Case No: 1303701/2019

EMPLOYMENT TRIBUNALS

Appellant: **Nurse 365 Ltd**

Respondent: **The Commissioners for Her Majesty's Revenue and Customs**

Heard at: Birmingham **On: 3 September 2019**

Before: Employment Judge Miller

Representation
Appellant: Mr G Wilcock – lay representative
Respondent: Mr A Serr - counsel

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The appellant's appeal is refused.

REASONS

Introduction

1. This is an appeal against a notice of underpayment dated 26 March 2019 issued under section 19 of the National Minimum Wage Act 1998 by the respondent to the appellant.

2. The notice of underpayment identified underpayments of the National Minimum Wage in respect of eight workers employed by the appellant. The total amount outstanding due to those workers was said to be £5238.01 and the associated penalty charge was said to be £10,026.38.

3. By way of an appeal form received by the employment tribunal 4 April 2019 the appellant appealed against the notice of underpayment on the following grounds.

a. The amount specified in the notice of the sum due to the worker (or workers) is incorrect; and
b. the amount of the penalty has been incorrectly calculated.

The Hearing

1. The respondent was represented by Mr Serr of counsel and the appellant was represented by Mr Wilcock, the appellant's accountant. The parties produced an agreed bundle of documents and a second bundle of authorities which were referred to at the hearing. The respondent also produced a witness statement of Zainab Jussab, a compliance officer for Her Majesty's Revenue and Customs and the individual who prepared the notice of underpayment issued on 26 March 2019.

2. In initial discussions it became apparent that Mark Slaney, a director of the appellant, had also produced a witness statement but that witness statement had not been brought to the tribunal today. Mr Serr helpfully emailed me a copy of Mark Slaney's witness statement.

3. The parties agreed that I did not need to hear evidence from either Zainab Jussab or Mark Slaney and referred me to a schedule of agreed facts at pages 290 to 295 of the hearing bundle. The parties proposed to make submissions only.

4. In light of this I adjourned to read the witness statements, the schedule of agreed facts and a number of other documents referred to by the parties, namely the appeal form and a number of cases in the authorities bundle; specifically the case of Commissioners for HM Revenue and Customs v Leisure Employment Services Ltd in the Employment Appeal Tribunal (UKAEAT/0106/06/MAA); Revenue and Customs Commissioners v Leisure Employment Services Ltd in the Court of Appeal ([2007] EWCA Civ 92); and a case of the Sheffield Employment Tribunal (1802424/2018) Ant Marketing Ltd v Commissioners for HM Revenue and Customs.

5. I also informed the parties at the outset of the hearing that there was no copy of the respondent's response on the tribunal file. There was, however, a copy of that response in the hearing bundle along with an email indicating that that response had been sent to the Employment Tribunal on 11 July 2019. The appellant confirmed that it accepted that that email had been sent and in fact is copied into it. I accept, therefore, that the respondent has complied with the order of employment Judge Perry of 17 June 2019 to provide a response within 28 days of that date.

6. I therefore also took the time to review the respondent's response, the respondent's skeleton argument that had been submitted in advance and documents referred to in the parties' witness statements.

The issues

7. The appellant is a company that provides healthcare assistants, nursing assistants and registered nurses to care homes and nursing homes. It does that by directly employing workers to undertake those roles and allocating them to various assignments.

8. The appellant incurs certain costs in recruiting and training those workers and ensuring that they are suitable to provide services it offers. Those costs include, as far as is relevant, recruitment agency costs for some workers, the costs of training that the respondent considers mandatory for its workers and the costs associated with obtaining a satisfactory DBS check. These are costs that the appellant seeks to pass onto the workers in some circumstances as discussed below.

9. The appellant also offers to workers services which it says are for the purposes of assisting the workers in the performance of their jobs. These are, again as far as is relevant, the provision of accommodation and travel to each assignment. The appellant also seeks to recover the costs of those services from its workers.

10. The respondent's view was that the deductions of the costs referred to in paragraphs 5 and 6 above from the workers' wages has the effect of reducing their wages. In the case of the eight employees identified in the notice of underpayment these reductions have the effect of taking their wages below the national minimum wage.

