drew my attention to the fact that there is no equivalent within the 1998 Act to the provisions to be found at section 231 of the Employment Rights Act 1996. This provision deals with associated employers and provides that for the purposes of the 1996 Act any two employers shall be treated as associated if one is a company of which the other (directly or indirectly) has control or both are companies of which a third person (directly or indirectly) has control.

91. I was then referred to section 11 of the Interpretation Act 1978. This provides that "*Where an Act confers powers to make subordinate legislation, expression used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act".*

92. Section 2 of the 1998 Act empowers the Secretary of State to make regulations and it was pursuant to those powers that the 1999 and 2015 Regulations were made. The general interpretive provisions in Regulation 3 of the 2015 Regulations do not provide a contrary definition for the term *"employer"* to that in the 1998 Act.

93. Mr Tunley then took me to *Bennion on Statutory Interpretation*. The following principles may be derived (at section 3.13): (1) The intention of the legislature, as indicated in the enabling Act, is the prime guide to the meaning of delegated legislation. (2) The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object while at the same time remaining true to it. In **Utah Construction and Engineering Party Limited (PTY Limited) v Patakay (1966) AC629**, the following passage was adopted:

"[Power delegated by an enactment] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

94. At Section 24.17 of *Bennion* it is said 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. If it is wrong, the courts will not hesitate in saying so."*

95. That this is recognised by the executive may be seen at pages 312 and 314 (from the 2007 guidance). This acknowledges that the guidance reflects the executive's understanding of the way the law operates in practice and is not

to be regarded as complete or authoritative statements of the law. It is general guidance only.

96. This is relevant as the 2007 guidance refers to a policy of HMRC of enforcing arrears of National Minimum Wage where those arise in circumstances where *"the employer's business and the landlord's business have the same owner or business partners, directors or shareholders in common; or the employer business, its owner, one of its business partners, shareholders or directors derives some financial and/or other benefit from the provision of accommodation and a family member of that owner, business partner, shareholder or directors is the owner, business partner, shareholder or director of the landlord's business."* I refer to page 316.

97. At page 333, the guidance provides that for the purposes of the accommodation offset rules, third parties (caught by it) will include businesses and companies which are separate legal entities to the employer or others in the circumstances set out in the penultimate paragraph at page 333. These circumstances are substantially the same as cited at paragraph 96.

98. The guidance from 2007 was formulated seven years or so after the coming into force of the 1998 Act and 1999 Regulations. Mr Tunley said that it appears to have been prompted by policy and in particular the wish to provide for regulation of *"unscrupulous employers who may seek to exploit its workers by using third party entities to provide accommodation."* Mr Tunley submits that that laudable policy aim cannot be invented through guidance. The wording of the legislation must be respected and applied. He also noted that the 2015 Regulations do not seek to expand the definition of *"employer"* beyond that of the 1998 Act.

99. Mr Tunley submitted that the Tribunal may not rely upon the purpose of the legislation in question in order to adopt a different legislative scheme to the one which is in the words of the legislation. In support of that proposition he referred me to **Inland Revenue Commissioners v Hinchy** HL (1960) AC748.

100. This case concerned the application of penalties to a taxpayer and a consideration of the absurd, unreasonable and oppressive result arising from what was described as a savage tax penalty. At page 767, Lord Reid said:

"*Difficulties and extravagant results of this kind caused Diplock J and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellant's contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, we must apply them as they stand, however, unreasonable or unjust the consequences, and however strongly we may suspect that that was not the real intention of Parliament."*

He then goes on to say (at page 768) that:

"I agree with the Court of Appeal that if it is possible to infer the meaning which they attached to these words that should be done. One is entitled and indeed bound to assume that Parliament intends to act reasonably, and therefore to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret that I am unable to agree that this leaves me with any choice."

101. Mr Tunley submitted that the Low Pay Commission (which is the independent statutory body which advises the Government on National Minimum Wage issues) recommended the Government to update existing guidance on the accommodation offset so that it is clear and comprehensive and that the Government should implement legislative measures to prevent employers using the device of a separate accommodation company to evade the offset. I refer to page 315 (being an extract from the 2007 guidance). Mr Tunley attaches significance to the fact that the Government have not legislated as recommended by the Low Pay Commission and have kept the statutory scheme in force when the Low Pay Commission made that recommendation.

