Case Number: 3332111/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Greene King Services Ltd	**v**	The Commissioners for Her Majesty's Revenue and Customs

Heard at: Bury St Edmunds **On:** 28, 29 & 30 October 2019

Before: Employment Judge King

Appearances
For the Appellant: Mr A Tolley, Queen's Counsel.
For the Respondent: Mr T Sadiq, Counsel.

JUDGMENT

The appeal is allowed and the notices of underpayment, reference CFS-1250426 dated 7 August 2018 are rescinded under s.19C(7) of the National Minimum Wage Act 1998.

REASONS

1. The appellant was represented by Mr Tolley QC and the respondent by Mr Sadiq of Counsel. Both counsel prepared helpful written submissions on the issues and which were well supplemented by oral submissions. I heard evidence from Mr Bean, the Shared Services Director of the appellant, and I heard evidence from Mr Birchall the National Minimum Wage Compliance Officer for the respondent. The parties had both prepared an agreed trial bundle that ran to 307 pages and also helpfully an authority bundle containing the legislation, cases and other materials such as the Low Pay Commission reports of 1998 and 2013, and BEIS Guidance – I have had regard to this bundle of authorities when considering this case.

2. At a case management discussion on 21 March 2019 the issues were identified, essentially this appeal centres on a difference of interpretation between the appellant and the respondent over what constitutes "living

accommodation" for the purposes of Regulation 9(1)(e) of the National Minimum Wage Regulations 2015.

3. The respondent concedes that the sample case of Edwards should have been one where HMRC took the view that living accommodation had been provided, this was because it met their internal guidance and a bed was provided albeit not used by Edwards. This I am told will impact on one of the notices which either way as it has not been withdrawn could not stand and would need to be rectified.

4. The s.19 National Minimum Wage Act 1998 notices (four in total) under reference CFS-1250426 dated 7 August 2018 total £131,061.71 with penalties in addition in the of sum £137,225.55 for the reference period 31 March 2014 to 26 March 2017. The shortfall in all cases relates to the amount of the living allowance off-set applied by the appellant in each case under Regulation 16 nothing more.

5. Sample cases were identified given the number of general managers involved and agreed between the parties. The parties also prepared a helpful statement of agreed facts.

The Law

6. S.1 of the National Minimum Wage Act 1998 states:

> **"1 Workers to be paid at least the national minimum wage.**
>
> (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.
>
> (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.
>
> (3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.
>
> (4) For the purposes of this Act a *"pay reference period"* is such period as the Secretary of State may prescribe for the purpose.
>
> (5) Subsections (1) to (4) above are subject to the following provisions of this Act."

7. S.19 of the National Minimum Wage Act 1998 states:

"19 Notices of underpayment: arrears

(1) Subsection (2) below applies where an officer acting for the purposes of this Act is of the opinion that, on any day ("the relevant day"), a sum was due under section 17 above for any one or more pay reference periods ending before the relevant day to a worker who at any time qualified for the national minimum wage.

(2) Where this subsection applies, the officer may, subject to this section, serve a notice requiring the employer to pay to the worker, within the 28-day period, the sum due to the worker under section 17 above for any one or more of the pay reference periods referred to in subsection (1) above.

(3) In this Act, *"notice of underpayment"* means a notice under this section.

(4) A notice of underpayment must specify, for each worker to whom it relates—

(a) the relevant day in relation to that worker;

(b) the pay reference period or periods in respect of which the employer is required to pay a sum to the worker as specified in subsection (2) above;

(c) the amount described in section 17(2) above in relation to the worker in respect of each such period;

(d) the amount described in section 17(4) above in relation to the worker in respect of each of such period;

(e) the sum due under section 17 above to the worker for each such period.

(5) Where a notice of underpayment relates to more than one worker, the notice may identify the workers by name or by description.

(6) The reference in subsection (1) above to a pay reference period includes (subject to subsection (7) below) a pay reference period ending before the coming into force of this section.

(7) A notice of underpayment may not relate to a pay reference period ending more than six years before the date of service of the notice.

(8) In this section and sections 19A to 19C below *"the 28-day period"* means the period of 28 days beginning with the date of service of the notice of underpayment."

8. S.19A of the National Minimum Wage Act 1998 states:

"19A Notices of underpayment: financial penalty

(1) A notice of underpayment must, subject to this section, require the employer to pay a financial penalty specified in the notice to the Secretary of State within the 28-day period.

(2) The Secretary of State may by directions specify circumstances in which a notice of underpayment is not to impose a requirement to pay a financial penalty.

(3) Directions under subsection (2) may be amended or revoked by further such directions.

(4) The amount of any financial penalty is, subject as follows, to be the total of the amounts for all workers to whom the notice relates calculated in accordance with subsections (5) to (5B).

(5) The amount for each worker to whom the notice relates is the relevant percentage of the amount specified under section 19(4)(c) in respect of each pay reference period specified under section 19(4)(b).

(5A) In subsection (5), *"the relevant percentage"*, in relation to any pay reference period, means 200%.

(5B) If the amount as calculated under subsection (5) for any worker would be more than £20,000, the amount for the worker taken into account in calculating the financial penalty is to be £20,000.