11. The affected employees and the respective amounts of underpayments specified in the notice are as set out below:

Employee	Amount of underpayment
Waclawa Falowska	£1146.43
Beverley Ainsworth	£30.26
Iwona Bucholc	£6.20
Adrian Cormosi	£740.05
Diana Corpadean	£907.77
Alexandru Guzun	£1040.66
Laurentiu Nasaudean	£1196.07
Lucy Smith	£170.57
Total	**£5238.01**

12. The appellant challenges the amounts of the reductions as a matter of principle only. There was nothing in the appeal form, and no representations were made to me, to suggest that the appellant challenges the numerical basis of the calculations. In summary, the appellant's case was that the respondent was wrong to treat the relevant deductions (as detailed below) as reductions in the national minimum wage at all. I have not, therefore,

considered the arithmetical basis of the calculations, solely the matters of principle that were raised before me.

13. The appellant confirmed that it did not intend to pursue the points relating to the recovery of administration fees for DBS checks or training costs. Therefore, the matters in dispute were as follows:

    a. Travel costs: the appellant deducted from some workers' wages transport costs at 30 pence per mile for the costs of transport provided by the appellant for workers to get to work. The respondent's position was that these deductions had the effect of reducing the workers' wages below the rate of the national minimum wage. The appellant's position was that an exemption applied, and this deduction did not have the effect of reducing the workers' wages.

    b. Agency/recruitment costs: the respondent incurred recruitment costs in respect of workers. This included agency fees and right to work checks for workers recruited from outside the UK. The appellant also sought to recover £60 for an enhanced DBS check (the actual cost of which is £44), the costs of paying for a new worker to shadow a colleague for a period and the costs of the provision of moving and handling training and an online training course. The appellant withdrew its appeal against the recovery of training costs, shadowing costs and DBS costs so that the only matter still in dispute under this head were the agency costs recovered from workers. These costs were recovered from workers who left the employment of the appellant within the first 12 months of their employment. These costs were £960 per worker for those workers recruited from outside the UK. The respondent's position was that these deductions had the effect of reducing the workers' wages below the rate of national minimum wage. The appellant's position was that an exemption applied, and the workers had voluntarily agreed to the deductions in their contracts.

    c. Provision of accommodation: the appellant provided accommodation to those workers who required it. This was an entirely voluntary arrangement and it operated by the respondent subletting a three-bedroom flat to workers for £90 per week which is deducted from their pay. The appellant also deducted a £100 deposit for this accommodation from their pay. The respondent's position in respect of accommodation is that any amount deducted in excess of the prescribed amount allowable for the accommodation offset has the effect of reducing the amount of workers' wages paid below the rate of national minimum wage. The appellant's position was that an exemption applied insofar as the provision of accommodation was a service; and further that, notwithstanding the appellant's admission (as to which see below) that Nurse 365 Ltd was both the workers' employer and the workers' landlord, in the course of acting as a

landlord the appellant was not thereby acting as employer so that the relevant provisions set out in regulations 14 to 16 of the National Minimum Wage Regulations 2015 did not apply.

Findings of fact

14. The parties provided a schedule of agreed facts. I do not repeat those facts here – they are attached as an appendix to this decision.

15. During the course of the hearing, however, it became apparent that there were still some matters of misunderstanding between the parties. It was not necessary to hear evidence as the following additional matters were clarified and agreed by the parties' respective representatives in the course of submissions:

