EMPLOYMENT TRIBUNALS

Appellants: **(**1) Taylors Services Limited
(2) Mr Ivan Taylor and Mr Eric Taylor T/A Taylors Poultry Services

Respondent :
(1) The Commissioners for her Majesty's Revenue and Customs

Heard at: Nottingham

On: 19 and 20 May 2021

Before: Employment Judge Broughton (Sitting alone)

Representatives

Appellants: Mr Boyd - counsel
Respondent : Mr Rowell - counsel

RESERVED JUDGMENT

The Appeals against the Notices of Underpayment pursuant to section 19C (1) of the National Minimum Wage Act 1998 brought by the First and Second Appellants are **not well founded** and are **dismissed** in their entirety.

The decision to serve the Notices was correct. The amounts and arrears specified are correct.

REASONS

Background

1. This case concerns Appeals brought by Taylors Services Limited (TLS) the First Appellant and
Mr Ivan Taylor and Mr Eric Taylor trading as Taylors Poultry Services (TPS) the Second Appellant, against Notices of underpayments (Notices) issued by the Respondent pursuant to section 19 of the National Minimum Wage Act 1998 (NMWA).

2. The Respondent assessed TPS for national minimum wage (NMW) arrears of £32,128.42 and penalties of £28,741.64.

3. The Respondent assessed TSL for arrears of £30,259.84 and penalties of £30,103.80.

4. An Order was made by Regional Employment Judge Swann on 25 November 2020, for Appeals to be heard together [45].

5. The workers whom it is alleged were underpaid for NMW purposes (hereafter referred to as the Workers) provided their labour under a 'zero hours' contract.

6. The business of both Appellants' involved the provision of labour to poultry farms around the country. The Workers were worked on the farms of various clients of the Appellants' as Flock Service Technicians. Their duties essentially involved; catching poultry, providing injections, grading and loading and unloading poultry. The farms were located throughout England and sometimes even Wales and Scotland. The Appellants' office/business unit is based in Nottingham. The Workers travelled to the farms on vehicles supplied by the Appellants' at no cost. .The return journey time to the farms varied, between 1 and 8 hours.

7. It is common between the parties that the Workers were engaged in *time work* pursuant to regulation 30 of the National Minimum Wages Regulations 2015 (NMWR) and thus entitled to be paid the NMW while carrying out time work. The Notices relate to alleged underpayments of NMW in respect of the travelling time to and from the farms.

8. The Respondent submitted a joint response to the claims [53 - 63]. It is a brief response in which it states that the HMRC Compliance Officer found that the pay the Workers had received was below the NMW. The period in question is the beginning of the financial year 2013/2014 to 18 August 2016 (Period of Review). After this date it is accepted by the Respondent that the Workers were paid the NMW for travelling time to and from the farms.

Issues.

9. The issues for determination by this tribunal, agreed at the outset (subject to the preliminary point on calculation set out below) are;

*(1) Were the Travelling Hours **actual work** for the purposes of the regulation's 30 and 31?*

*(2) If not, were the Travelling Hours **deemed work** for the purposes of regulation 34?*

(3) [Is the quantum of the Notices correctly calculated?]

Evidence

10. The parties provided an agreed bundle of documents numbering 896 pages. References in this judgment to numbers in square brackets are to the pages in that bundle.

11. The Appellants did not produce any witness statements or call any witnesses.

12. The Respondent called two witnesses;

    (i) Ms Jowita Romanek , an HMRC Officer who was involved in the investigation along with Ms Deane, and took over responsibility for it when Ms Deane retired, from June 2018 [342]; and

    (ii) Mr Gregory, who worked for TPS from 2005 on and off until 15 July 2015 as a Flock Technician.

13. Both witnesses had produced witness statements, gave evidence and were cross examined by the Appellant.

Preliminary matters

Time Limit

14. At the outset of the hearing, I noted that the Appeals were presented on the 20 November 2020 however, the date of the Notices was 21 October 2020. A period of 30 days.

15. An appeal must be made before the end of the 28-day period pursuant to section 19C NMW Act. The 28-day period is defined in section 19 (8) as; "*the period of 28 days beginning with the date of service of the notice of underpayment."*

16. I was then taken to documents in the bundle [790 – 792] and informed that these documents were delivery receipts from Royal Mail confirming receipt of the Notices and dated 26 October 2020. After taking instructions the Respondent did not challenge this evidence or that the Appeals were presented in time. I was satisfied that the Appeals had been presented in time and that this tribunal therefore has jurisdiction to proceed to hear the Appeals.

Calculation

17. Counsel indicated that the Appellant's intended to argue that the basis for the calculation by the Respondent, namely that it has used tracker information from the vehicles as the basis of calculating the travel times to and from the farms, failed to take into account that the Workers were collected not from the Appellant's office but from their homes (or otherwise locations nearby) and as such, if the travelling time held to be time work but not waiting time, the calculations must be incorrect in that those collected later would spend less time on the minibus. The Respondent objected to what it asserted was an attempt to introduce a new ground of defence and further, that the tracker information had been supplied by the Appellants' as the most reliable information it had for calculating the travelling times. After taking further instructions however, the Appellants confirmed that they were not pursuing this line of argument because the tribunal will need to determine the issue of whether travel is time work and whether that includes waiting time and if

it does not, then the Notices were wrongly issued in any event and would have to be rescinded. Further, the Appellants confirmed that they were not in a position to put forward any alternative calculations.

Findings of fact

18. I have considered all the evidence and the findings set out represented what I consider the material findings of fact to be based, on a balance of probabilities. If evidence is not directly referred to, it does not mean it has not been considered.

Background

Taylor Poultry Services (TPS)

19. It is not in dispute that in the year 2000 Messrs Eric and Ivan Taylor set up the business
partnership TPS.

20. TPS specialised in the supply of temporary workers to farms for the purposes of chicken catching for which it also holds a licence issued by the Gangmasters & Labour Abuse Authority)and woodwork activities (including the fabrication of sheds and summers houses).

8 December 2016

21. On 8 December 2016 it is not in dispute that NMW Officers; Ms Deane supported by Ms Romanek, carried out an unannounced visit at the TPS site in Nottingham pursuant to section 14 of the NMWA and interviewed Mr Martin Taylor. Mr Martin Taylor was informed about the purpose of the enquiry, when a Notice of Underpayment may be issued, the policy of naming employers and the possibility of criminal prosecution for employers who obstruct officers or provide false records or information.

22. The Officers made notes from that meeting [64]. The undisputed evidence of Ms Romanek is that a copy of those notes was sent to the First Appellant on 16 December 2016.

23. The notes record Mr M. Taylor identifying himself as one of the business partners who would also become a director of the business when it planned to later transfer to TSL. Ms Romanek under cross examination confirmed that Mr Martin Taylor was present for the full interview while Mr Ivan Taylor was not present the whole time but answered questions which Mr Martin Taylor did not know.

24. The undisputed evidence of Ms Romanek is that Mr M. Taylor informed her that the business employed drivers, foreman, Flock Service Technicians and shed makers who were all paid the NMW or above for hours worked. Lower rates were historically paid to Flock Service Technicians for hours spent travelling to the first assignment and from the last assignment.

25. The notes record that the officers were informed, in summary, that ;

    - *TPS do not own any farms but supply farms with workers.*

- *They have around 19 poultry catchers including supervisor and managers.*
- *All workers have written contracts which are normally given within about a month of them starting.*
- *They recruit via Facebook but mostly by word of mouth – the workers they recruit are usually local to the area.*
- *They can be sent anywhere but now try and limit the travelling to 1 ½ to 2 hours because of paying travelling time at £7.20 per hour.*
- *Most jobs want the workers at start at the farms around 7:30 – 8am but it could be 2am in the morning.*
- *Works can be called at any time to work and hours are not guaranteed.*
- *Travel is calculated by AA route planner and there is a tracker on the vehicle. The AA route planner measures the distance from the business premises at the urban Business Park to the farm and return.* ***The workers are meant to get themselves to the business to be picked up but they do have the choice that they can be picked up from home but that is their choice not a requirement.***
- *The workers are meant to get themselves to the business to be picked up but they do have a choice that they can be picked from home – that is their choice not a requirement and all workers are told to meet at the business unit.*
- *The driver gets paid from when he starts his engine at home to when he switched it off at home.*
- *They are paid an hourly rate for their* ***travelling and work time on the farms: "Any waiting time on the farms is paid for if they are required to wait for transport they are paid for that time".***
- *Any waiting time on the farms is paid for if they are required to wait for transport they are paid for that time.*
- The notes also include the following entry;

- *Travel from home/business and back to the business/home used to be paid at £2.50 per hour per person as they said they were just sitting in a van often sleep.* ***Again, the official line for the employer was to meet at the premises****. I explained that this could be a problem as we have always said that travelling time* ***from business to work*** *destination had to be paid for and Martin admitted that they did not start paying* ***until week ending 21/08/16 from business to first place of work****. I highlighted it as a risk area as there may be arrears due for those hours. Martin thought that had only just changed under new European rules but for NMW* ***we have only excluded Home to first place of work but from business to first place of work it should always have been included as hours worked****. I said we would check this for him, but it was a possible issue. Martin said [redacted] one of the clients he works with had been asking them to do it and that is when they became aware. He said mileage is definitely calculated from business address to farm and not home address as that is a choice and requirement is from business address*

Martin stated it was mostly when they were doing a long drive to Anglesey , as 6- 9 workers would have at least a 4-hour journey calculated from business to place of work. I asked if there were records of these longer journeys before August and Ivan stated time sheets were not completed beforehand as it was really hard to get workers to complete them correctly. ***A bonus was paid for Anglesey of £10- £20 per man. About 3 years ago they were paying £4 - £4.50 per hour for 1 way travel and it was entered by the foreman how many hours it was for. Then the return journey was not included. When Martin came on board, he started paying for both ways but at £2.50 per hour, based on time sheets/foreman and local knowledge."***

[Tribunal Stress]

26. The First Appellant do not dispute what is recorded about them paying travel time at £4 - £4.50 per hour for one way travel in **2013/2014** (the return journey was not paid) and that this changed in **late 2015** when the First Appellant started paying £2.50 per hour each way. From late August 2016 they limited travelling time to 1 ½ hours – 2 hours maximum due to paying travelling time at £7.20 per hour.