(6) If a financial penalty as calculated under subsection (4) above would be less than £100, the financial penalty specified in the notice shall be that amount.

(7) . . . . . .

(8) The Secretary of State may by regulations—

(a) amend subsection (5A) above so as to substitute a different percentage for the percentage at any time specified there;

(b) amend subsection (5B) or (6) above so as to substitute a different amount for the amount at any time specified there.

(9) A notice of underpayment must, in addition to specifying the amount of any financial penalty, state how that amount was calculated.

(10) In a case where a notice of underpayment imposes a requirement to pay a financial penalty, if the employer on whom the notice is served, within the period of 14 days beginning with the day on which the notice was served—

(a) pays the amount required under section 19(2) above, and

(b) pays at least half the financial penalty, he shall be regarded as having paid the financial penalty.

(11) A financial penalty paid to the Secretary of State pursuant to this section shall be paid by the Secretary of State into the Consolidated Fund."

9. S.19C of the National Minimum Wage Act 1998 states:

"19C Notices of underpayment: appeals

(1) A person on whom a notice of underpayment is served may in accordance with this section appeal against any one or more of the following—

(a) the decision to serve the notice;

(b) any requirement imposed by the notice to pay a sum to a worker;

(c) any requirement imposed by the notice to pay a financial penalty.

(2) An appeal under this section lies to an employment tribunal.

(3) An appeal under this section must be made before the end of the 28-day period.

(4) An appeal under subsection (1)(a) above must be made on the ground that no sum was due under section 17 above to any worker to whom the notice relates on the day specified under section 19(4)(a) above in relation to him in respect of any pay reference period specified under section 19(4)(b) above in relation to him.

(5) An appeal under subsection (1)(b) above in relation to a worker must be made on either or both of the following grounds—

(a) that, on the day specified under section 19(4)(a) above in relation to the worker, no sum was due to the worker under section 17 above in respect of any pay reference period specified under section 19(4)(b) above in relation to him;

(b) that the amount specified in the notice as the sum due to the worker is incorrect.

(6) An appeal under subsection (1)(c) above must be made on either or both of the following grounds—

(a) that the notice was served in circumstances specified in a direction under section 19A(2) above, or

(b) that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason).

(7) Where the employment tribunal allows an appeal under subsection (1)(a) above, it must rescind the notice.

(8) Where, in a case where subsection (7) above does not apply, the employment tribunal allows an appeal under subsection (1)(b) or (c) above—

(a) the employment tribunal must rectify the notice, and

(b) the notice of underpayment shall have effect as rectified from the date of the employment tribunal's determination."

10. S.27 of the National Minimum Wage Act 1998 states:

"27 Tribunal hearings etc by chairman alone.

(1) In section 4 of the Employment Tribunals Act 1996 (composition of employment tribunal) in subsection (3) (which specifies proceedings to be heard by the chairman alone) after paragraph (ca) there shall be inserted—

"(cc) proceedings on a complaint under section 11 of the National Minimum Wage Act 1998;

(cd) proceedings on an appeal under section 19 or 22 of the National Minimum Wage Act 1998;".

(2) In Article 6 of the Industrial Tribunals (Northern Ireland) Order 1996 (composition of industrial tribunal in Northern Ireland) in paragraph (3) (which specifies proceedings to be heard by the chairman alone) after sub-paragraph (b) there shall be inserted—

"(bb) proceedings on a complaint under section 11 of the National Minimum Wage Act 1998;

(bc) proceedings on an appeal under section 19 or 22 of the National Minimum Wage Act 1998;". "

11. S.28 of the National Minimum Wage Act 1998 states:

"28 Reversal of burden of proof.

(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

(2) Where—

(a) a complaint is made—

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages), or

(ii) to an industrial tribunal under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996, and

(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,

it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

(3) Where in any civil proceedings a person seeks to recover on a claim in contract the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established."

12. S.55 of the National Minimum Wage Act 1998 states:

"55 Interpretation

(1) In this Act, unless the context otherwise requires—

- *"civil proceedings"* means proceedings before an employment tribunal or civil proceedings before any other court;
- *"enforcement notice"* shall be construed in accordance with section 19 above;
- *"government department"* includes a Northern Ireland department, except in section 52(a) above;
- *"industrial tribunal"* means a tribunal established under Article 3 of the Industrial Tribunals (Northern Ireland) Order 1996;
- *"notice"* means notice in writing;

- *"pay reference period"* shall be construed in accordance with section 1(4) above;
- *"penalty notice"* shall be construed in accordance with section 21 above;
- *"person who qualifies for the national minimum wage"* shall be construed in accordance with section 1(2) above; and related expressions shall be construed accordingly;
- *"prescribe"* means prescribe by regulations;
- *"regulations"* means regulations made by the Secretary of State, except in the case of regulations under section 47(2) or (4) above made by the Secretary of State and the Minister of Agriculture, Fisheries and Food acting jointly or by the Department of Agriculture for Northern Ireland.

(2) Any reference in this Act to a person being remunerated for a pay reference period is a reference to the person being remunerated by his employer in respect of his work in that pay reference period.

(3) Any reference in this Act to doing work includes a reference to performing services; and "work" and other related expressions shall be construed accordingly.