    a. paragraph 33 of the agreed schedule of facts says "Mr Slaney provided three workers with rental accommodation. Mr Slaney rents a three-bedroom flat that he sublets to workers for £90 per week which is from their pay". Despite paragraph 33 of the agreed schedule of facts, Mr Serr submitted that there were no third-party interests in the assured short hold tenancy other than Nurse 365 Ltd and the tenants. A copy of an assured short hold tenancy agreement made 1 March 2018 is set out at page 113 to 116 of the hearing bundle. The tenancy agreement is said to be "BETWEEN Mr Mark Slaney (Nurse 365 Ltd) of suite 3B Nicholson House, Shakespeare Way, Whitchurch, Shropshire SY13 1LG ("landlord")" and then names a tenant. I raised with the parties that this seems to be a somewhat unclear description of the landlord - it was not wholly clear whether it was referring to Mr Mark Slaney as an individual or Nurse 365 Ltd as a company. Mr Wilcock confirmed that it was in fact Nurse 365 who had a lease with the head landlord and who let the property to sub tenants. It was therefore agreed between the parties that the appellant, Nurse 365 Ltd, was the landlord of the accommodation made available to relevant workers.
    b. Paragraph 32 of the agreed schedule of facts says "Workers are required to travel between care/nursing homes. Workers do not have a set place of work." Mr Serr submitted that the appellant provided travel between sites and it was part and parcel of the job duties. It transpired, however, on seeking to clarify this with the parties that in fact the transport provided by the appellant collected the workers at the beginning of the day, took them to their assignment for that day, and then collected them in the evening to take them home. They were not collected from their homes or from the appellant's place of business but from a convenient location for the workers. The respondent did not take issue with this assertion by the appellant, so I accept that it is an agreed fact that the travel provided by the appellant was, effectively, from home to work rather than between jobs during the course of the workers' employment. The transport

was provided directly by the appellant in that the appellant had procured a vehicle and employed a driver to drive that vehicle. Again, there were no third-party interests in the transport service.

The law

16. The relevant statutory provisions are those set out in the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015 as follows.

National minimum wage act 1999

17. Section 1 provides, as far as is relevant that:

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage; and

(2) A person qualifies for the national minimum wage if he is an individual who—

(a) is a worker;
(b) is working, or ordinarily works, in the United Kingdom under his contract; and
(c) has ceased to be of compulsory school age.

18. Section 2 (Determination of hourly rate of remuneration) provides, as far as is relevant

(1) The Secretary of State may by regulations make provision for determining what is the hourly rate at which a person is to be regarded for the purposes of this Act as remunerated by his employer in respect of his work in any pay reference period.
(2) …
(3) …
(5) The regulations may make provision with respect to—
(a) what is to be treated as, or as not, forming part of a person's remuneration, and the extent to which it is to be so treated;
(b) the valuation of benefits in kind;
(c) the treatment of deductions from earnings;
(d) the treatment of any charges or expenses which a person is required to bear.
(6) The regulations may make provision with respect to—
(a) the attribution to a period, or the apportionment between two or more periods, of the whole or any part of any remuneration or work, whether or not the remuneration is received or the work is done within the period or periods in question;
(b) the aggregation of the whole or any part of the remuneration

for different periods;
(c) the time at which remuneration is to be treated as received or accruing.

(7) Subsections (2) to (6) above are without prejudice to the generality of subsection (1) above.

(8) No provision shall be made under this section which treats the same circumstances differently in relation to—
(a) different areas;
(b) different sectors of employment;
(c) undertakings of different sizes;
(d) persons of different ages; or
(e) persons of different occupations.

19. Section 19 provides the power for the respondent to serve the notice of underpayment in issue in this case; section 19A prescribes the circumstances in which and amount of penalty the respondent is required to impose on the appellant and section 19C provides for the right of appeal to an employment tribunal against the notice of underpayment. It is not necessary to set out these provisions in detail as none of the principles under those provisions are in dispute.

20. In summary, and so far as is relevant to this case, these provisions established principles that a worker is entitled to be paid national minimum wage and that if an officer of HM revenue and Customs consider that an employer is not paying the national minimum wage they may serve a notice of underpayment on the employer requiring them to pay such sums as they have identified as necessary to account for any shortfall in payment of wages to the relevant employees. Further, HM revenue and Customs must impose a penalty calculated by reference to the amount of underpaid wages on the employer. That penalty is, by virtue of section 19A, 200% of the underpayment subject to a maximum of £20,000 per worker and a minimum of £100 in total. The amount is halved if the employer pays the penalty within 14 days of the service of the notice of underpayment.