27. The Appellants provided the Officers with a contract of employment for a worker, Gary Henshaw employed as a Flock Service Technician from 2012. The contract was signed in June 2016 [94]. The contract which it is not disputed between the parties was the standard form of contract used by TPS, included the following provisions;

Normal days & hours of work:

Your normal hours of work will vary depending on the nature of the job that you are required to undertake. Whilst the company does not guarantee the availability of work you will normally be aware of the work you are required to do on a weekly basis. Notwithstanding this, the company reserves the right to confirm working hours to you on a day by day basis

Hours of Work

…

3.1 *Travelling time to the first Assignment Work of the day and travelling time after the last Assignment of the day are* ***not normally payable.*** *However, Assignment Work carried out at different places between which the worker is obliged to travel that are not places occupied by the worker's employer are considered to be part of normal hours of work and are paid accordingly.* ***That is travelling time during the day, after arrival at the first assignment, is normally paid.***

Working time directive

3.3 For the purposes of calculating the average number of weekly working hours your working time shall only consist of those periods during which you are carrying out activities for the Employer. Lunch breaks and time spent travelling to and from the Client or the Employer's premises (other than on Assignment Work) at the beginning and end of the day are unpaid and will not be working time ***for these purposes***

4. Place of work

*Your normal **place** of work will be at the premises of the Employer, any client to whom your services are provided by the Company or any other location where the Employment may require you to work.*

28. I find that on a common sense and ordinary construction of the contract, clause 3.3 relates specifically to the definition of working time for the purposes of the working time legislation. Clause 3.1 has a wider and general application, it states that travel to the first assignment (not defined) and after the last assignment, is not normally payable, it does not state it will never be paid or that it is not deemed working time more generally.

29. There are other copies of contracts in the bundle including one for Mr Ryan who started work in 2011 and it is signed in 2012 [99] with essentially the same provisions as set out above other. During 2012 and up to August 2016, I find that the contracts of employment issued to Workers, included the above express provisions about payment. The Respondent did not produce any evidence that a different form of contract was provided to the Workers.

30. Ms Romanek confirmed that at this stage she understood the Workers went to the office/business unit first and were then taken to assignments. She identified this to Martin Taylor as a risk [68]; "… *for NMW we have **only excluded Home to first place of work** but from business to first place of work it should always have been included as hours worked…"*

31. There is no express contractual term set out in the contract of employment, requiring the Workers to travel to the First Appellants premises and to collect the minibus from there. Mr M Taylor during this meeting stated that this was however the 'official line'.

32. During cross examination, Ms Romanek accepted that there was nothing arising from the
Respondent's investigation to contradict the evidence given at this interview by the First Appellant, about how they recruited the Workers, and that Workers are usually recruited from the local area.

33. Mr Gregory's evidence is that he worked for the First Appellant from 2005 to July 2015, he was recommended for the job by a friend who had worked for them and he confirmed that he was aware that the job involved travelling long distances to the sites.

Amendment to contract

34. The First Appellant provided a document to the Officers at this early stage, headed Amendment to Contract dated 7th September 2016 [93]. It referred to an earlier Agreement dated 29 August 2016 and in this document between TPS and a Worker employed as a Flock Service Technician, states;

35. " *Paragraph 3.1: regarding travel time to be disregarded and deleted as **travel time is now to be paid."***

36. The First Appellants were informed by Ms Deane that, for the period prior to this contractual amendment, the workers had in her opinion been underpaid NMW for the hours spent travelling to the first and from the last assignment.

13 April 2017

37. Ms Romanek accepted that a note within the bundle was likely to be a note of a call on 13 April 2017 between Mr Martin Taylor and Ms Deane [149]. Ms Romanek accepted the format of the file note was one which is used by the Respondent . I find on a balance of probabilities that this is a file note created therefore by Ms Deane following a call with Mr Taylor where she notes the following;

"If workers were required to travel with the employers transport to go to one site and required to be from employer premises the travelling time had to count as working hours in my opinion.

I explained that ***from home to premise*** *[sic] of employer did not have to count as it was their choice to be picked up form [sic] there but as he told me it himself it was a requirement form [sic] the business premises it had [sic] had to be paid."*

38. The Appellant in May 2017 provided excel spreadsheets setting out information to calculate NWM [154- 164] for the period from 11 April 2014.

July 2017

39. On the 31 July 2017, Ms Dean sent a letter to the First Appellant Headed ' National Minimum Wage Enquiry' alleging an underpayment of NMW. The basis for this was Ms Deane's view that travelling time for certain workers during the journeys from and to their homes amounted to working time for which she alleged they were remunerated below the NMW;

"*A worker is deemed to be working for the period he is travelling* ***as part of or for the purpose of his duties****. Where workers are travelling to and from their home to the place of work and <u>they travel with a driver</u>* ***and*** *<u>are collected from their home or a meeting point</u> it is considered to* ***be travelling in connection with their employment****. You stated at our meeting that workers are contracted to start their journey from the employer's premises but have a choice whether they are picked up from their home address by the relevant driver."*

40. Ms Romanek gave evidence under cross examination that she investigated this further and at this stage their understanding was that the contractual arrangement was to start the travel from the business premises, however the workers had the choice to be collected from home. At this stage, they did not know that the workers always travelled from home, other than 1 or 2 workers .

41. Ms Romanek under cross examination stated that in her view, whether there was a driver or not alone "*does not say much I agree*" and could not therefore explain the rationale for the comment by Ms Deane about the relevance of travelling with a driver.

42. Attached with the letter were schedules prepared by Ms Deane showing the underpayments of NMW from information provided by the First Appellants. [66 – 254]

43. Following an exchange of correspondence; Notices were then issued against the First Appellant dated 21 October 2020 under the Respondent 's powers under section 19 of the 1998 Act. .

Informal NMW arrears calculations : July 2017

44. By letter of 31 July 2017 [166] the Respondent wrote to the First Appellant stating that they had examined the spreadsheets which had been sent to them showing the weekly payments made to their workers and details of their working hours including travelling time. Attached with the letter were two schedules of arrears which had been split due to the fact that depending on the period of arrears, there are different penalty procedures in place. The arrears were uplifted to the current rates of NMW appropriate to the ages of the Workers. Within the letter the Respondent set out an explanation of the issue;

"*A worker is deemed to be working for the period that he is travelling as part of all for the purpose of his duties. Where workers are travelling to and from their home to the place of work* ***and they travel with a driver*** *and are collected from their home or a meeting point it is considered to be travelling in connection with their employment.* ***You stated at our meeting that workers are contracted to start their journey from the employer premises but have a choice whether they are picked up from their home address by the relevant driver. Therefore I am of the opinion that the travelling time is included as working hours.*** *Although you have paid about of travelling, these are varied from £4/£4.50 an hour for one-way travel to £2.50 an hour for a return journey. This is resulted in an underpayment of NMW…"*

[Tribunal Stress]

8 September 2017

45. By letter of **8 September 2017** [266] solicitors for TPS wrote to the Respondent regarding the investigation into the alleged underpayment of NMW, enclosing a sample contract of employment, sample payslips, sample timesheet. It set out the Appellants understanding that the alleged arrears relate only to payments connected with travel time from the workers homes to the first assignment and from the final shift to the workers homes. Reference was made to the provisions in the contract of employment dated January 2016 which includes in all material respects the same provisions as set out in the contract supplied to the Officers in December 2016.

46. Ms Romanek did not refute that pursuant to the standard contract terms, travelling time to and from the client or employer's premises are unpaid

however she argued terms can be ' implied' and they look at the arrangement overall.

47. Ms Romanek alleges that letter of the 8 September from solicitors for the First Appellants contradicted the previous responses. Under cross examination she confirmed that she was making specific reference to the assertion within that the workers were not obliged to travel; "..***there is no requirement or obligation on Taylor's workers to be collected by the business*** *and there is no fee or other cost to the worker utilising the minibus service."* Whereas at the meeting on the 8 December 2018, the notes record the First Appellant stating; "*The workers are meant to get themselves to the business* ***to be picked up*** *but they do have a choice that they can be picked up from home but that is their choice not a requirement and all workers are told to meet at the business unit".*

48. Solicitors for the First Appellant referred to the contractual terms as unequivocal and asserted that there was no contractual right for the workers to receive pay for travel time nor was it the First Appellants' intention that travel time be considered working hours.

49. The letter confirmed as follows;

"*It is correct that the majority of Taylor's workers are collected in a business minibus and driven to the first assignment at the start of the day and then driven home after the final assignment of the day.* ***It is important to note that there is no requirement or obligation on Taylor's workers to be collected by the business*** *and there is no fee or other cost to the worker in utilising this minibus service, if necessary, our client will submit witness statements detailing the free minibus service is offered to its workers recognising that;*

i. A number of its workers are young and do not have private transport;

ii. The times of work and location of assignment means the public transport is unavailable or inconvenient;

iii. Provision of the free minibus is beneficial to workers paid NMW levels; and

iv. the service provides greater flexibility for Taylor's workers, for example, frequently workers will be collected or dropped off friends or other relatives houses.