(4) For the purposes of this Act, a person ceases to be of compulsory school age in Scotland when he ceases to be of school age in accordance with sections 31 and 33 of the Education (Scotland) Act 1980.

(5) Any reference in this Act to a person ceasing to be of compulsory school age shall, in relation to Northern Ireland, be construed in accordance with Article 46 of the Education and Libraries (Northern Ireland) Order 1986.

(6) Any reference in this Act to an employment tribunal shall, in relation to Northern Ireland, be construed as a reference to an industrial tribunal."

13. The National Minimum Wage Regulations 2015 came into force in April 2015 prior to this the 1999 Regulations existed but also referred to "living accommodation" without a definition. The reference period spans both regulations but the tribunal is not assisted in either set of regulations with a definition. For the purposes of this case, the law is no different under the 1999 Regulations or the 2015 Regulations.

14. Regulation 9 of the National Minimum Wage Regulations 2015 states:

"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."

15. Regulation 14 of the National Minimum Wage Regulations 2015 states

"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 fulltime 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."

16. Regulation 15 of the National Minimum Wage Regulations 2015 states

"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—

((AxB)) / (C)

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."

17. Regulation 16 of the National Minimum Wage Regulations 2015 states

"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 [£5.08] (Amended from time to time).

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

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

18. Article 6 of European Convention of Human Rights states:

"ARTICLE 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

19. The following case references are contained in the bundle for the citations and I have had regard to the same:

19.1 King v Walden [2001] STC 822.

19.2 Han v HMRC [2001] EWCA Civ 1040 and [2001] 1 WLR 2253.

19.3 Leisure Employment Services Ltd v HMRC (EAT) [2006] ICR 1094.

19.4 Leisure Employment Services Ltd v HMRC (CA) [2007] EWCA Civ 92.

19.5 C&D DH Ltd T/A Elite Homecarers v HMRC UKEATS/0039/12/BI (12 February 2013).

Findings of fact

20. The parties have helpfully prepared a statement of agreed facts. The facts of this case are largely agreed and my decision does not turn on any disputed facts. The case is around interpretation of the law and its application to the agreed facts.

21. The evidence I heard was more of chronological value given there was little in dispute between the parties contained in the statement of agreed facts. There was a dispute as to the accuracy of HMRC telephone notes, calls were not recorded, transcripts were not agreed and the author of the notes did not give evidence. The appellant's witness disputed the comments attributed to him. This however takes the tribunal no further in determining the issues, as it is a question of interpretation of the statute that is key and any witnesses view on that accurate or not is not an influencing factor.

22. The respondent sought to suggest the appellant had misled the investigator in his answers and that in essence there was a culture of avoidance by the appellant. This is not relevant to the issues to be decided so I make no findings in this regard. It is however noted that even the initial complainant Williams is recorded as telling the investigating officer that the

accommodation had a bed, washing and toilet facilities as when asked this direct question he replied "Yes".

23. I have adopted the statement of agreed facts which the parties helpfully prepared save that there was one typographical error amended during the proceedings by the parties.

"**STATEMENT OF AGREED FACTS**

A. THE KEY ISSUE

1. Under regulations 9 (1) (e) and 16 of the National Minimum Wage Regulations 2015 (SI 2015/621) [the ***Regulations***], for the purpose of payment of National Minimum Wage [***NMW***] to a worker, an employer may take into account in respect of a pay reference period an amount per day (as prescribed from time to time by regulation 16) where the employer has provided the worker with living accommodation during the pay reference period and is not otherwise entitled to make a deduction from the worker's wages or to receive a payment from the worker as respects the at provision of living accommodation.

2. The essential legal question for determination concerns the meaning of 'living accommodation'. These words are not defined in the Regulations.

3. Having determined that legal question, the Tribunal will then need to decide whether, applying the legal test to the facts, the accommodation provided by the Appellant [**Greene King**] to the relevant workers comprised 'living accommodation'.

B. THE PARTIES

4. Greene King is predominantly a pub company and brewer, operating approximately 2,900 managed, tenanted, leased and franchised pubs, restaurants and hotels across England, Wales and Scotland. It employs about 39,000 people. It is headquartered in Bury St Edmunds.

5. The Respondent [***HMRC***] is, relevantly, the policing and enforcement authority for NMW. The Department for Business Energy and Industrial Strategy has policy responsibility for NMW.

C. THE CONTRACTS OF EMPLOYMENT

6. Greene King employs a large number of employees to manage its pubs, with one or sometimes two individuals employed to manage each pub. Such employees are known as 'General Managers' [**GMs**].

7. The GMs were at all material times employed by Greene King on the terms of a written contract of employment [the ***Contracts of Employment"***], which referred to the employee as "the Worker".

8. Under the Contracts of Employment:

(1) The Worker's normal place of work would be a particular pub, identified as "the Premises".

(2) The Worker would be required to occupy the Premises in the capacity of a service occupier.

(3) The Worker's occupation of the Premises would be subject to the terms of a separate agreement, the "Accommodation Agreement".

(4) If the Worker breached any of the obligations in the Accommodation Agreement, s/he would be subject to disciplinary action.

(5) The Worker's right of occupation of the Premises would cease automatically on the termination of the Worker's employment with Greene King and s/he would vacate the Premises in accordance with the Accommodation Agreement.