21. It is not disputed that the named individuals in the notices of underpayment are workers and the calculations themselves of the underpayments and the penalties are not disputed. The real matters in issue are the nature of the deductions which fall to be taken into account in the calculation of the national minimum wage in accordance with regulations made under section 2, namely the National Minimum Wage regulations 2015.

National Minimum Wage Regulations 2015

22. I set out in full the relevant regulations:

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 benefits in kind which do not form part of a 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);

(i) 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.
Commencement

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

> (a) payments made to or deductions by a Higher Education Institution, Further Education Institution or a 16 to 19 Academy in respect of the provision of living accommodation where the living accommodation is provided to a worker who is enrolled on a full-time higher education course or a full-time further education course at that Higher Education Institution or Further Education Institution or on a full-time course provided by that 16 to 19 Academy;
> (b) payments made to or deductions by a local housing authority or a registered social landlord in respect of the provision of living accommodation, except where the living accommodation is provided to the worker in connection with the worker's employment with the local housing authority or registered social landlord.

(3) For the purposes of this regulation—

"further education institution" means an institution within the further education sector as defined by section 91(3) of the Further and Higher Education Act 1992;
"higher education institution" means an institution within the higher education sector as defined by section 91(5) of the Further and Higher Education Act 1992;
"local housing authority" means—

(a) in England and Wales, a local housing authority, as defined in Part 1 of the Housing Act 1985, or a county council in England;
(b) in Scotland, a local authority landlord as defined in section 11(3) of the Housing (Scotland) Act 2001;
(c) in Northern Ireland, the Northern Ireland Housing Executive;

"registered social landlord" means—

(d) in England and Wales—
(i) a private registered provider of social housing or a subsidiary or associate of such a provider, as defined in Part 2 of the Housing and Regeneration Act 2008, or
(ii) a social landlord registered under Part 1 of the Housing Act 1996 or a subsidiary or associate of such a person as defined in that Act;
(e) in Scotland, a body registered in the register maintained under section 20(1) of the Housing (Scotland) Act 2010;
(f) in Northern Ireland, a housing association registered under Chapter II of Part II of the Housing (Northern Ireland) Order 1992.

15 Deductions or payments as respects living accommodation adjusted for absences

(1) The amount referred to in regulation 14 is to be adjusted in accordance with paragraph (2) if, in the pay reference period, a worker is absent from work and all of the following conditions are met—

(a) the worker would be required to do time work but for the absence;
(b) the worker is paid, for the hours of work during which the worker was absent, an amount not less than that which the worker would have been entitled to under these Regulations but for the absence;
(c) the hours of work in the pay reference period are, by reason of the absence, less than they would be in a pay reference period containing the same number of working days in which the worker worked without reduced hours and for no additional hours;
(d) the amount of the deduction or payment the employer is entitled to make or receive in respect of the provision of living accommodation to the worker during the pay reference period does not increase by reason of the worker's absence from work.

(2) The amount is adjusted by the formula—

where—

"A" is the amount of the deduction the employer is entitled to make or payment the employer is entitled to receive in respect of the provision of living accommodation by the employer to the worker during the pay reference period;
"B" is the number of hours of time work determined in accordance with Part

5;
"C" is the number of hours of work the worker would have worked in the pay reference period (including the hours of work actually worked) but for the absence.

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 [£7.55].
(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.

Discussion and analysis

23. The effect of these provisions is that the remuneration in a pay reference period is calculated, as set out in regulation 8, by adding together payments made under regulations 9 and 10 and then deducting from that figure deductions made by the employer from the worker's wages or payments required to be made by the worker to the employer as set out under regulations 12, 13, 14 and 15.

24. This case concerns deductions from workers' wages which fall to be considered in accordance with regulations 12, 13, 14, 15 and 16. In this case it is agreed that the workers' wages are calculated and then an amount equivalent to payments the employer says they are entitled to be paid in respect of either travel costs, accommodation costs or repayment of recruitment costs is deducted from that sum before the net payment is paid to the workers.