There is no obligation on Taylor's workers to take up the offer transport, and workers are free to travel from their home to the first assignment of the day and from the last assignment to their home using their own ***transport*** *if they wish to. It is <u>not correct</u> that Taylor's workers were obliged to attend its depot before transported to the first assignment of the day, nor is this reflected in the Contract."*

[Tribunal Stress]

Further investigation by HMRC

50. In November 2017 questionnaires were sent out by the Respondent to the Workers in light of the apparent change in the position of the First Appellant, in order to conduct further investigations.

51. The undisputed evidence of the Respondent is that 43 questionnaires were sent out. Written responses were received from 9 workers and telephone response from one other. Ms Romanek gave evidence that the questionnaires went out to the existing Workers and former Workers. It was a sample therefore of the Workers, representing about a quarter of the Workers.

52. The questionnaires included 13 questions. [283]. Some of the key questions included; whether the workers were required to travel in a minibus or other transport provided by the First Appellant or able to make their own way by public or personal transport, whether they were able to use their own transport, whether anyone did use alternative methods of travel, the restrictions placed on vehicles, notification of travel arrangements and what would happen if a worker did not use the minibus provided on request for documentation

53. There were follow up conversations with some of the Workers.

54. The questionnaires did not ask the Workers whether they had ever asked the First Appellant whether they could use their own vehicle to get to the first assignment, however Mr Romanek accepted that this was an important point which she initially under cross examination stated that she had later asked only to concede that this question had not been put to them.

55. I was taken to a number of replies from various Workers on the disputed issue about whether the First Appellant would have allowed Workers to use their own vehicles including;

Mr Wood [287]

" 1*) We always travelled to work sites in works vehicles. I was always picked up from my home address and driven to the site we were working on that day.*

3) No alternative for me personally as I'm unable to drive.

4) I was unable to use my own method. Only occasionally did we meet at the works office, usually at the request of the vehicle driver. "

11) If workers didn't use the vehicle provided to a site, then they simply didn't go into work that day. I was never provided with an option for an alternative travel arrangement to site. I always accepted the travel arrangements as the normal procedure" [287]

[295]

"1) I travelled to site via mini bus or vehicle provided that was the only form of transport and they provided it.

4) I don't drive and they provide transport.

11) If you don't use the vehicle provided you don't go to work.."

[298]

"1) Yes we traveled [sic] in a minibus

2) we were all picked up individually from our home's

4) No other transport was available to me only the minibus

5) sometimes other people went in car's depening [sic] how big the Job was.

11) we were never penalised or disciplined but we totally relied on the minibus for work …

[315]
1) I am collected from outside my house …

3) There is no other way to get to work as distance is so far

11) if you don't use the mini bus you don't go to work and than Taylor's wont given you work for the rest of the week .

[332] Flock Technician later driver – Mr Yeoman

3) There was no other way for lads to reach work sites.

7) Travel was arranged by phone or going into the office . foreman where [sic] allocated a van and their job sheet and told which men they needed to collect.

8) All men got collected from their home and dropped back at their home.

9)…if a man didn't wake up to go to work in time he didn't go because he couldn't get there. Then you got disciplined because you overlayed [sic] and money took from your wages as a fine"

56. The replies were pretty consistent in that the vast majority of those who replied stated that the Workers always travelled to travel to sites in the company vehicles and they were picked up from their home (or close by). The replies were consistent in stating that there was no alternative to get to the sites and a number stated that they were personally unable to drive.

57. Ms Romanek confirmed under cross examination, that the Respondent did actually not ask the Workers whether they had at any point asked to travel from the Appellant's offices/ business unit by their own mode of transport and whether this was refused.

58. One individual, Mr Wood [287] however said that occasionally they met at the works office to be collected, usually at the request of the driver.

Mr Gladwin

59. Mr Gladwin replied stating that for a while, when he moved out of the area, he was made to make his own way to the office to get the minibus [323]. I was not taken to any further information from Mr Gladwin about how long this period was for, when it was and how far he travelled during this period.

60. One individual [298] stated that some people travelled to the site in cars depending how big the job was; however, it was not clear in his answer whether this was a car provided by the First Appellant or the Worker's cars. Ms Romanek under cross examination referred to being aware that the First Appellants used cars as well as the minibuses to transport workers and indeed this is commented on in an interview with the First Appellants on 12 February 2019 [406] where reference is made to them having minibuses and 3 cars being used to transport the workers. I find on a balance of probabilities, that it was the First Appellant's cars this worker was referring to and not the Worker's own cars.

61. Mr Romanek confirmed in a response to a question from the tribunal, that when sending the questionnaires, the Workers were never asked whether they had their own drivers' licence either . The solicitor for the First Appellant, in the grounds of appeal [25], complain that all those who replied to the questionnaire did not have their own licence. Mr Romanek was not in a position to refute that this was the case and therefore on balance, I find that it was.

62. From the questionaries' disclosed, there was also a fairly consistent picture of an arrangement which consisted routinely of Workers being told the evening before what the arrangements were for collection and the driver would be the only one with the postcode of where they were travelling to.

63. The Workers were not paid for waiting for the minibus and one Worker in particular stated that sometimes he would have to wait for as long as 3 hours to be collected.

Penalty

64. The Respondent asked (question 11) whether the Workers were penalised or disciplined for not using the minibus.

65. In addition to the replies to the questionnaires there were also phone conversations. In one such conversation [349] between Ms Romanek and Mr Yeoman, he provided evidence that he was always picked up from home due to unsociable hours, there was no public transport and a lot of them did not drive. Sometimes they had to wait for hours for the minibus. If someone was not ready to be picked up at the agreed time, they would lose their shifts for the rest of the week., they would not be told they would be penalised, but this is what would happen. Mr Yeoman also alleged that money was taken from his wages as a fine for overlaying and missing the transport [333] but no other Worker mentioned this.

66. There was also a note of a call between Ms Romanek and Mr Wood [51]. His evidence was along the same lines, that he had to use the

company transport because this was the only way to get to work because of the lack of public transport during the hours they worked. If he missed the shift, the First Appellant's would replace him for 2 – 5 days if they could find a replacement. It was never suggested he could use his own transport . Mr Walters [317] also stated that all the workers travelled in the minibus and if "*you don't use the minibus you don't go to work and then Taylor's won't give you work for the rest of the week."*

67. Some workers [287] [195] [299] replied that they simply did not go into work that day if they missed the minibus because there was no other way to get to the farm – hence they missed that day's work. There was no reference otherwise to any penalty.

68. Mr Gregory's evidence was that he would be picked up and taken to the jobs by the minibus, he was 15 when he started work for the First Appellant therefore he did not drive but his evidence is that the farms were inaccessible by public transport, he did not know the locations, some of the workers had their own cars but he never saw anyone using them and accepted the majority did not have a licence. His evidence was that he was never told to make his own way to the sites and that he was told the day before what his shift would be the next day, where they were going and what time he was being collected, however he accepted it would probably have cost too much to get there via his own means. His evidence is that on the minibus he would just sit or sometimes sleep. If he missed the minibus he would call and sometimes if they were nearby it would come back to collect him, but he gave evidence that if he missed the minibus, he was sometimes not picked up the next day as normal. He would wait perhaps 5 or 10 minutes for the minibus but could not recall precisely what the waiting time was.

Payment for travel

69. Ms Romanek accepted under cross examination that part of the reason some of the Workers commented that they could not get to work other than by the minibus, was because or at least partly because, the cost would be prohibitive for them due to the geographical locations (and the lack of public transport).

70. In terms of what the Workers understood the position to be about being paid for the time spent travelling they were asked the question: 13) " *I understand that some various types of payment have been paid by your employer in the past? Are you an aware if this was discretionary? Are you aware how the rates were decided an what it was based on?"*

71. Mr Gregory's evidence was that he was not paid for the travelling but that at some point he was paid £4 for one way travel but the return journey was not paid but that there was no real explanation for the change in pay but that; " *we were told that's what we would get and that they didn't even need to pay us that".*

72. A number of Workers reported never receiving any payment for travel *[287] [299] [321][337]* some were unsure, and others did not address the question.

73. Mr Wood [288] recalled only once getting a token payment for £20 for extra responsibilities, he was not clear what this was, however Mr Martin Taylor at the December 2016 interview had referred to paying a bonus between £10 and £20 for the long journey to Anglesey which would be a 4 hour trip from "business to place or work".

74. One Worker referred to the*; "rates were decided by Martin Taylor, And I wasn't aware of any discretionary" [299] .* One referred to people being paid cash in hand [317] but it is not clear from this answer whether this was related to travel.

75. Mr Gregory in his evidence in chief stated that he left the First Appellant's employment, because he was unhappy about the pay for travel but was told that the Appellants "*could only pay me for what I worked.".* When he received a payment, he did not recall getting a new contract and; "*They made it sound like they were paying it to us out of their own generosity*".

76. There was no consistent evidence on this issue and what the Workers said was not on all fours with the First Appellant's evidence that they did make payments for travel from 2013 for one way and then this was changed to £2.50 for both ways.

77. I find on a balance of probabilities that there no express contractual clause providing for payment for travel and the Workers I find had no expectation of receiving any payment.

78. There were a number of issues raised by the Workers about the safety of the transport
provided.

TUPE : February 2018

79. On 3 February 2018 it is not in dispute, that 14 members of staff transferred under the Transfer of Undertaking (Protection of Employment Regulations 2006 (TUPE) from TPS to **TSL** the Second Appellant. TPS ceased trading on 31 March 2018. The first Notice relates to the Workers not employed immediately before the TUPE transfer liability for which therefore did not transfer to the Second Appellant. None of this is in dispute.

80. The three directors of TSL are Martin Taylor (Managing Director), Eric Taylor and Ivan Taylor.

81. TSL carries out the same activities; it is also a company which specialises in the supply of temporary workers to farms for the same purposes of TPS.