9. Each Worker was entitled to an annual salary, specified in the Contract of Employment, payable at 4-weekly intervals in arrears.

10. The normal hours of work were such hours as were necessary to keep the Premises open during licensed hours.

11. It was agreed that working time could not be measured and that the work should be treated as unmeasured work for the purpose of NMW.

D. THE ACCOMMODATION AGREEMENTS

12. The occupation by each GM of the Premises identified in the Contract of Employment was at all material times governed by the terms of a separate written agreement called an "Accommodation Agreement". The Accommodation Agreements also refer to the GM as "the Worker".

13. There were the following material express terms of the Accommodation Agreements:

(1) It was essential for the proper performance of the Worker's duties that s/he reside in the Premises (referred to in the Accommodation Agreement as "the Property") (clause 1.2).

(2) Greene King permitted the Worker to occupy the Property and to use the Contents (defined as "the furniture, furnishings and any other items at the Property including those set out in any inventory attached to" the Accommodation Agreement) while s/he was employed under the Contract of Employment (clause 2.1).

(3) The Worker would occupy the Property as a service occupier and no relationship of landlord and tenant was created between Greene King and the Worker (clause 2.2(a)).

(4) Greene King retained control, possession and management of the Property and the Worker had no right to exclude Greene King from the Property (clause 2.2(b)).

(5) The licence to occupy granted by the Accommodation Agreement were personal to the Worker and was not assignable (clause 2.2 (c)).

(6) There was at present no charge levied for the Worker's residence in company accommodation, however should the Worker move to different role or site within Greene King, s/he would be charged a licence fee that was equal to HMRC guidelines at the time of the relocation and in line with then current Greene King charges made to other employees. Such charges would be accounted for through payroll (clause 2.2 (d)).

(7) The Worker would reside at the Property while employed under the Contract of Employment (clause 3 (a)).

(8) The Worker would use the Property only as a private residence for occupation by her/him (clause 3 (b)).

(9) The Worker would pay for all charges for the use of the telephone at the Property (clause 3 (i)).

(10) The Worker would maintain a TV licence (clause 3 (j)).

(11) The Worker would pay for Council Tax (clause 3 (n)).

E. THE RELEVANT WORKERS

14. For the purpose of these proceedings, three sample cases have been identified, namely in relation to the following individuals:

(1) Kevin Williams and Patricia Williams ("Williams");

(2) Paul Edwards and Lyn Edwards ("Edwards"); and

(3) Christopher Fullard ("Fullard").

(1) Mr and Mrs Williams

15. Mr Williams was employed by Greene King from 2003 until September 2015. At the material time his employment was governed by a Contract of Employment dated 7 October 2014. His annual salary was £30,000, with an entitlement to a potential bonus of a maximum of £30,000.

16. Mrs Williams was employed by Greene King from 25 November 2003 until September 2015, with some brief gaps in her employment. At the material time, her employment was governed by a Contract of Employment dated 21 February 2015. Her annual salary was £18,969, with an entitlement to a potential bonus of a maximum of £18,969.

17. Mr and Mrs Williams operated the Cuckoo Pint pub at 120 Cuckoo Lane, Fareham, Hampshire.

18. They entered into an Accommodation Agreement dated 16 February 2015 in respect of the Cuckoo Pint.

(2) Mr and Mrs Edwards

19. Mrs Edwards' employment with Greene King commenced on 9 January 2011. She continues to be an employee of Greene King. At the material time her employment was governed by a Contract of Employment dated 11 January 2011. On entry into the contract her annual salary was £20,000.

20. Mr Edwards' employment with Greene King commenced on 22 January 2010. He continues to be an employee of Greene King. At the material time his employment was governed by a Contract of Employment dated 25 October 2012. On entry into the contract his annual salary was £23,562.

21. At the material time Mrs and Mr Edwards operated The Bromborough pub at 2 Bromborough Village Road, Wirral, Merseyside. They continue to do so.

22. Mrs and Mr Edwards entered into an Accommodation Agreement in respect of The Bromborough, but neither they nor Greene King has been able to locate a copy.

(3) Mr Fullard

23. Mr Fullard's employment with Greene King commenced on 14 August 2005. He continues to be an employee of Greene King. At the material time his employment was governed by a Contract of Employment dated 8 July 2009. On entry into the contract his annual salary was £23,000.

24. At the material time Mr Fullard operated the New Derby pub at Roker Baths Road, Sunderland, Tyne and Wear. He continues to do so.

25. Mr Fullard entered into an Accommodation Agreement in respect of the New Derby, buy neither they nor Greene King has been able to locate a copy.

F. THE RELEVANT ACCOMMODATION

(1) General

26. In all of the sample cases, the accommodation provided to the employees comprised a self-contained flat above the pub. The flats had their own access and could be locked and secured. They had at least three bedrooms, and a separate kitchen, bathroom (with shower and bath) and lounge. They were supplied with electricity, heating and running hot and cold water.

27. In all of the sample cases, the flats were used as the only residence of the employees. They had sole use of the flats and could access it whenever they wanted. They had control over who had access to the flats (subject to the terms of the Accommodation Agreements). Greene King did not enter the flats unless they

had notified the employees in advance or there was an emergency. The employees paid the relevant council tax. Greene King paid for the electricity, gas and water.