25. I set out in that slightly convoluted, but hopefully neutral, way because there is in one instance a potential difference in treatment as between deductions from wages and a requirement to make payment to the employer after wages have been paid into the worker's hands.

26. Regulation 11 refers to reductions in pay as including both payments and deductions treated as reductions in the relevant pay period. This regulation refers back to regulation 8 which provides that the remuneration in the pay reference period comprises of payments less reductions. The only sums that fall to be treated as reductions in the relevant period are those set out and calculated in accordance with regulations 12 to 16.

27. The appellant sought to argue in respect of travel costs that a deduction from wages was in effect identical to a requirement to make payment after wages had been paid. However, I will deal with that particular argument under "travel costs" below.

28. Having set out the broad principles of the scheme, I turn to each of the three alleged reductions and the application of the regulations to them in turn.

Travel costs

29. The appellant's submission was that transport costs fall within regulation 12. The respondent referred to the case of *Revenue and Customs Commissioners v Leisure Employment Services Ltd* [2007] EWCA Civ 92 for a discussion of the meaning of "own use and benefit". The head note of the industrial cases report of that case says "the company is the debtor of the utility companies, and the £6 payment it obtains from its employees enables it to discharge an unidentified part of that debt. The payment is, therefore, without question for the company's "own use and benefit" the purpose of regulation 32 (I) (b)". The meaning of this is that, regardless of any other liabilities the employer may incur as a result of providing a service (in this case transport services), the money the employer obtains from the employees assists the employer in discharging its own liabilities.

30. This means, the respondent says, that the deduction for the travel costs must, in accordance with the Leisure Services case, be for the appellant's own use and benefit. The fact that the workers may derive some benefit from this arrangement does not change that fact.

31. I agree. In my judgment the appellant has incurred a liability in respect of the provision of transport – it is required to pay the driver and fuel and maintain the vehicle. It has these liabilities regardless of whether any workers use the transport. The recovery of the deductions from the workers assists the appellant in the discharge of this liability and the deductions are therefore for the appellant's own use and benefit.

32. The appellant's argument was that the payments for transport costs fell within the exemption within regulation 12(2)(e), namely that the deductions were in respect of the purchase by workers of services from the employer and that the purchase was not required by the employer in connection with workers employment.

33. It was not disputed by the respondent that the workers are not obliged to use the transport provided by the appellant. The appellant's argument was that it was merely the provision of services by the employer that the workers were free to either purchase or not purchase as they saw fit. The difficulty for the appellant is that the exemption under subparagraph (e) refers to *payments* made by worker as distinct from *deductions* made by the

employer.

34. Mr Wilcock sought to argue that there was no difference in principle between an agreed deduction and a voluntary payment. I do not, however, agree. This matter was considered in *Leisure Services* which referred with approval to the observations of Elias J in the same case before the Employment Appeal Tribunal. Wilson LJ observed in his dissenting judgement at paragraph 43 that the rationale for the distinction is "presumably that, once the worker has received the money in his hands, deployment of it in making a purchase from his employer is more likely to be the product of real choice". The identification of the rationale explains the distinction, but it is, even without that explanation, clear that there is a difference between the working and operation of exemptions (a) to (d) and exemption (e). Exemptions (a) to (d) refer to deductions or payments, exemption (e) refers only to payments. Necessarily, therefore, exemption (e) does not apply to deductions.

35. Mr Wilcock was unable to direct me to any authority to the contrary or provide any further arguments as to why the distinction between a payment and a deduction should not be maintained. In my view, it is clear for the reasons set out by Elias J that there is such a distinction. The cost of the transport provided by the appellant may be for services provided by the employer which are not made in order to comply with the requirements imposed by the employer in connection with the workers employment; but the appellant does not benefit from the exemption in regulation 12 (2) (e) because the payments for the transport costs are not "payments" made by the workers having received therefore remuneration, they are deductions.