82. On the **12 February 2019**, the Officers met with Martin, Eric, Dan and Ivan Taylor [406]. It was explained that the Respondent considered that the letters from solicitors for the Appellants had
included a new explanation around the travel time arrangements and as a result the Respondent had contacted a number of Workers to get

their understanding of the arrangements. The Appellants' solicitors were not present at this meeting.

83. The notes record the Second Appellants stating that [406];

- *Workers are still being picked up from home as it is difficult to expect that the workers will arrive at the business premises.* ***They are paid for the travel time as if they were being picked up from the office to the first assignment****. When asked how far away the workers live- an example was given that one worker lives around the corner for the office and the others 5 – 6 minutes away.*

- *The notes record (para 4) that when workers commences employment, they find out where they live and pick them up from home.*

- *Workers are picked up from 6-7 different locations in a sequence and if someone is not ready this has a knock-on effect on the time of arrival at the destination.*

- *The client decides the timings and require the work to start at certain times.*

- ***There would be a security problem if the workers arrived separately. Also, there would be issues with MOT, insurance of the workers vehicles. If they travelled in their own vehicles there would be issues with insurance and mileage. It was also recorded that customers would not allow any vehicle to enter the premises***

  Q: could you trust that the workers would arrive at assignments without using the vehicles. Could they arrange their own group and travel?

  A:I wouldn't trust them to organise that transport themselves if they had the weekly plans. Not from their homes and not from the business premises, it doesn't matter. ***We would go out of business if the workers started using their own transport. There is also a risk of cross contamination (DEFES standards).***

- *Not to the Appellants knowledge had a customer ever used their own transport to get to a customer's premises.*

- *The distance to be travelled to reach customers farm can be a 4-hour drive one way to a location – normally 2 hours away.*

- *Very unlikely that there is public transport to the premises at the times workers are required to be there.*

- *Workers are not asked if they require transport to each assignment; " most of them can't drive, they are young. Also, the farms don't like it, it is also convenient for the business"*

- *The Appellants stated that providing the transport is a cost which it was confirmed was "*
  necessary" for the Appellant to operate the business.

- *" T agreed that the 2 -4-hour drive to the farms is not commuting time."*

- *"JR asked if the workers ever started their journey from the business premises. T said no."*

[Tribunal Stress]

84. The second Appellant's are also recorded as stating that the cost of the transport is *necessary* to operate the business.

85. In terms of penalties if they miss the pick-up, the Second Appellants are recorded as stating; "*There could be a multitude of reasons for why workers said that. There might be some personal issues in the team if someone lets them down by not waking up on time. A worker might be transferred to a different team*" [408]

86. The notes from this meeting were sent to the Second Appellants on 20 February 2019 [397]. The Appellants had been informed [397] that if no comments were received by 27 February 2019, it would be assumed that the content of the notes were correct. No comments were received as directed.

87. By letter of the **8 March 2019** [411] HMRC informed the Appellants that;

" I am aware that under Regulation 34 (1) (a) & (b) time spent travelling from a workers home to a place of work is ordinarily not counted as working time.

However, having considered the evidence that has been provided to me by yourselves and from a selection of workers, it is my opinion that the arrangements impose a requirement on workers to arrive at their work assignment locations ***in a particular manner and not a discretionary service provided to workers*** *as one of a number of voluntary options for travel.* ***It is my opinion that this requirement means that the time spent travelling should be considered as being the purposes of work.***

I understand that workers may have had a choice about where they were picked up, and that
this could have been from Taylors office location. It is also my understanding that the practice of picking workers up at their home locations may have evolved over time and may be subject to individual arrangement between the vehicle driver and the workers and that ***this is a matter of mutual convenience between the business and the workers.***

It is my opinion that the fact that workers were picked up from their home is therefore incidental. If they made their journey to the Taylor site, they

*would have automatically been paid for the time spent travelling to the first work assignment and for the time spent travelling back the Taylor site**. To suggest that a worker shouldn't be paid because they got picked up from home instead is not correct."***

88. The Appellants then informed Ms Romanek that some of the assignment times recorded on farms visiting sheets were not consistent with the working time recorded on the business timesheets in certain weeks and the arrears were reviewed.

19 July 2019

89. There was a further interview on 1**9 July 2019** [564] to discuss the calculations. Present at this meeting were Eric, Ivan, Daniel and Martin Taylor and their solicitor, Ms James. At this meeting Daniel Taylor stated he had carried out an analysis which incorporated current tracker travelling time and the travel hours claimed originally by the Workers, which indicated that the travel hours claimed originally by the Workers could be excessive .

90. The typed notes of 19 July 2019 meeting prepared by the Respondent record that; "*…D Taylor stated that given time he could do a full analysis into the extent of the excessive travelling time claimed*." When questioned why this had not been checked previously the Respondent was informed that the workers worked hard, the work they were doing was not very pleasant and they have been allowed to *"get away with this*" and "*the business vehicles had now been fitted with trackers, as the journeys were the same this information could be used to compare against those claimed by the workers used in our original calculations. A small analysis of the tracker information suggests the workers claimed almost double the actual amount of travelling time."*

91. The undisputed evidence of Ms Romanek is that in light of this new information, the Officers agreed to review the tracker information and use maps to estimate the actual travel time and change the calculations.

92. The notes record the Appellants stating that the contract of employment issued to workers excluded paying for travelling time, but all workers are now paid travel time. The further following statements from the Appellants were also recorded, ;

    i. *Workers would have been given the choice on how to travel to the first assignment. As most did not drive the Taylors gave them a free minibus If the clients were not accessible from public transport.*

    ii. *They had requested advice from the GLAA*

    iii. *There would have been no issue with multiple vehicles turning up at the client location as long as the foreman had been informed before.*

    iv. *NMW officers misunderstood the Taylors original explanation that bio security concerns are an issue but workers could have parked in visitor car park and the only reason they didn't promote the use of individual vehicles was due to the fact*

the workers would require business insurance

v. *Officers had only spoken to workers without vehicles, currently only 3 workers have their own vehicles*

vi. *Non-drivers didn't get the work plan, if they had their own vehicle they would have, if they asked for the plan would have been provided*

vii. *The Taylors were careful about handing out the work plan due to animal rights activists, they do not want their client's addresses advertised . Even now clients will not advertise their exact addresses*

viii. *The client could turn vehicles away if they look dirty, all vehicles are subject to contamination check.* ***The use of the business vehicle limited this risk.***

ix. *There will be no financial benefit in the worker travelling themselves,* ***would not be financially viable***

x. *The farmer could turn a workers away if the group was late or when insufficient numbers of workers arrived*

[Tribunal Stress]

93. What was said at the meeting on 29 July 2019 was, in some fundamental respects, not consistent with what the officers had been told during the interview on 12 February 2019 and December 2016. Previously the directors had informed the Respondent at the February 2019 interview, that they would go out of business if Workers used their own transport, there would be security problems if they did and they would not trust the Workers to arrange their own transport. The situation was now very much presented as something which could be accommodated and not the risk it had previously been presented as.

94. The notes were provided to the Second Appellant's and their solicitors.

95. There is an email on 20 August 2019 from Ms James, solicitors instructed by the Appellants' to Ms Romanek referring to having reviewed the notes that have been provided [570] and the email is headed: "*National minimum wage - notes of meeting 19/07/2019*". With regards to the arrangements about the vehicles few comments were made with regards to the accuracy of the notes. These included comments on the above bullet points;

- *There was respect to viii. it was disputed that Mr Taylor had referred to the use of the business vehicle "**limiting this risk'**.*
- *Point ix. Martin had explained that he was was happy for the worker to travel there themselves but explained in practice there was no financial benefit for them to do that as they had a minibus they could use for free instead of 3 hours travel costs for themselves. Please amend to refer to that instead of " financially viable".*

96. Otherwise with regards to the above points i. to x. there were no material changes.

97. Ms Romanek responded [575] on 24 September 2019 and stated that overall, she agreed with the comments from Ms James with the **exception** a few matters including the following;

"E. James comments that the client felt that there were issues with the previous notes from HMRC … it was it was confirmed for example that Martin had confirmed that other means of travel were discussed with workers but he did not do so where he had already checked if they had a driving licence and they did not. E James asked Martin to explain further . Martin confirmed that he does ask whether they had a licence and vehicle and does give the option if they do but in practice most did not. He would prefer it that they did.

Also

When discussing client sites and workers travelling there themselves, Martin was asked by the Officers if they could have more than 1 vehicle at work? He said yes. The Officers clarified
" that were not your vehicle?" and Martin said yes

My client does not recall using the words" the use of the business vehicle limited this risk"

Martin explained that he was happy for the worker to travel there themselves."

98. I find on a balance of probabilities, that the evidence provided about the travel arrangements was more accurately recorded in the meetings with the First Appellants in December 2016 and the Appellant's in February 2019, without the presence of solicitors. At the February 2019 meeting 4 of the directors were all present and their evidence is more consistent with the evidence of the Workers who replied to the questionnaires . It is simply not credible that if the Workers using their own transport would create such problems for the Appellants' and their customers, that they would have been content for the Workers to use their own transport.

99. I accept the undisputed evidence of Ms Romanek that on 7 August 2019 the Second Appellant provided details of the travelling times from the business location to all farms from the tracker system. They had also provided all the timesheets for the review period. The legislation Ms Romanek accepts would require calculating the travel time using each Workers individual travel time from their homes to the first assignment and back home however, this was not possible because this would require detailed information regarding the Workers exact locations on each day they travelled as well as a sequence of collection and drop off by a driver and the data was not available. Therefore, travel calculations were done using the office location as the starting point as the majority of workers lived in that postcode.