28. The flats were mostly unfurnished when the employees moved in. The flat at the Bromborough (Mr and Mrs Edwards) contained a bed when Mr and Mrs Edwards moved in, but they disposed of it as unwanted. The flats at the Cuckoo Pint (Mr and Mrs Williams) and the New Derby (Mr Fullard) did not contain a bed when the employees moved in.

(2) The Cuckoo Pint (Mr and Mrs Williams)

29. The flat comprises three double bedrooms, a modern kitchen, a lounge and a bathroom. It is accessed by an internal set of stairs, with an entrance through the back door of the pub.

30. Mr and Mrs Williams lived at the Cuckoo Pint from 2003 to September 2015 (when their employment terminated). They used the flat as their family home. At least one of their (adult) children lived there with them.

(3) The Bromborough (Mr and Mrs Edwards)

31. The flat comprises five bedrooms, a fully-fitted modern kitchen, a living room, dining room, office, bathroom and storage rooms.

32. Mr and Mrs Edwards have lived at The Bromborough since 2013. They were given the opportunity to inspect the flat before they moved in. There was at that time a bed in the flat. Mr and Mrs Edwards did not wish to use it and disposed of it. Their furniture, including beds, was moved from the pubs which they had previously occupied to The Bromborough.

33. Mr and Mrs Edwards use the flat as their home. They are registered on the electoral roll at the address. They own a house, which they rent out. Their son lives with them at the flat.

(4) The New Derby (Mr Fullard)

34. The flat at the New Derby comprises three double bedrooms, a kitchen, lounge/dining room and a bathroom.

35. Mr Fullard has lived at the New Derby since 2009. He was given the opportunity to inspect the flat before he moved in.

36. Mr Fullard uses the flat as his home. He is registered on the electoral roll at the address. He is divorced. He shares custody of his children, who live with him for part of each week. They attend local schools and the flat is used as their home address.

G. THE PROCEEDINGS

37. HMRC's investigation in relation to payment of NMW by Greene King to its GM commenced in late 2015, following a complaint by Mr and Mrs Williams.

Discussions between HMRC and Greene King continued until 2018 without an agreed resolution.

38. On 7 August 2018 HMRC served four Notices of Underpayment on Greene King in relation to 191 GMs. The Notices of Underpayment allege that Greene King has underpaid £131,061.72 to the GMs in question, in respect of pay reference periods from 31 March 2014 to 26 March 2017. In addition, the Notices of Underpayment allege that Greene King is liable to pay penalties of £137,225.55.

39. The alleged shortfall in payment of NMW is in each case comprised of the amount of the accommodation offset which Greene King applied, based on the then relevant amount specified by regulation 16.

40. Greene King appealed against the Notices of Underpayment by proceedings issued on 21 August 2018.

41. HMRC served their response to the appeal on 22 October 2018.

42. The Tribunal (Employment Judge Laidler) gave directions at a Case Management Hearing, held by telephone, on 21 March 2019. The Tribunal approved the parties' agreed approach of seeking to resolve the issues arising in the appeals by reference to three sample cases (at that time not yet identified). Orders were made to ensure that all necessary preparatory steps were taken in good time."

Conclusions

Burden of Proof

24. This was disputed by the parties.

24.1 The respondent asserted it was on the appellant and it was their appeal, this was a civil matter before the Employment Tribunal and the appellant bears the burden of proof.

24.2 The appellant asserted the contrary, that the burden of proof is on HMRC as the respondent.

24.3 The appellant's submissions were that s.28 of the National Minimum Wage Act 1998 does not apply and that a penalty under the National Minimum Wage is properly to be regarded as a criminal charge in accordance with Article 6(2) of the European Convention of Human Rights and with the authorities of Han v HMRC and King v Walden.

24.4 The appellant submits that the penalties are substantial and their purpose is punitive and a deterrent so that the burden rests with HMRC to show there has been an underpayment.

25. In this case the point does not matter greatly as there are few disputed relevant facts and the parties have helpfully prepared an agreed statement of facts which I have adopted. If I was to consider it relevant to any issue of fact, I would favour the appellant's submissions in this regard, s.28 reverses the burden onto the employer (the appellant) and this is not one of those cases, this suggests that the burden ordinarily rests with HMRC otherwise there would be no need for s.28 at all within the Act. Further, this is supported by the authorities and Article 6(2) of the European Convention of Human Rights. The question is whether the legislation as a matter of law has been correctly interpreted.

What is the correct interpretation of "living accommodation" under regulation 9(1)(e)?

26. The starting point is of course the legislation. There is no statutory definition of living accommodation. There is no case law to assist on this specific point. The only case law on living accommodation at authoritative level is the Leisure Employment Services Ltd cases but these are not determinative of the specific issue in this case.

27. Both parties agree quite rightly that I should adopt a purposive approach to the interpretation of the legislation. This was endorsed by Elias J in the HMRC v Leisure Employment Services Ltd EAT case who said:

> "*Analysis*
>
> 30 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 the well known dictum of Lord Diplock in *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 1005, a passage which was, in fact, referred to in the decision of the employment tribunal. Lord Diplock said:
>
> > "To find out the meaning of particular provisions in 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 words and phrases used in different contexts … should be subordinate to this purposive approach."