36. For these reasons, the deductions of 30p per mile by the appellant from workers' wages in respect of transport provided by the employer are deductions made by the employer in the pay reference period from workers and are therefore a reduction under regulation 11 that falls be taken into account under regulation 8.

Recruitment costs

37. In respect of the agency fees (other recruitment related costs no longer forming part of the case) the respondent's position is that they are caught by both regulations 12 and 13.

38. In respect of regulation 12, the respondent says simply that 12(1) applies and none of the exemptions are applicable.

39. In respect of regulation 13, the respondent argues that the agency fees are due "in connection with the employment" and I am referred to the ET case of *Ant Marketing v HMRC*. The respondent says that regulations 12 and 13 are to be considered separately as free-standing alternative possibilities. That is to say that regulation 11 means that each deduction or payment

should be compared against regulations 12, 13 and 14 and if it amounts to a reduction under any of those regulations, even if it benefits from an exemption under another, it must count as a reduction, albeit that any reduction will only be counted once. There is an additional exemption for accommodation costs (as to which see below) in regulation 12(1) so that accommodation costs must be considered under regulations 14 – 16.

40. The appellant says that, in respect of liability under regulation 12(1), it benefits from the exemption in regulation 12(2)(a) – namely "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". The appellant relied on *Commissioners for Revenue and Customs v Lorne Stewart Plc* UKEAT/0250/14/LA in which it was held that the decision of an employee to resign was an "event". The relevance of this was that, in *Lorne Stewart*, the employee's resignation within 2 years triggered a contractual liability to repay training costs incurred by the employer.

41. Further, as I understand it, the appellant effectively sought to adopt, as far as is relevant, the submissions of Mr Tunley, counsel for the appellant before the ET in *Ant Marketing*. Although no specific submissions were made about the interaction between regulation 12 and 13, I take this to mean that the appellant's position was that as regulation 12 applied (including the exemption under regulation 12 (1)), regulation 13 could not.

42. The appellant also referred to section 13 of the Employment Rights Act 1996 and submitted that as the workers had agreed to these deductions, they were not unauthorised. I understood Mr Wilcock to be submitting that although not directly relevant, a comparison could be drawn between the treatment of the deductions under s13 and the National Minimum Wage Regulations 2015. I do not agree – section 13 of the Employment Rights Act 1996 is dealing with wholly different matters and there is no inconsistency between deductions being authorised under one provision and not under another.

43. Firstly, I accept the respondent's argument that the provisions are to be applied disjunctively. That is clear from the words of regulation 11.

44. Considering next the position under regulation 12, I agree that the deductions are for the use and benefit of the appellant. For the same reasons relating to the transport costs, the appellant is able to use the money recovered from workers to discharge its liabilities to the recruitment agency. In fact, in its appeal, the appellant said that the money was not for its own use and benefit but "is instead to recover costs which Nurse 365 Ltd incurred from loss of earnings due to the employee leaving their employment…". The very fact that the appellant uses the money in partial discharge of costs that *it* has incurred shows that it was for its own use and benefit.

45. The deductions for recovery of agency fees therefore fall within regulation 12(1). The appellant sought to rely on the exemption in 12(2)(a) on the basis that it was the employees conduct – namely leaving employment within 12 months – that triggered the deduction. This, the appellant said, was an "event" within that sub-paragraph.

46. I am bound to accept, following *Lorne Stewart* that the voluntary resignation by workers can amount to an event within regulation 12(2)(a). At paragraph 12, Shanks J said;

> *"But when it comes to 'any other event', I cannot accept that the event must be akin to misconduct. It seems to me that the proper way to interpret reg. 33(a) and the controlling mechanism on abuse is that 'any other event' should indeed, as Mr Hersey submits, be interpreted as having some relationship to conduct for which the worker is responsible, but not necessarily to something which amounts to misconduct by the worker. Thus a voluntary resignation or damage to property for which the worker is responsible would come within the concept of 'any other event' but not a dismissal forced on a worker for redundancy or a request of a referral to occupational health, which would presumably have been brought on by ill-health for which the worker could not be said to be responsible".*