102. Within the bundle are three decisions of the Employment Tribunal. These are at pages 393 – 415. These are of course not binding upon me. Dealing briefly with each: -

(1) *Brien Accountancy Limited v HMRC* (2401543/2014): it was held not to be within the spirit of the legislation for the appellant in that case to hide behind the corporate veil so as to circumvent legislation there to protect workers and employees to ensure they receive a certain level of payment. The case concerned the rental of a property to a worker by an individual and his wife (in their individual capacity) in circumstances where they were Managing Director and Company Secretary of the employer.

(2) *Lavender Lodge Limited v HMRC* (265065/10): this was another case in which properties were rented to workers by individuals who were shareholders in the employer. It was held that if employers could lawfully undermine the policy objective of securing the statutory minimum wage by charging rent for accommodation provided through linked third party landlords low paid workers including immigrant workers would be at risk of exploitation.

(3) *Springfield Care Services Limited v HMRC* (1801578/2010): again, this was a case involving a close connection between the landlord of the properties in question on the one hand and the employer on the other. It was held that the connection was so close as to make it effectively possible for the landlord and the employer to speak with one mind and one voice.

103. Mr Tunley submits that in none of those cases were the Tribunals referred to section 11 of the Interpretation Act 1978 (and presumably the passages from *Bennion* and the ***Hinchy*** case) and therefore ought to be viewed as having been decided *per incuriam:* that is to say, material which would have affected the decisions of the Tribunals was not brought to their attention.

104. Mr Tunley also submitted that the interpretation advanced by the respondent has the potential to produce absurd results and onerous consequences. He constructed a hypothetical scenario of "Mr X" as employer and "Mrs X" as letting a property but the married couple sharing the proceeds of their ventures. An employee letting a property from Mrs X would have the consequence of putting Mr X in possible breach of the National Minimum Wage legislation. This may have the effect of restricting work and tenant choice and an employer may have to make onerous enquiries of his or her employees as to their living arrangements to ensure that they do not fall foul of the provisions.

105. In the correspondence between the parties within the bundle (in particular at pages 158 to 171) the suggestion was made by the appellant that a wide interpretation of the word *'employer'* may have the result of the employer dismissing employees who happen to live in accommodation provided by a related third party (within the meaning of the guidance within the bundle dated 2007). This would have the result in upsetting those such as Mr Scott and Mr Wilson who are happy with their living arrangements. It was suggested that cannot have been Parliament's intention.

106. In response, Mr Serr submitted that the appellant's submission was a bold one as the 2007 guidance has not been challenged by way of judicial review and three Employment Tribunals have separately interpreted the Regulations in the manner advocated by HMRC. He drew my attention to the fact that further guidance has been issued by BEIS. This guidance is the *'National Minimum Wage and Living Wage – Calculating the Minimum Wage: 2018'.* It says in this guidance that the provisions of Regulation 14 apply in a number of circumstances including those where the employer and the landlord are part of the same group of companies or are companies trading in association or where there is a common owner, business partners, directors or shareholders. He submitted that the 2018 guidance while not having the force of law, is a sensible purposive interpretation of the Regulations.

107. In the amended grounds of response to the appeal it was said that unscrupulous employers could simply set up ostensible third providers of accommodation thereby thwarting the purposes of the legislation. Mr Serr submitted that the legislation must be interpreted in a way which avoids the possibility of such abuse even if it may have harsh effects in a particular case.

108. About Mr Tunley's *per incuriam* point, Mr Serr submitted that it was not unreasonable to assume that experienced Employment Judges took judicial notice of the basic canons of construction notwithstanding that those passages from *Bennion* were not specifically cited before those Tribunals. He also said that like submissions had not been made to the Employment Appeal Tribunal or Court of Appeal in **Leisure Employment Services Limited**.

109. Mr Serr submitted that **Hinchy** concerned a different piece of legislation from that with which we are concerned in this case and was from a different era.

110. He made reference to **Autoclenz Limited v Belcher & others (2011) ICR 1157 SC**. This decision indicated that Courts and Tribunals have greater scope to look behind the written terms of a contract in the employment context than the ordinary law of contract generally allows. This represented a departure from the narrower approach that had been adopted in the construction of employment contracts: that a finding that the terms of written agreement were a sham could only be made where the employer and the employee had colluded in misrepresenting their relationship in the written documents **(***per* **Consistent Group Limited v Kalwak & Others (2008) IRLR 505, CA)**. **AutoClenz** was recognition of the fact that, unlike commercial contracts, the parties to an employment contract rarely have equality of bargaining power. It represents a modern approach to the reality of the employment relationship and that the true agreement between the parties will often have to be gleaned from all of the circumstances of the case of which the written agreement is only a part.