100. Ms Romanek formed the view, she explained in her evidence, that she considered the time spent travelling should be in this case, treated as time work because; "*they would otherwise be working*" due to the fact that the employer imposes a requirement for a Worker to travel by

business transport including the obligation to be available at a specific time and place in order to comply with obligations placed upon them; such that they are not simply commuting.

101. The Respondent wrote to the Appellants on 3 March 2020 [587] setting out the calculations and attaching schedules of arrears . The Appellants were informed that if they did not agree with the calculations, evidence in support should be provided by 17 March 2020. On 12 March 2020 Solicitors for the Appellants asked for additional time to consider the letter and calculations [679] The Appellants were advised that delaying the Notices would mean that they would be issued after the new NMW rates came into force on 1 April 2020 680] however the extension was granted

102. On the 14 April 2020, solicitors on behalf of the Appellants emailed to confirm on 14 April 2020, they would not be providing any comments on the calculations [684] and to date the Appellants have not set out what they argue the correct calculations should be and why the calculations by the Respondent are not correct..

6 October 2020

103. The Respondent then wrote to the Appellants and their solicitors on **6 October 2020 .** Within this letter the Respondent informed the Appellants that it had formed the view that the Workers had been underpaid applying the following rationale[703];

"Regulation 34 of the NMW regulations 2015 states that travelling between a workers home and place of work is not working time for NMW purposes. ***However, it is possible in some instances, this time could be working time.*** *For example, whether worker is under an obligation to use employer transport including the requirements to be available to use that transport) such as waiting to be picked up from a specified location. The issue in this case is whether the requirement to be picked up in the minibus provided by the employer, as a way of travel to and from work* ***was imposed*** *by the employer on the worker or if it was a workers choice to use the minibus because it was convenient.*

I have formed a view that ***because of the particular circumstances, which I consider are imposed on the worker by the employer, the travel time from home to place of work****, and every place of work back home at the end of the day, should be considered working time."*

[Tribunal Stress]

104. Within the conclusion section of the letter from the Respondent, it states as follows;

7.1 I have considered regulation 34 and it is my view that based on the business arrangements and the requirements placed upon workers, the time spent travelling to and from the work assignment should be considered as working time for NMW purposes.

7.2 regulation 34 (2) goes on to expand regulation 34 (1) I explained that the hours treated as hours when the work would "otherwise be working" . Regulation 34 (2)(a) covers the scenario where the workers travelling between assignments for which the work is obliged to travel. Regulation 34 (2)(b) covers the scenario where it is uncertain whether travelling when they would otherwise be working, time will be treated as working. In this case, if it is not clear when the worker will be starting work, which in turn makes it difficult to determine the number of hours they would spend travelling, the whole time spent travelling is likely to be treated as working time for NMW purposes."

105. In terms of regulation 34, Mrs Romanek under cross examination explained that with reference to the above paragraph, the "centre of the argument" was regulation 34 (1), that the travelling time in this case is time "*where the worker would otherwise be working"* and if that general exclusion does not apply then regulation 34 (2) does because of the uncertainty of the travelling time. However, when put to Ms Romanek how the hours varied for the workers , her response was unclear; " *I would not read literally*" but stated that " *at the end of the day, this should be working time because of the contractual arrangement which falls under regulation 34 (1)*"

106. Under cross examination Ms Romanek gave evidence that if the workers could make their own way to the farms, it would be classed as commuting time.

107. It was put to Ms Romanek that the determining factor in terms of the Respondent's decision that it was not commuting time, was the distances involved, to which she responded;

" …when look at the broad perspective , travelling of 7 hours – I personally would not travel to work for 7 hours- so it was a determining factor – it is not in legislation what a commuting distance is but at the same time, its difficult to accept workers would chose to travel 3 to 7 hours to work …" .

108. When she was asked at what point she considered travel time stopped being commuting her response was not consistent with her previous reply, in that she stated; " *length of time is not important- the legislation does not say if for example over 5 hours it should be paid – it was not a determining factor – it was one of many factors – not the decisive one."*

109. Ms Romanek was not prepared to provide an indication of what the cut off is for commuting time but referred to the issue being whether it falls under the contractual arrangements and that a Notice would not have been issued only on the basis of the length of the travelling time . She also sought to resile from her earlier comment by stating that the comment about not choosing personally to travel that distance was her personal opinion and not part of her decision making. In response to a question from the Tribunal whether it would have made a difference to the issuing of the Notices if the commute was 30 minutes, Ms Romanek stated that it would have made "*no difference."*

110. The clear impression I formed from the way Ms Romanek answered the question, was that the length of travel was an important factor, but that she then appreciated the difficulty of setting a precise limit on what would may be considered acceptable as commuting time, because the NMW Regulations do not define commuting time or set any limitation on it.

111. The focus of the reasons set out in the 8 March 2019 letter [411] however, are very much that it is the obligation on employees to arrive at their " *work assignment*" locations in a particular manner (namely by minibus as a group) and that mode of travel to the sites is not discretionary, that lead her to conclude that the travelling should be considered to be " for the purposes of work".

112. Ms Romanek explained that what was key to her decision was the requirement to use the company minibus but accepted that the vast majority of the workers did not have their own means of transport. Ms Romanek also conceded that the location were not accessible by public transport and none of the Workers had said that they had asked to use their own transport and been told they could not do so.

113. It was put to Ms Romanek in cross examination, that the question whether the Workers knew whether when they started the job that the travel could be from 2 to 7 hours return journey; to which she replied that the questionnaire had been sent by the previous Officer and this question had not been asked.

114. Ms Romanek confirmed in response to a question from the tribunal, that she accepted the information from the trackers provided by the Appellants to show the travel times to the various farms. She did not request the tracker data itself but what she did was carry out a sample of checks of the tracker times as against the time using google to check the distances. The Appellants produced timesheets provided by the foreman (who was on occasion also the driver) which recorded dates each worker had worked but not the farms. the Appellants

supplied further information to identify the farm worked that day (Ms Romanek confirmed that she did not question where that further data was obtained from – she simply accepted it as accurate). Ms Romana accepted the Appellants concerns that the travel times were inflated and hence agreed to use the tracker information supplied to her. Where there were discrepancies between the foreman's signing in and out sheets and where there were records available from the farms (which were limited), Ms Roman preferred the farms own records, due to the Appellants concerns about the reliability of the foreman's records. If however, they could not identify the farms separately from the foreman's timesheets, they would revert to using travel time recorded by the foreman.

115. In terms of what happened in practice on the evidence produced during this hearing; I find that the Workers had no control over where they would be working, they were often only told the evening before what the arrangements were. The Workers had no control over the mode of transport which was determined by the Appellants. The Workers had no control over the route, this again was determined by the Appellants.

116. A letter on **21 October 2020** [711] confirmed that the period of arrears starts from 27 October 2024, which is 6 years from the date of the issue of the Notices which is a maximum period allowed as per the legislation. The notices were separated into 2 to reflect the different penalty regimes;

Notice of underpayment 1;

Total arrears due to workers: £16,126. 50
Total penalty to be paid to HMRC: £12,197.29

Notice of Underpayment 2;

Total arrears due to workers : £16,001.92.
Total penalty to be paid to HMRC : £16,544.35

Appeals:

The Appellants exercised their right to appeal the Notice under section 19C of the Act.

TSL/Appellant 1 – Appeal [25 – 26]

117. The First Appellant appealed the Notices on the grounds 19 C (a) and (b)

Ground 1

118. *The decision to serves the Notices was incorrect because no arrears were owed to any worker names in the Notice.*

119. The First Appellant argue that the Workers carry out time work and that time spent by the Workers to and from their home and back home from work does not amount to work.

Ground 2

120. *The requirement imposed by the Notice to pay arrears to a specific worker (or workers) was incorrect because the amount specified in the Notice as the sum due to the worker (or workers) is incorrect and/or no arrears were owed to this workers (or workers) in respect of any pay reference period specified in the Notice.*

121. The First Appellant stated it is "*not in a position to confirm the accuracy or otherwise of those figures(in the event its primary contention herein are not accepted) and puts the Respondent to strict proof as to the basis of calculations and the accuracy of those calculations*".

122. The First Appellant presented its appeal to the Tribunal on 20 November 2020.

TPS/Appellant 2 – Appeal

123. The Second Appellant presented its appeal to the Tribunal on 20 November 2020 [29 – 38]. The grounds are in all material respects identical to those for the First Appellant.

124. It should be noted that Ms Romanek accepted, that the Appellants had cooperated and that although they had not sought advice from HMRC on whether they should be paying NMW for the travelling time to the first assignment, they had, she accepted sought advice from various other bodies; ALP, HMRC and GLA.

Submissions

125. I have considered the skeleton arguments of both counsel and their oral submissions. I set out in brief and in summary, the submissions however I have considered them in full.

Claimant

126. Counsel submits that the Respondent 's first rationale set out in its letter of 31 July 2017 [166] appears to be based on the Workers travelling with a driver and being collected from their home or meeting point such that this would be considered to be travelling in connection with their employment however, it is unclear what the legal basis for that assertion was. Regulation 34 he submits is quite clear and provides that travel to and from work is expressly not included as time work and there is no reference within regulation 34 to how a worker gets to work. Regulation 34 does not distinguish between a worker making his way to work or one transported by vehicle laid on by his employer.

127. It is accepted that a worker is deemed to be working when he is travelling between assignments during the course of the day counsel refers the case of ***Whittlestone v BJP Home Support Ltd 2014 ICR 275, EAT*.**

128. Counsel refers to the Respondent 's further analysis in the letter of 6 October 2020 [703] submits that the rationale mirrors what was set out the previous decision in 2017 i.e. that the Workers had the method of travel imposed upon them and that this was somehow sufficient to overcome the wording in regulation 34. Counsel refers to the letter providing a second rationale namely the reference to regulation 34 (2) and counsel argues this is confusing. The purpose of regulation 34 (2)(b) and regulation 34 (2)(a) is to address what is meant by the words "*the worker would otherwise be working"*

129. Counsel argues that the simple point is that whenever circumstances are covered by the wording of regulation 34 (2)(b); those circumstances are to be treated as hours of time work unless the travelling is between home and place of work.