28. Similarly, in this case both counsel submit their construction gives better effect to the purpose.

29. The decision in HMRC v Leisure Employment Services Ltd (EAT decision) confirmed that the Employment Tribunal at first instance defined living accommodation as:

> "The term 'living accommodation' in the 1999 Regulations includes the physical structure provided to the worker, together with sanitary ware, baths and showers, kitchen appliances and appliances for space and water heating together with other fixtures such as cupboards and wardrobes, but does not include the gas or electricity supplied to the respective appliances and units within the physical structure."

30. When that case reached the Court of Appeal said:

> "That view, and how far, if it all, the employment tribunal's understanding of "accommodation" extends beyond the limits suggested by the employment tribunal, is obviously capable of a good deal of debate. But Elias J was, with respect, correct to hold that that is not the relevant question."

31. The Employment Tribunal's view of living accommodation in that case was therefore not tested by the appellant courts and it is not binding upon me.

32. The respondent submits that the purpose of the National Minimum Wage legislation is to protect workers from having to supplement living accommodation at their own cost. That interpretation is its own and is not referred to in any authority or guidance. I do not accept that submission.

33. The purpose of the National Minimum Wage is to ensure that workers are paid at least the national minimum wage, a figure set down by Parliament each year. It is to prevent exploitation of workers and it is for this reason that Parliament did not permit benefits in kind to be taken into account except living accommodation and only then by a set (arguably low) amount not reflective of the market value of that accommodation given the undisputed benefits to the employer in having the employee on site.

34. The Low Pay Commission set out its rationale for the accommodation offset in its first report in June 1998 as being mutually beneficial to both sides, but that workers should ideally be remunerated in money and not in kind, and should earn enough to pay the rent. The rationale for the living accommodation offset, is that it is a measure to protect minimum wage workers from excessive reduction in their income.

35. As Justice Elias said in Leisure Employment Services Ltd EAT decision:

> "I take the purpose here to be specifically the elimination of payment by benefits in kind and a desire to ensure workers receive cash in hand at least equivalent to the national minimum wage save where carefully circumscribed exceptions apply."

36. Living accommodation is an exception but only up to the prescribed limit, no more and any payments in respect of that provision of living accommodation are capped at that limit including as the Leisure Employment Law Services cases identified payment for gas/electricity made to the employer.

37. I have also considered the DTI National Minimum Wage and

Accommodation Offset Guidance (which is only guidance) from April 2017, the offset allowance is designed to ensure that employers cannot avoid paying their workers the national minimum wage by levying excessive charges for accommodation. This guidance further states:

> "The Government understands that an employer may provide accommodation in a wide range of circumstances and not merely in situations where he owns the property occupied by the worker
>
> The employer will be considered as providing accommodation in all the following circumstances whether or not the accommodation is let by the employer or a third party:
>
> - the accommodation is provided in connection with the worker's contract of employment; or
> - a worker's continued employment is dependent upon occupying particular accommodation; or
> - a worker's occupation of accommodation is dependent upon remaining in a particular job
>
> …..
>
> When enforcing the national minimum wage, enforcement officers and tribunals will look at the facts of each individual case before determining whether an employer is providing accommodation."

38. In fact, this is not what HMRC do, HMRC have developed their own internal manual which interprets the statute – NMWM10100 states:

> "Accommodation should be regarded as living accommodation for national minimum wage purposes when it provides the worker with access to and free use of:
>
> - a bed (this can be in a shared room), and
> - washing facilities (these may be shared with other residents but must afford some degree of privacy), and
> - toilet facilities (these may be shared, but again must afford some degree of privacy).
>
> These facilities must be within the accommodation itself or reasonably close by.
>
> The facilities must all be provided but do not have to reach any set standard for the accommodation to be considered as living accommodation. For example, living accommodation could be:
>
> - A bed in a communal dormitory with shared washing and toilet facilities;
> - A shared bedroom in a family home with the worker given free access to the household bathroom.

> Also the accommodation does not have to include all the items a worker may desire. Living accommodation may still be provided when there is:
>
> - a shared bathroom with no shower;
> - no facilities to wash clothes;
>
> Compliance Officers should form a view based on an examination of the actual arrangements in place. Some example scenarios and comments are provided at (NMWM10110)."

39. The evidence was clear that HMRC adopt a tick box exercise, if the accommodation does not even have one of these things it is not living accommodation, it is not considered further. If it does, have these minimum standards then all circumstances must be considered. Only if it meets these three minimum standards is it considered further. Here in this case there was no bed in two out of three of the sample cases which meant the matter was not considered further. The internal manual meant that the accommodation was not "living accommodation" and the appellant was in breach of the National Minimum Wage.

40. This goes back to the interpretation of living accommodation as referenced in the Act.

41. Other HMRC documentation under the taxation regime EIM11321 HMRC guidance states

> "there is no statutory definition of living accommodation and so it is given its everyday meaning. Examples of what is clearly living accommodation are houses, flats, houseboats, holiday villas and apartments."

42. The taxation legislation has a different purpose and again this is only an internal manual so has not statutory weight.