111. Mr Serr submitted that the reality of the situation here was that the employer/appellant was one and the same with the landlord. Mr Simpson's shorthold tenancy agreement dated 18 June 2015 (in the bundle commencing at page 434) shows that Mr Hinchliffe is the landlord. He is also the director and 100% shareholder of the appellant.

112. That Mr Hinchliffe is the controlling mind of the appellant and Mayfield Properties Limited is also evident, submitted Mr Serr, from the letter written to Mr Armitt on 3 June 2016 at pages 158 and 159. This letter was sent to him by Nadia Remeikis. She is the Payroll and HR Manager for the appellant. On behalf of Mr Hinchliffe, she said the following: -

"*Mayfield Properties Limited is the landlord and owner of the properties. Ant Marketing Limited is the employer. It is purely coincidental that any employees of Ant Marketing Limited have tenancies of property belonging to Mayfield Properties. The individuals concerned were not under obligation to rent or occupy the properties as a condition of their employment. Some of them will have been tenants before becoming employees of Ant Marketing and some will have been employees before becoming tenants of Mayfield Properties. Ant Marketing does not provide accommodation to anyone and neither does Mr Hinchliffe in his personal capacity.* [I interpose to observe that this assertion appears to be at odds with the copy of the assured shorthold tenancy agreements to which I have just referred in paragraph 111 and which was in force when this letter was written.]. *However, in the past three years the following employees of Ant Marketing have also been tenants of Mayfield Properties:*

[These are then listed. There is no need to make reference to them by name save that they include Mr Wilson].

They represent an insignificant proportion of the workforce of Ant Marketing Limited over this period.

Where this has been the case, some of them have asked for their rent to be deducted from their wages and paid to Mayfield Properties in which case this has been done. It was convenient to them and not a requirement of their

employment or tenancies. In other cases, the employees have made their own arrangements to pay the rent, depending on their preference.

If it is wrong for Mayfield Properties to offer tenancies to employees of Ant Marketing, please let us know. As you will appreciate, it will then be necessary to give at least three months' notice under the tenancy agreements to any employees who are tenants. Naturally, we would prefer not to have to ask them to leave their homes."

113. There is much force in Mr Serr's submission that this passage is reflective of the fact that to all intents and purposes the appellant and Mayfield Properties Limited are in reality one and the same. The letter was written on behalf of the appellant but also advances Mayfield Properties Limited's position. Miss Remeikis seeks direction from HMRC on behalf of Mayfield Properties Limited with an indication of what that entity may do dependent upon that advice (with reference to the final paragraph).

114. Mr Serr submitted that this is precisely the kind of case caught by paragraph 4.5 of the 2007 guidance (at pages 332 – 334). In particular, the employer and the landlord are part of the same group of companies who are trading in association and have the same owner. In Mr Simpson's case the employer and landlord are in fact the very same person. Mayfield Properties Limited is thus a third party by reason of association with the appellant within the ambit of Regulation 14. Accordingly, a broad and purposive approach should be taken to Regulation 14.

115. Mr Serr also submitted that Parliament may be presumed to have been aware of the 2007 guidance when introducing the 2015 Regulations. Regulation 14(1) is in terms identical to Regulation 31(1)(i) of the 1999 Regulations. Although there is no change in wording to the relevant provision to the 1999 Regulations in the 2015 Regulations the guidance concerning cross-ownership was updated in 2018. There was therefore some significance to Parliament not having seen fit to amend the statutory wording as had been recommended by the Low Pay Commission (as referred to in the 2007 guidance at page 315).