130. Counsel argues that the Respondent cannot rely upon the wording of regulation 34 (2) (b) to somehow bring travel between home and work into the definition of time work, it is clearly excluded by regulation 34 (1). Further, counsel argues that this confusion is not helped by the fact that in their response to the Appeals, the Respondent

provided no legal analysis why they believe the operation of regulation 34 justifies the impositions of the Notices.

131. Counsel invites the tribunal to consider the basic rules of interpretation, that judges must give effect to the ordinary meaning of words in the context of the statute.

132. Counsel argues that the incorrect approach is to 'shoehorn' the case into regulation 30 which is what the Respondent seeking to do.

133. Counsel argues that we do not ever get to considering regulation 34 (2) where the travel is between the workers home and the first place of work.

134. Respondent has not produced any case authorities whereby travel from home to the first place of work has been held to be time work.

135. Counsel argued that Ms Romanek's answers were not convincing and that it is clear that the length of the travelling time was an important factor however the legislation does not define defined commuting and would have done, if it was considered necessary to do so.

136. Counsel for the appellants argue that Mr Rowell wants to do 'violence' to the statute and redraft it because it does not suit his interpretation and he is in effect wanting to make new law.

137. Counsel submits that the Workers chose the job, they understood the parameters of the job and that it involved a lot of travel. There was no public transport to these locations and there is no suggestion that any of the Workers ever asked if they could take their own car and incur personally the cost of travel and indeed it would make no sense. There was no coercion in any real sense.

138. Counsel argues that the Notices were issued for misguided reasons and the tribunal is invited to rescind them.

139. Counsel submits that the case stands or falls on whether travel is held to be time work in that the Appellants have not challenged the figures or put alternative calculations forward therefore the only issues to be determined are those set out above at a) and b).

Respondent submissions

140. Counsel in his oral submissions argues that Ms Romanek's reasoning is not relevant. The cross-examination of her reasoning is incorrect. Further ,the tribunal are also not concerned with the motives of the Appellant's directors.

141. Counsel argues the Appellants did not seek to refute in any substantial respect the notes made by the Officers in the meetings in 2016 and 2019.

142. Counsel refers to notes of the February meeting [406] when solicitors were not present and the answers that were provided during that meeting including the Appellant's comment that they would not trust the workers to arrange the transport themselves and they would go out of business workers use their own transport [409].

143. Counsel also refers to the comments about the health and safety issues and the customer not allowing other vehicles on site.

144. Counsel submits that transport was not a discretionary option, but a fundamental part of the
Appellants. business and the minibus was provided for the benefit of the employer's business.

145. Counsel argues that the distances involved take it out of the category of commuting to the workplace. He submits that despite what Ms Romanek had said under cross examination, the length of time spent travelling to the farms, is not of itself decisive but a relevant factor. The fact that Ms Romanek did not state this ultimately in her evidence is counsel argues, at variance with the Respondent 's position in law.

146. Counsel argues that there was a form of penalties for those who did not catch the minibus and this is a factor in support of this travelling requirement being formal work.

147. Counsel argues that only if the tribunal find that they were not carrying out work when travelling is it then relevant to look at the deeming provisions and regulation 32 33 and 34.

148. Counsel refers to paragraph 18 B of his own skeleton;

> *(b) The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose (Uber/ 70) . Applying the words of Ribeior PJ in Collector of stamp Revenue v Arrowtown Asstes Ltd [2003] HKCFA 46 AT 36 approved in UBS AG v RCC [2016] uksc 13 at 61- 68*
>
> *", The ultimate question is whether the relevant statutory provisions , construed purposively, were intended to apply to the transaction, viewed realistically*

149. Counsel argues that national minimum wage legislation is there to protect workers and it is nothing to the point that the workers entered into the arrangement with their eyes open.

150. Counsel argues that when looking at whether travelling hours of actual work tribunal is invited to consider **Whittlestone** and look at the actual position

<u>Actual Work</u>

151. Counsel refers the definition of time work under regulation 30, namely the work that a worker is entitled under their contract to be paid for by reference to the time worked by the worker.

152. Counsel argues that a reasonable starting point is first to ascertain the relevant terms of the workers contracts of employment and whether the time spent travelling to the farms and back, was pursuant to the contract, actual work for which they were entitled to be remunerated under the contract.

153. Counsel comments upon the clause 3.1 in the standard form of contract that provides;

.."travelling time to the first assignment work of the day and travelling time after the last assignment of the day not normally payable"

154. Counsel also accepts the Appellants may point to the fact that the contract does not contain an express requirement for the workers to travel to farms in the vehicles provided by the appellant. However, counsel invites the tribunal to find in light of the principles set out in the **Uber** and **Autoclenz Ltd v Belcher and ors 2011 ICR 1157that** the true agreement between the parties is to be ascertained with reference to how the working relationship operated in practice and there is no presumption that the true agreement is correctly recorded in the written documents produced by the employer.

155. Council refers to the interviews that were conducted by the Appellants, the Respondent 's witness statements and the workers questionnaires their answers and telephone conversation.

156. Counsel argues that the working relationship in practice had the following features and I summarise;

i. The workers were obliged to travel in the Appellant's minibuses in each and every occasion when they travel to farms in the core course of their employment

ii. None of the workers ever use their own transport or even attempted to do so. Even if they had access to vehicles of their own and counsel submits the majority did not, they could not have made their own way to the farms is only the Appellant's drivers knew the addresses and in any case the travel costs would have been prohibitive

iii. The workers were given no say in how the arrangements operated in practice. They were required to attend the place and time specified by the Appellant . If they failed to do so, they lost the day's work rather than been allowed to travel to the farm by the means

iv. The workers compliance was enforced through a system of unofficial penalties. Five of the nine workers reply to the questionnaire and telephone, including a former driver foreman said if they failed to attend a pickup point as directed, the Appellant would deny the work for the rest of the week if a substitute could be found.

v. *Contrary to clause 3.1 of the written contract, the workers were paid for the travelling hours. In 2013 and 2014 the rate of pay was for £4 – 4.50 for one-way travel with a return journey not paid. By late 2015 the appellants started paying £2.50 per hour each way and around August 2016 the Appellants put the rate up to £7.20 in compliance with the NN W legislation.*

vi. *As the Appellant said on 8 December 2016 interview, the official requirements of the workers to make themselves available for collection at the appellant's office but in practice there are usually picked up a point closer to their homes and driven directly to the farm with a days work was to be carried out.*

vii. Consistent with this requirement, the pay for Travelling Hours was always calculated on the basis of the distance from the Appellant's office to the farm.

157. Counsel therefore submits the true contractual agreement between the Appellant and the Workers was that the Workers were required to travel to farms in minibuses as directed by the Appellant and they were entitled to be paid, at the low rates mentioned for the travelling time .

158. Counsel submits that the written term purporting to disentitle the Workers to pay for travelling hours was an attempt to contract out the NMW legislation and is therefore void by reason of section 49 (1) NMW.

159. It is also submitted the following factors relevant to the question whether workers were engaged in actual work during the travelling hours;

- Travel arrangements were put in place by the Appellants for their own commercial purposes in that they were required by their clients to comply with different standards.
- The appellants felt they could not rely upon the workers to make their own way to the farms.
- The arrangements are clearly a very important commercial matter for the Appellant.
- Throughout the travelling hours of workers under the complete control of the Appellant.
- They were picked up at the time the Appellant specified, they arrived at the destination chosen by the Appellant
- Travel hours were often much longer than the typical journey to work for most workers.
- Sometimes workers were taken as far afield as Anglesey or Scotland - total working day including the travelling hours could be as long as 15 hours

- The minibuses were decrepit badly maintained and several Worker spontaneously mentioned concerns about their safety.

- counsel submits the travelling arrangements were therefore different OM character from undertaken as part of ordinary commuting to work workplace office

160. The features of the relationship counsel submit shows that the Appellants were in a subordinate position and have no option but to undertake lengthy travelling hours for negligible pay and are precisely the sort of workers whom the NMW legislation is there to protect.

161. Council also referred to the dicta in Whittlestone that no *particular level of effort and activity is required* of the worker to be engaged in time work and therefore it is not relevant that the workers were passengers rather than drivers in the minibus.

162. Counsel therefore submits that the workers undertook the travelling pursuant to a contractual obligation and were remunerated for doing so. Travel being part of the Workers work rather than merely ordinary travel to workplace or place an assignment

Deemed work

163. Counsel argues that in the alternative travelling hours are not found to be actual work then they are working by virtue of regulation 34.

164. Counsel submits that it is obvious and does not appear to be disputed that during the travelling hours the workers were travelling for the purposes of work and "*would otherwise be working".*

165. Counsel therefore submits that the requirements of regulation 34 (1) will be made out unless the Appellants are entitled to rely on the exception for travelling between (a) the workers home… And (b) a place where an assignment is carried out.