47. However, the exemption applies only where the worker is contractually liable.

48. Mr Wilcock took me to a number of documents which he said demonstrated that the workers became contractually liable for the recruitment costs incurred by the appellant if they ended their employment within 12 months. They were:

    a. Principal statement of terms and conditions – 16 hours;
    b. Statement of terms and conditions of employment; and
    c. Agreement for the authorised deduction of monies from wages

49. The only document that makes any reference to recruitment or agency fees is the "Principal statement of terms and conditions – 16 hours". That says, at paragraph 14,

> *"Nurse 365 reserves the right to recover all monies from the employee, should the employee, following recruitment through an agency, leave the employment of Nurse 365 Ltd before the completion of a full 12 month period from the employment start date. The employee agrees that all monies can be deducted by Nurse 365 ltd from the employee pay."*

50. This contractual provision is not clear. It does not specify which costs fall to be repaid, it simply says "all monies". It could be deduced that the monies

related to agency costs, but not necessarily. The ambiguity becomes more apparent when compared to the preceding paragraph 13 which starts “Nurse 365 Ltd reserves the right to recover all monies from you for the training undertaken should employment be terminated prior to the completion of the 12-month period”.

51. Although the amount is not specified in paragraph 13 it is apparent that such amount is simply identifiable. Conversely, it is not possible to see how the amount referred to in paragraph 14 is identifiable. The appellants say that this refers to the monies paid to the recruitment agency. This may well be what the appellant thinks it means, but it is far from obvious that that is what it says. In my judgment, this clause is too ambiguous to impose a contractual liability on a worker to impose liability for a reduction on the occurrence of an “event” in regulation 12 (2)(a). It simply does not provide any information from which it can be objectively ascertained what “all monies” refers to.

52. Therefore, the appellant is unable to rely on the exemption in regulation 12(2)(a) as it has not demonstrated that there is a contractual provision that makes a worker contractually liable for the repayment of any money on the occurrence of an event.

53. I now consider the application of regulation 13 (a). As mentioned previously, the appellant’s case was that having benefited from the exemption in regulation 12(2)(a) I need look no further. As I have already found, I do not accept that proposition – the provisions are to be applied disjunctively. Even if I am wrong, therefore, about the contractual provisions set out above in relation to regulation 12, I am required to consider the application of regulation 13(a) in any event.

54. The respondent’s case is that regulation 13(a) operates to include the agency fees as a reduction as the expenditure is made in respect of the worker’s expenditure in connection with employment. Specifically, that a sum was paid to an agency to secure the services of the worker. Mr Serr referred me to paragraph 202 of Division B1 of *Harvey*:

> *Under NMWR SI 2015/621 reg 13(a) deductions made by the employer (or payments made by or due from the worker) 'as respects the worker's expenditure in connection with his employment' reduce national minimum wage pay. So, for example, deductions from pay for safety equipment or for tools or uniform must be subtracted from national minimum wage pay, thereby ensuring that the employer must pay the national minimum wage in addition to any costs connected with the job. Deductions for training are treated in the same way. This element of the legislation is often overlooked by employers, who make deductions for, say, uniform without realising the implications for the national minimum wage. If it transpires that the national minimum wage is not being paid then the employer has a choice – he must either stop making the*

deduction or increase the hourly rate.

55. I was also referred again to the *Ant Marketing* case. The argument in that case was that, in respect of training costs deducted, the costs were not “expenses”. In this case, there is no dispute that the appellant incurred the agency costs.

56. I am mindful that I have found that the contractual provisions relied on by the appellant do not impose any contractual liability on the workers to repay this money. However, the appellant’s position is that it does have the contractual right to recover that money. This means that, as far as the appellant is concerned, the deduction for agency fees is the worker’s expenditure in so far as the worker has a contractual liability to pay the money. I accept Mr Serr’s submission that this payment is in connection with employment – it self-evidently is to secure the service of a worker.