116. In **Leisure Employment Services Limited**, the Honourable Mr Justice Elias (as he then was) sitting in the Employment Appeal Tribunal commenced his analysis with the following words:

"29.I will deal with the relevant issues in turn. In interpreting these Regulations, both Counsel accept that I should adopt a purposive approach to the construction of the provisions. Both rely on a well-known dictum of Lord Diplock in the ***Jones and Hudson v The Secretary of State for Social Services (1972) 2 WLR210****, a passage which was, in fact, referred to in the decision of the Employment Tribunal. Lord Diplock said this (at page 212):*

"To find out the meaning of particular provisions of social legislation of this character calls, in the first instance, for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve

them. Meticulous linguistic analysis of the words and phrases used in different contexts… should be subordinated to this purposive approach"

30. I take the purpose here to be specifically the elimination of payment by benefits in kind and a desire to ensure that workers should receive cash in hand of at least the National Minimum Wage, save where carefully circumscribed exceptions apply."

117. When the same case reached the Court of Appeal, Lord Justice Buxton said the following (at paragraph 14):

"… as the President of the Employment Appeal Tribunal Elias J will have had well in mind, 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."

118. I have carefully considered each of the Employment Tribunal cases to which I was referred. I note that in *Lavender Lodge Limited* the Employment Judge expressed himself surprised to find that the relevant guidance did not have full expression in the 1999 Regulations (which were then in force). He observed that the draftsman could have made clear that the word "*employer"* in Regulation 31(1)(i) included those associated with the employer in the way it is described in the guidance. He concluded that, *"Given, however, that these Regulations are tightly drawn, the omission may be significant and symptomatic of the draftsman's view that a broad interpretation of the word "employer" was called for given the policy objective behind the accommodation offset provisions. The Employment Judge's conclusion is that he should adopt a purposive approach and recognise that a literal approach would have the effect of driving a 'coach and horses' through the policy objective behind the accommodation offset Regulations."*

119. In *Springfield Care Services Limited* Tribunal took the point made by Counsel for the appellant that the guidance produced by the DTI (presumably the 2007 guidance) was expressly stated to be just that, only guidance. The Tribunal in that case was persuaded to adopt a wider purposive approach by reference to the **Leisure Employment Services Limited** and the *dicta* to which I have referred from it.

120. There is therefore some force in Mr Serr's submission that it is not unreasonable to assume that the Employment Judges hearing those cases were familiar with basis canons of statutory construction.

121. That said, I consider there to be more force in Mr Tunley's argument that in none of those Tribunal cases was reference made to section 11 of the Interpretation Act 1978 and the passages from *Bennion* to which he refers. Further, **Hinchy** was not cited.

122. Mr Serr made the point that none of those materials were before the Employment Appeal Tribunal or the Court of Appeal in **Leisure Employment Services Limited**. Doubtless, that is a correct observation. However, **Leisure Employment Services Limited** may be distinguished upon the facts from the instant case. As I have said, in **Leisure Employment Services Limited** the issue was around a deduction of £6 per fortnight made from worker's wages for gas and electricity. There was no issue in that case about the landlord and the employer being associated or connected. As I read the facts of that case (at paragraphs 4 – 9 of the Employment Appeal Tribunal report at pages 275 – 278 of the bundle), the employer provided the accommodation. I refer in particular to paragraph 8 which refers to the 'accommodation agreement' (as it was called) that was applicable. Paragraph 11 of the accommodation agreement provided that:

"*The company [Leisure Employment Services Limited] may at your request permit you to live in accommodation which is owned or occupied by the company ('accommodation') but only if any suitable accommodation is available. If you are offered accommodation you will be required to enter into an accommodation agreement with the company and to abide by the terms and conditions as laid down in the agreement."* [emphasis added].

123. Different issues therefore arose in **Leisure Employment Services Limited:** whether the £6.00 per fortnight charge was levied in respect of living accommodation; and whether the deduction was made by the employer for his own use and benefit. It was not concerned with the question that arises here which is about the issue of a connected or associated company of the appellant, as employer, providing living accommodation to the workers (or at any rate some of them).

124. I agree with Mr Serr that it would be bold of me to say that rulings of the Employment Appeal Tribunal and Court of Appeal were *per incuriam*. However, I need not go so far as I am quite satisfied that **Leisure Employment Services Limited** and the instant case may be distinguished on the facts and concerned quite different issues.

125. I am satisfied that the three Employment Tribunal cases were decided *per incuriam.* No submissions were made to those Tribunals citing Section 11 of the Interpretation Act 1978, *Bennion* and **Hinchey**.

126. It follows therefore, in my judgment, 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.

127. It follows therefore that the delegated legislation must remain true to the enabling Act. As the enabling Act provides an exhaustive definition of the term *"employer"* that must be adhered to absent a contrary intention in the delegated legislation (being the 1999 and 2015 Regulations).