43. The BEIS Guidance entitled - National Minimum Wage and National Living Wage calculating the minimum wage - which is from the department responsible for National Minimum Wage Policy. This is published guidance on the Act and Regulations, but again this provides no definition of living accommodation and in fact merely uses the term "accommodation" which is rather than using "living accommodation", this states:

> "The accommodation offset provisions apply whenever you provide accommodation to a worker. You may provide accommodation in a wide range of circumstances, not merely where you own the property occupied by the worker.
>
> You will be considered as providing accommodation in the following circumstances, whether or not the accommodation is provided by you or a third party:

- the accommodation is provided in connection with the worker's contract of employment
- the worker's continued employment is dependent upon occupying particular accommodation
- the worker's occupation of accommodation is dependent on remaining in a particular job

Where the provision of accommodation by you and the worker's employment are not dependent upon each other, you may be considered to be providing accommodation if one of the following applies:

- you are the worker's landlord either because you own the property or because you are subletting the property
- you and the landlord are part of the same group of companies or are companies trading in association
- yours and the landlord's businesses have the same owner, or business partners, directors or shareholders in common
- you or an owner, business partner, member, shareholder or director of your business receives a monetary payment and/or some other benefit from the third party acting as landlord to the workers

…..

The accommodation offset will apply whenever you are providing accommodation regardless of whether the worker can choose whether or not to occupy the accommodation."

44. I consider that had Parliament intended the phrase "living accommodation" to have anything other than an everyday meaning it would have set this out in the Act, particularly where in the ordinary way the Regulations/Act contain definitions to help interpret the same.

45. I believe that the use of living accommodation within the Act means a place to live, a simple approach is required in order to give the word its common meaning. Adopting the phraseology of Elias in the EAT case, HMRC v Leisure Employment Services Ltd "the workers made use of the accommodation on offer". He stated that Mr Clarke's submission was correct,
"whenever the accommodation is in fact occupied then it must be treated as a payment in respect of the provision of living accommodation."

46. Does a place to live mean anything will do? Is it as simple that? There are some clear examples that would be obvious as being somewhere capable of being lived in such as a flat or a house, they provide shelter and would enable someone to live there. If they are capable of being lived in they are living accommodation. There are then the more obscure examples such as doorways, sheds, outbuildings, houses of multiple occupation, barns and it is not as simple as the appellant would submit that they are not offices or warehouses so anything else is living accommodation by default.

47. I favour the interpretation that it is accommodation capable of being lived in and this must involve a consideration on a case by case basis. If there is a building (noun – meaning a structure with roof and walls from the Cambridge English dictionary and the Collins dictionary) that provides shelter, access to sanitation facilities (toilet and running water) and services of some kind then it is living accommodation. The quality of the accommodation and level of comfort is not relevant if it does have shelter, access to sanitation facilities and services. The furniture, standard of it or other matters are not relevant.

48. If this interpretation were applied, HMRC would have some certainty and can issue an internal policy to guide its officers accordingly should it wish to do so. Employers would have some certainty that if they provide a building with access to sanitation facilities and services (gas or electricity and water) they can use the low allowance. The more the employer does to ensure the building is capable of being lived in, i.e. more akin to the norm then the more certainty they will have and the move away from sheds, shacks etc would be a positive thing for the worker.

49. I have then considered whether this interpretation gives a purposive approach to the legislation or whether it would have unintended consequences for the more vulnerable workers the Act seeks to protect. The living accommodation allowance is a daily rate (most recently at £7.55 per day from April 2019) and can only be used where the worker is provided with accommodation during the pay reference period, (Regulation 9(1)(e) of the National Minimum Wage) and it must be provided for the whole day under regulation 16(2) of the National Minimum Wage Regulations 2015. The purpose I have explored above but in essence it is to leave the worker with sufficient funds to pay rent. If living accommodation is provided, (i.e. somewhere capable of being lived-in that provides shelter, access to sanitation facilities and services of some kind) then this reduces the requirement for workers. Even for the lowest paid
worker under the National Minimum Wage, (an apprentice) this rate would be less than 2 hours wages, for those at the top end of that scale by virtue of their age this would be less than 1 hour of work.

50. The employer cannot charge for any ancillary services as per HMRC v Leisure Employment Services Ltd, so at the end of each day any worker would have a place to live and cash in their hand. The rate is set low by Parliament to protect the worker. For those workers who are not in receipt of accommodation and therefore the employer does not make use of the living allowance, they are paid the National Minimum Wage and they are at a greater disadvantage than a worker who is provided with accommodation. This is because of the value of open market rents and ancillary costs, and the need to make ends meet to cover those costs. I therefore believe that the interpretation I have given to living accommodation would meet the purpose of the Act.

51. Applying this analysis to the three sample cases, in the matter before me, the flats are clearly living accommodation. They are somewhere capable of being lived in. Whilst it is not necessary to mine further into the detail they do clearly fit within the everyday meaning I have given of being a building that provides shelter, they have access to sanitation facilities i.e. a toilet and running water, and services so are capable of being lived in.