166. Counsel concedes that the Appellant's position is that the workers were travelling between their home and a place where an assignment is carried out and thus the exception provided for under regulation 34 (1) is made out, however counsel argues the Appellants make the;

"*fundamental error of disregarding the requirements of the legislation to be given a purposive construction in accordance with auto cleanse, over and all of the modern case law on statutory interpretation".*

167. Counsel argues that the purpose of regulation 34 is to be ascertained from the overall purpose which is to protect vulnerable employees. Counsel submits that the purpose of the exemptions under the NMW regime to exempt time spent commuting is for a regular workplace and it would be surprising if the legislative intention is to enable employees to require low-paid workers to undertake much longer travel than ordinary commuting without being paid for doing so and it would run a coach and horses through the legislation's purpose. Counsel highlights two particular features;

i. The travelling hours were very much longer and more arduous than ordinary commuting and were completely under the appellant's control.

ii. The true agreement was that the Workers were required to report to the Appellant's office if the Appellant so chose and were paid for travelling hours on that basis in practice there are usually picked up a point near their homes as a matter of mutual convenience. It would be arbitrary and anomalous for a minority of workers required to attend the office to qualify for NMW and regulation 34 and other Workers picked up from near their home a few minutes away works are excluded

168. Counsel submit that the travelling hours in this case bear no relation to the much more limited travel at which the regulation 34 exception is directed.

169. Further and alternatively, regulation 34 should be construed so as to exclude protection by giving the employer the choice as to whether they are to commence the lengthy work-related journey either from home or at the employer's premises – to do so would facilitate evasion by unscrupulous employer

170. Counsel argues that Mr Gladwin was the only one of the Workers who responded to the questionnaires who said he was required to report to the office to be collected for a period of time. If the tribunal construe regulation 34 as only applying in those circumstances, Mr Gladwin will be entitled to the NMW for the time from the business to the farm while the others would be entitled to no payment and that is a matter of pure 'happenchance'.

171. Counsel submits that the travelling is work and regulation 30 and 34 should been given a purposive approach .

172. Counsel further directed me to the following cases which I have considered **BUPA**
Purchasing Ltd and others v Customs and excise Commissioners (No.2) [2008] STC 1010, [207] EWCA Civ 542. Focus Care Agency Ltd v Roberts [2017] ICR 1186.

Legal Principles

The Purpose of the NMWA

173. The right to receive the NMW was introduced on 1 April 1999 by the NMWA and is governed by the provisions of that Act and the NMW Regulations.

174. In its First Report the Low Pay Commission listed a number of goals for the NMWA. The broad aim of the Act has been defined by the Commission as to 'make a difference to the low paid while minimising burdens to business'.

175. More specifically, the Commission maintained that the Act was intended to reduce inequalities of income among workers and minimise social exclusion; to create a greater incentive to work by rewarding work more highly; to remove 'gross exploitation'; to prevent competition that focuses on low wages and creates a 'downward spiral' leading to low morale and low productivity, which is detrimental to both workers and businesses; to prevent the transfer of costs by some employers onto the benefits system, akin to taxpayers subsidising wage exploitation and unfair competition; and to support a competitive economy, with greater development of workers' skills (as opposed to competition focused on the lowest price of labour).

The NMWA

176. The National Minimum Wage Act 1998 provides pursuant to section 1(1) that:

"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"

177. Under section 2 headed, "*Determination of Hourly Rate of Remuneration*" it is provided:

"2(3)(a). The regulations may make provision with respect to –

(a) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated."

178. What is "*work"* for the purposes of the Act is to be determined by the NMW Regulations. It is not to be determined by the Working Time Regulations nor by any common law or conventional view of what constitutes work.

179. The NMW Regulations 1999 deal with the concepts of time work, salaried hours work, output work and unmeasured work.

Time Work

180. It is common ground between the parties that the Workers were engaged on time work for the purposes of NMW legislation.

181. *Regulation 30 provides that time work is work, other than salaried hours work, in respect of which a worker is* ***entitled under their contract*** *to be paid-*

a) by reference to the time worked by the worker;
b)by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or
c)for work that would fall within sub-paragraph (b)but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not excess a particular level.

182. What is “time work” is defined under regulation 3 as the meaning given to it under regulation 30. Regulation 30 requires a determination of what the contractual entitlement is. (The emboldened words are the tribunal’s own stress)

Regulation 30 the meaning of time work

*Time work is work, other than salaried hours work, in respect of which worker **is entitled under their contract to be paid** –*

*(a) By reference to **the time worked** by the worker;*
(b) by reference to a measure of output in a period of time with the work is required to work for the whole of that period; or
(c) for work that would fall within subparagraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.

183. There are also further provisions which set out when, regardless of the contractual arrangements, hours are to be treated as time work. The relevant regulations are;

Regulation 32 Time work where worker is available at or near a place of work

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

*(2) In paragraph (1), hours when a worker is “available” only includes hours when the worker is **awake** for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provide suitable facilities for sleeping*

Regulation 34 Travelling treated as hours of time work

*(1) The hours when a worker is travelling for the purposes of time work, where the worker **would otherwise be working**, are treated as hours of time work **unless** the travelling **is between** –*

*(a) **the worker’s home**, or a place with a worker is temporarily residing other than the purposes of working, and*
*(b) **a place of work or a place where an assignment is carried out**.*

*(2) In paragraph (1), hours treated as hours when the worker would **“otherwise be working**” include-*
*(a) hours when the worker is travelling for the purpose of carrying out assignments to be carried out at different places **between** which the worker is obliged to travel, which are not places occupied by the employer;*

(b) hours when the workers travelling where it is uncertain whether the work would otherwise be working because workers hours of work vary either as to their length or in respect of the time at which they are performed.

Regulation 20 Hours spent travelling

In this part, reference to travelling include hours when the worker is-

(d) in the course of the journey by mode of transport or is making a journey on foot;

(e) ***waiting at a place of departure to begin a journey*** *by mode of transport;*

(f) waiting at a place of departure for a journey to recommence either by the same or another mode of transport, except for any time the worker spends taking a rest break; or

(g) waiting at the end of the journey for the purpose of carrying out duties, or to receive training except for any time the worker spends taking a rest break .

Enforcement

184. Section 17 of the NMWA in essence provides that a worker who qualifies for the NMW and is remunerated for any pay reference period by the employer at a rate which is less than the NMW , is entitled under his contract to be paid the underpayment/difference.

185. Pursuant to section 19 NMWA an Officer appointed by the Secretary of State to act for the purposes of the NMWA, has the power to enforce that right under section 17, by issuing a notice of underpayment to the employer. The notice of underpayment must specify certain matters which are set out under section 19 (4) in respect of each worker, including the sum due.

186. Pursuant to section 19 A, NMWA, a notice of underpayment must, subject to this section, require the employer to pay a financial penalty specified in the notice of the Secretary of State within the 28-day period;

Section 19 A

(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) and (5B).

(4) The amount 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 is 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

187. Section 19 C provides the employer a right of appeal against the notice on the grounds that no sum is due to the work under section 17 or the amount set out in the notice is not correct;

Section 19C

(1) a person on whom the 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 the worker; (c) any requirement imposed by the notice to pay a financial penalty.

…

(5) an appeal under subsection (1) (b) above in relation to 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 a sum due to the worker is incorrect.

(6) *an appeal under subsection (1)(c) above must be made in either or both of the following grounds-*
(a) that the notice was served in circumstances specified in the direction under section 19 A(2) above, or the amount of the financial penalty specified in the notice of underpayment been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect the calculation 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, employment tribunal allows an appeal under subsection (1)(b) or (c) above-*

(a) employment tribunal must ***rectify*** *the notice, and*
(b) the notice of underpayment shall have effect as rectified from the date the employment tribunal's determination

[Tribunal Stress]

Record keeping

188. Section 9 NMWA provides that the Secretary of State may by regulation make a provision requiring employees to keep such records as may be prescribed and preserve those records for such period as may be prescribed.

189. It is a criminal offence to fail to keep or preserve such records, or to keep or produce false records — S.31(2)–(4).

190. The statutory duties that pass to the transferee of an undertaking under Reg 4(2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 (TUPE) include record-keeping obligations under S.9 NMWA in respect of a period before the relevant transfer: *Mears Homecare Ltd v Bradburn and ors 2020 ICR 31, EAT*. However, criminal liability does not transfer under TUPE.

191. Regulation 59(1) NMW Regulations provides that employers must keep records in respect of workers who qualify for the NMW sufficient to establish that such workers have been paid at a rate at least equivalent to the NMW;

59 records to be kept by an employer

(1) the employer of a worker who qualifies a national minimum wage must keep in respect of that worker record sufficient to establish that the employer is remunerated the worker at a rate at least equal to the national minimum wage.

(2) The records required to be kept in the paragraph (1) are to be in a form which enables the information kept about a worker in respect of the pay reference period to be produced in a single document.

…

(8) the records required to be kept by this regulation must be kept by the employer for a period of three years beginning with the day upon which the pay reference period immediately following that which they relate ends.

192. Employment tribunal in ***CIP Recruitment Services Ltd v Commissioners for HM Revenue and Customs ET Case No.2377744/11*** noted that, where an employer appeals against a notice of underpayment issued by HMRC : the burden of proof will be on it to demonstrate that it had in fact paid the NMW to the workers concerned. In the tribunal's view, therefore, to the extent that an employer did not have or produce at the appeal hearing the records required by what is now Reg 59 to show that it had paid the NMW, 'its appeal must fail'.

193. The obvious question that arises is what constitutes sufficient records.

194. The Department for Business, Energy and Industrial Strategy (BEIS) guide, 'Calculating the Minimum Wage' ('the BEIS guide'), lists examples of records that may suffice.

Burden of proof

195. Section 28 of the National Minimum Wage Act 1998 (NMWA) reverses the burden of proof

in national minimum wage (NMW) claims in any civil proceedings with the effect that employment tribunals must presume that a worker has been paid at a rate less than the NMW unless the employer can show otherwise. However, in terms of enforcement by HMRC, the Act is silent. I was not taken to the HMRC guidance by either party however, on preparing this judgement I have taken into account the HMRCs own internal guidance document; the HMRC – National Minimum Wage Manual updated on 21 April 2021 which provides as follows;

"General

It is the responsibility of employers to retain sufficient information (NMWM12140) to demonstrate that they are paying their workers at least the national minimum wage. Where a worker takes legal action in the civil court against their employer for not being paid at least national minimum wage the court, under section 28, will place the onus on the employer to provide their evidence to the contrary.