57. Regulation 13(a) requires only that the deduction is *in respect of* the worker’s expenditure in connection with the employment. Regardless of whether the appellant had the contractual right to recover the money, the deduction was in respect of that expenditure. I refer to *Leisure Services*. In that case the court of appeal gave a wide interpretation to the phrase “as respects” in relation to the provision of accommodation. In my judgment, “in respect” in regulation 13(a) has the same broad meaning as “as respects” in regulation14. Regardless of the actual contractual position relating to the recovery of agency fees, the deduction, from the employer’s perspective, is *in respect of* the worker’s expenditure in connection with the employment.

58. For these reasons, the deductions of £960 by the appellant from workers’ wages in respect of agency costs are deductions made by the employer in the pay reference period from workers and are therefore a reduction under regulation 11 that falls be taken into account under regulation 8.

Accommodation Costs

59. The appellant’s first argument was that the deductions for rent were not for the employer’s own use and benefit but they were merely passing the payments on to the head landlord for the worker’s benefit. The employer did not receive any benefit.

60. For the reasons set out above in relation to transport costs, I do not agree. It was clear that the primary liability for the rent under the head lease rested with the appellant. In fact, the appellant asserted in submissions that the appellant retained liability for the rent even when the property was unoccupied. Clearly, therefore, and for the reasons already expressed, the collection of rent from workers assisted the appellant in discharging that liability and the payments were, accordingly, for its own use and benefit.

61. Secondly, the appellant sought to rely on the exemption in regulation

12(2)(e). The exemption in regulation 12(2)(e) does not apply, for the reasons set out above in relation to the transport costs, as the rent and deposit was recovered by way of deduction from wages rather than payment back to the employer. Regulation 12(2)(e) is only capable of applying where the worker has had the money in their hands and then makes a payment back to the employer. That did not happen in this case – it was deducted form the workers' wages.

62. Thirdly, the appellant sought to argue that although it accepted that Nurse 365 Ltd was the employer and the same Nurse 365 Ltd was the landlord under the tenancy agreement, they were not, in fact, the same person when exercising the separate functions of landlord and employer. Therefore, regulations 14 – 16 could not apply at all because regulation 14 applied only "as respects the provision of living accommodation by the employer". Here the appellant sought to rely on the *Ant Marketing* case in which it was held that "employer" did not include associated employers. In that case, accommodation was provided by a company that was different from but associated with the employer.

63. I simply don't accept the appellant's argument. The only possible interpretation of regulation 14 is that the employer and the landlord are the same person which in this case, despite the ambiguity in the tenancy agreement, it is accepted by the appellant that they are – namely Nurse 365 Ltd.

64. Finally, the appellant argued that the deposits did not amount to deductions as they were repaid to the workers on termination of their tenancy. I was referred to *Leisure Employment Services*. It is clear from that case that payments caught by regulations 14 – 16 are those "as respects the provision of living accommodation". In *Leisure Employment Services*, this was held to be wide enough to include payments for utilities. I agree with Mr Serr's submissions that this must also therefore be wide enough to include a payment of a deposit. I note that the appellant say that they repaid the deposits when workers left the accommodation and I addressed the respondent about this.

65. Regrettably, it appears that there is no provision for offsetting this repayment. It is clear from regulation 9 that the calculation of payment of the minimum wage is to be determined by the pay reference period. The exceptions set out in regulations 9(1)(b) and 9(1)(c) do not apply to these circumstances unless the deposit was immediately repaid in the next pay period after it was deducted.

66. For these reasons, therefore, in so far as the deductions for accommodation costs exceed the offset provided for in regulation 16, the deductions for accommodation costs are reductions within the meaning of regulation 8.

Conclusion

67. For the reasons given above, my decision is that the appellant's appeal is unsuccessful. All of the deductions identified by the respondent had the effect of reducing the remuneration paid to the workers in the relevant pay reference periods and the amount specified in the notice of the sum due to the worker (or workers) is correct. Accordingly, the amount specified as the penalty is also correct.

68. Finally, I note that there was no suggestion by the respondent that the appellant was engaged in any deliberate unscrupulous practices in the arrangements referred to in this judgment.

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Employment Judge Miller
Dated: 30 September 2019