52. I have been asked by the parties to consider the alternative position that in the event that I had not decided to give the phrase it's ordinary meaning, can it be interpreted as HMRC have done to require the three basic requirements of a bed, washing facilities and toilet facilities, otherwise nothing else matters. Alternatively, should as the appellant submits there be a requirement as to the quality of the accommodation including the nature and standard of accommodation, the legal basis of the workers occupation of it and the duration or intended duration of the use of the accommodation – no one factor should be treated as decisive.

53. I do not accept that the non-provision of a bed in every case would mean that it is not living accommodation. Had I not decided a more commonsense approach was required to give the term living accommodation its everyday meaning as set out above, I would favour an interpretation that when deciding whether living accommodation is being provided this should be on a case by case basis depending on a number of factors. This is not intended to be used in the same way as the current guidance, as a tick box exercise and failing one of these hurdles means that the matter is not considered further. I believe the alternative is that in order to give the Act its true interpretation the whole circumstances must be considered in every case. I have considered what matters ought to be taken into account but it is not intended to be an exhaustive list, but might give some factors to be considered on a case by case basis such as:

- The location and industry of the worker.
- Does the living accommodation provide shelter, utilities and sanitary facilities, i.e. toilet and running water?
- Is it habitable?
- How long is it intended to be lived in for?
- Is there space to live?
- Is furniture provided and if not, is it needed?
- Is it shared and if so, by how many?
- Is it exclusive and what is the level of privacy for washing, toilet, sleeping and the like?
- Can you eat or cook there?
- Can you sleep there?
- Is it a requirement that the worker lives there?

- Is it accommodation with any value on the open market?
- Is it warm, dry and clean?
- Is there somewhere to store food and belongings?
- Could it be family home?
- Is there a need to raise Health and Safety concerns or concerns over the accommodation with other agencies?

54. As I have set out, it is not intended to be an exhaustive list, but that when interpreting the legislation HMRC would need to give consideration to the full facts on a case by case basis.

55. Turning to whether this would meet the purpose of the legislation, the purpose of the National Minimum Wage is to ensure that workers are paid at least the national minimum wage, a figure set down by Parliament each year. It is to prevent exploitation of workers and it is for this reason that Parliament did not permit benefits in kind to be taken into account except living accommodation and only then by a set (arguably low) amount not reflective of the market value of that accommodation given the undisputed benefits to the employer in having the employee on site.

56. One could argue that this more case by case approach would further protect the worker by ensuring that HMRC would take into account factors such as habitability and quality in reaching its decision for enforcement purposes. Employers can meet the test by ensuring a higher standard of accommodation so are more likely (in some cases albeit I accept there will always be good employers who already meet the standard and unscrupulous ones who would never intend to) it would raise the standards.

57. HMRC may argue that it is more difficult to police as it requires an analysis of all the circumstances on each case leading to more uncertainty. HMRC say that they do this anyway but only if the three standard minimum requirements (bed, washing facilities and toilet facilities) are met, so are considering other factors on a day to day basis in any event. The appeal mechanism provides the Employment Tribunal with a chance to review cases where “living accommodation” is disputed if notices are appealed.

58. It seems to me apparent that on a case by case analysis, fits all cases and it is not a one size fits all assessment. It covers the more obvious examples that are met by either interpretation, but also the more obscure examples that may have ticked HMRC’s guidance for the three minimum standards but are more likely to fall outside the case by case approach. The shed in the garden big enough for a single bed with no other space, no services, no running water that is cold, damp, has access to a toilet in another building via a key as and when required and a sink which is close by – this would fail (this example would also incidentally fail in my other interpretation of the legislation and not qualify for the allowance) this has to offer better protection for workers.

59. Applying the case by case basis to the facts of this case, the accommodation would clearly qualify as living accommodation. In two out of three of the sample cases no furniture was provided but there was no evidence it was needed. In some cases the appellant paid for the general managers to move their own furniture in. The accommodation was on-site and in the pub industry where accommodation is customary. It provides shelter, toilet facilities, water, was connected to utilities, is habitable and intended to be habited for some time. There is space to live and space to store things like food and belongings (all three sample cases have at least five rooms). It was not shared unless the worker chose to live there with their partner or family, it was exclusive with a high degree of privacy in every respect. The worker could eat, cook and sleep there. It is a requirement that the worker live there. It has a value far in-excess of the National Minimum Wage living accommodation allowance on the open market. It was warm, dry and clean. It could be (an in some cases was) a family home or the sole place of residence. There was no need to raise health and safety concerns or concerns over accommodation with other agencies.

60. Taking into account all of this, all three flats in the sample cases would clearly therefore be living accommodation within the meaning of the Act or Regulations.

Outcome

61. In this particular case, on either interpretation, the appeal against these four notices must be allowed. The living accommodation allowance was applicable and given the notices only relate to that permitted amount they should not have been served and are incorrect. The appellant did not pay the workers below National Minimum Wage and is not liable for the arrears identified. The appellant it follows is therefore not in breach of the National Minimum Wage legislation and not liable to pay the penalties imposed by the notices of underpayment.

62. Pursuant to s.19C(7) of the National Minimum Wage Act 1998 the notices of underpayment should be rescinded and this is the decision of this Employment Tribunal.

_____

Employment Judge King

Date: …20th December 2019

Sent to the parties on: .....

.....24/12/2019.....
For the Tribunal Office