128. As section 24.17 of *Bennion* states, guidance is not a source of law and cannot alter the true legal meaning of a statute. It is difficult to see upon what basis the guidance sought to enlarge the term *"employer"* beyond the statutory definition in the 1998 Act. Although not binding on me, I am fortified in this view by the expression of surprise by the very experienced Employment Judge in in *Lavender Lodge Limited* that the guidance did not have full expression in the Regulations and that the draftsman could have made clear that the word *"employer"* in Regulation 31(1)(i) of the 1999 Regulations (now Regulation 14(1) of the 2015 Regulations) included those associated with the employer in the way it is described in the guidance. Had that been done, then plainly a contrary intention would have appeared. As it is, the proper construction of *"employer"* must (by reference to section 11 of the Interpretation Act 1978) be the exhaustive definition in the 1998 Act.

129. The respondent urged the Tribunal to adopt a purposive approach by applying a wider definition of the term *"employer"* than is provided for in the 1998 Act. I am of course cognisant that this is social policy legislation. The adaptation of a narrow and strict construction of the term "*employer*" will give rise to the risk of employer's sidestepping the legislation by taking the simple steps apprehended in the 2007 guidance. This is a real concern. A disquiet over inequality of bargaining power in the employment relationship was at the heart of the jurisprudence adopting a modern approach to the proper construction of the entirety of an employment agreement enabling Courts and Tribunals to look behind the written terms of the contract. This indicates a move away from a "black letter law" approach.

130. The difficulty for the respondent, however, is that this case concerns the proper construction of an Act of Parliament. This is of quite a different order to that of proper construction of the reality of a contractual relationship between parties of unequal bargaining power. I find persuasive the passages from **Hinchy** cited above that we can only take the intention of Parliament from the words which they have used in the Act. Those words must be applied as they stand however unreasonable or unjust the consequences or however strongly it may be suspected this not to be the real intention of Parliament.

131. It calls for a degree of speculation as to why Parliament legislated to leave Regulation 14(1)(a) in identical terms to the equivalent provision in the 1999 Regulations in circumstances where the Low Pay Commission had recommended in 2006 that the government should implement legislative measures to prevent employers using the device of a separate accommodation company to evade the offset.

132. I am less persuaded by Mr Tunley's argument that the respondent's wider construction of the word *"employer"* may lead to potentially absurd results. As Mr Serr said, the hypothetical examples constructed by Mr Tunley were not the facts of this case. The appellant alluded in the letter of 3 June 2016 to the taking of drastic steps (including the termination of the tenancies) were it to be wrong for Mayfield Properties Limited to offer tenancies to employees of the appellant. As was said in **Hinchy**, one is bound to assume that Parliament intends to act reasonably and therefore to prefer a reasonable interpretation of a statutory provision if the there is any choice. In this case however in my judgment I see little choice but to interpret the

word *"employer"* in accordance with the exhaustive definition provided by Parliament in the 1998 Act.

133. I share the surprise of the Employment Judge in in *Lavender Lodge Limited* that the draftsman of the Regulations did not frame the term *"employer"* wider than is to be found in the 1998 Act. Wording akin to that to be found at section 231 of the 1996 Act may serve. I however, in my judgment, it is not the function of the Tribunal to plug a gap left by the absence of anti-avoidance provisions within the legislation. That is a matter for the legislature to address.

134. I can deal quickly with the alternative argument about the accommodation cost issues that arises in this case. This is that the deduction is caught by Regulation 12(1). In this case, there is no evidence that the rent deducted by the employer is for the employer's own use and benefit. Holly Fordham's evidence is to the effect that the rent deductions are paid to Mr Hinchliffe personally (trading as Mayfield Properties) or Mayfield Properties Limited. As they are therefore not for the appellant's own use and benefit and thus they are not caught by Regulation 12(1).

135. It follows therefore that the appellant's appeal is allowed in part. I should also observe that the respondent fairly accepts that the appellant is not engaged in any sharp or unscrupulous practices in relation to its workers. In those circumstances the appellant may be considered to be somewhat unfortunate.

136. Should any further issues now arise that require the Tribunal's determination then the parties may make any application as they see fit and should do within 21 days of the date of promulgation of this judgment.

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Employment Judge **Brain**

Date 16 Ocotber 2018