Position of HM Revenue & Customs

When NMW Officers take enforcement action against employers for not paying workers at least the national minimum wage they issue a notice of underpayment (NMWM13030). An employer can appeal against a notice of underpayment to the Employment Tribunal or, in Northern Ireland, the Industrial Tribunal under section 19C.

Where a Tribunal allows an appeal to proceed, the Employment Judge will consider and weigh up the evidence from both the appellant (the employer) and Respondent (HM Revenue & Customs). ***The onus to prove their case falls equally on both parties; there is no inbuilt reverse burden of proof on the employer to prove that a notice is incorrect in the first instance and both parties will be required to present their respective positions to the court.*** *(As NMW Officers undertake impartial investigations (NMWM12150), obtaining evidence from employers and workers, it is likely that most, if not all, of the evidence will be produced at a tribunal.)"*

[Tribunal Stress]

Case Law

Contractual Construction

196. The starting point in construing a contract is that words are to be given their ordinary and natural meaning. The interpretative exercise involves the court in identifying what the parties meant: "*Through the eyes of a reasonable reader, and, save perhaps in a very neutral case, that meaning is most obviously to be gleaned from the language of the provision*". ***Arnold v Britton 2015 UKSC 36 [2015] AC1619*** at [17].

197. It is not however for a tribunal or court to improve what has been agreed between the parties.

198. The 'golden rule' in ascertaining that intention is that the words of the contract should be interpreted in their grammatical and ordinary sense in context. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage however, as

counsel for the Respondent drew attention to in his submissions, the approach to employment contracts requires an appreciation of the imbalance of the respective negotiating positions of the parties and that the contract may not reflect the reality of the contractual arrangement.

199. The Supreme Court in ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157,*** *SC*, acknowledged that employment contracts are an exception to ordinary contractual principles as the circumstances under which they are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part';

" 20. The essential question in each case is what were the terms of the agreement. The position under the ordinary law of contract is clear…

88. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. ***The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.***

89. Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, [48] to [66], in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 with whom all the other law lords agreed. …"

21. Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. …

"But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. ***But in each case the question the court has to answer is: what contractual terms did the parties actually agree?"***

22. In this context there are three particular cases in which the courts have held that the ET should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship: Consistent Group Ltd v Kalwak ("Kalwak") [2007] IRLR 560 in the EAT (but cf [2008] EWCA Civ 430, [2008] IRLR 505 in the Court of Appeal) , Firthglow Ltd (t/a Protectacoat) v Szilagyi ("Szilagyi") [2009] EWCA Civ 98, [2009] ICR 835 and the Court of Appeal decision in the present case.

24. ***Those cases were examples of the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result.*** *The same approach underlay the reasoning of Elias J in Kalwak in the EAT.*

25. At paras 57-59 Elias J said this:

59. … ***Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"***

"The kernel of all these dicta is that the court or tribunal has to consider whether or not the ***words of the written contract represent the true intentions or expectations of the parties,*** *not only at the inception of the contract but, if appropriate, as time goes by."*

31. She added in paras 52, 53 and 55:

52. I regret that short paragraph [i.e. para 51] requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.

200. The Supreme Court In **Uber *BV and ors v Aslam and ors 2021 ICR 657, SC***, The Supreme Court pointed out that Lord Clarke's judgment in *Autoclenz* makes **clear that whether a contract is a 'worker' contract is not to be determined by applying ordinary principles of contract law. The Court in pointed out that it was critical to understand that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunal was primarily one of statutory interpretation, not contractual interpretation.** Furthermore, that interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. In the Court's view, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual fall within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent.

201. In the case before this tribunal, it is necessary to consider the contractual position when determining whether the travel to sites is time work given that regulation 30 refers expressly to the **contractual position**, mindful of the need to consider not only the express terms but whether those terms in reality reflect the true agreement between the parties. .

Regulation 34 : Additional category of work/ deeming provisions

Travelling to work

202. In the case of ***Whittlestone v BJP Home Support Ltd 2014 ICR 275, EAT*****,** the claimant was a carer who was required to make several home visits each day. She was paid £6.35 per hour for the time that she spent at the home of each service user but was not paid for the time she spent travelling between visits. A tribunal found that the travelling time was incidental to her duties and so she was not entitled to the minimum wage in respect of it. The EAT overturned that decision and held that the claimant's work was clearly assignment work. The situation was not the same as if she had been starting work at her employer's premises at the start of a shift and returning home after. She was obliged to visit each service user in turn and there was inevitably travelling time between each visit, which was within the general control of the employer who arranged the assignments. The travelling time therefore had to be remunerated;

"61. I turn to the second. The Tribunal simply did not deal with the question of assignments.

Travelling time is time work, except where incidental to the duties being carried out and the time work is not assignment work. It is clear that if the work which the Claimant was doing was properly to be regarded on the facts as "assignment work" the travelling time which she spent should have been remunerated. Here the general principle must be that for someone working the hours as indicated on the Respondent 's schedule, to which I have already referred, the fact that the contract called each separate visit a "shift" does not have the consequence that this was the same arrangement as if the Claimant had been starting work at her employer's premises at the start of an 8 hour shift or thereabouts and returning home after. She was on the rota and obliged to visit each service user in turn during the course of the day, and ***there inevitably was travelling time between them.***

62. ***That time was within the general control of the employer who was arranging the assignments****. The finding seems inescapable in the present case that with the exception of those periods, none of which were clearly identified in the decision, when the Claimant might have had so long between the end of one assignment and the next as to return home, such that the time would not be travelling time because it would be removed by Regulation 15(2)(b) from consideration, the work would be assignment work. It could be* ***nothing else within a common sense meaning of the word "assignment".***

203. In the case of ***Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security*****: C-266/14, *[2015] IRLR 935*, *[2015] ICR 1159*** the ECJ held that in the case of workers **who do not have a fixed or habitual place of work** (such as care workers who visit patients in their own homes and service engineers who travel to see customers), the time spent travelling each day between their homes and the premises of the first and last patients or customers constitutes 'working time' within the meaning of the Working Time Directive (2003/88/EC). The rationale is that during such time the worker is at work, at the employer's disposal and carrying out their duties or activities within art 2 of the Directive. However, the ECJ also stated that, annual leave apart, the Directive does not concern itself with worker's pay

so that whether a worker should be remunerated for such travelling time is entirely a matter for member states. Such travelling time is *not* to be treated as hours of time work when calculating whether the **national minimum wage** has been paid.

204. Government guidance on 'Calculating the Minimum Wage' states that the *Tyco* decision has no application to pay and advises that the **national minimum wage** is not payable for travel between home and the first or last client or customer of the day, regardless of whether the worker has a fixed place of work.

205. The relevant guidance is as follows;

Time spent travelling on business

*"Time spent travelling **between home and place of work and back again** (meaning commuting) does not count as working time when the minimum wage is payable (**unless the worker works whilst travelling, for example on a laptop on a train**).*

Likewise, travelling from home to a task or assignment will generally not be considered as working time for which the minimum wage is payable.
…

However, there are some periods of travelling which are considered as working time for minimum wage purposes. These include time when the worker is:

- *travelling **for the purpose of carrying out work***
- *waiting for a train or changing trains or any other form of transport in connection with work travel*
- ***travelling from one work assignment to another** – for example a care worker driving from one client to another between appointments*
- *waiting to either collect goods, meet someone in connection with work or start a job*
- *travelling from work to training venues – but travel between the worker's home and the training venue does not generally count*

Any rest breaks taken during travelling are treated the same as any other rest breaks and do not count as working time for minimum wage purposes."

Regulation 32 (1) : Additional category of work/ deeming provisions

206. The NMW regulations contain specific provisions dealing with the issue of how to treat time when the worker is merely *available for work (as opposed to when he or she is actually working*) under 32(1). Harvey in Industrial Relations and Employment Law (Harveys) suggests ;

"*This would no doubt cover workers who are on site, waiting for a piece of machinery to be mended or where the **start of a shift** is delayed and the worker has to wait in the company canteen for work to begin" and "NMWR SI 2015/621 reg 32(2) also provides that a time worker is 'available' for these purposes only during hours 'when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a*

place of work and the employer provides suitable facilities for sleeping". **[214.03]**

207. These provisions provide that certain 'on call' work *that would otherwise not be counted* is to be included in the minimum wage calculation.

208. In ***British Nursing Association v Inland Revenue*** *[2002] EWCA Civ 494*, *[2002] IRLR 480*, *[2003] ICR 19* which concerned time work, the question was whether duty nurses who operated their employer's emergency booking service during the night and from their homes were 'working' throughout their shifts so that all their work amounted to time work within NMWR reg 3 (now NMWR **reg 30**). It was relevant that the telephone service was provided on a 24-hour basis and that the only difference between day shifts and night shifts was that during the day the service was provided from offices around the country, whereas at night it was provided from worker's homes. The Court of Appeal held that in these circumstances the duty nurses were working throughout their shifts. As Buxton LJ put it:

> *"the question is whether [the night duty nurses] were nonetheless working when waiting to answer the telephone… as an issue of the ordinary use of the English language, it seems to me self-evident on these facts that they were indeed so working. No-one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to apply if the employer chooses to operate the very same service during the night-time… That in the event there may during the middle period of the night be few calls to field is nothing to the point." [Tribunal Stress]*

209. The entirety of the nurses' night shifts was held to come within reg 3 (now reg 30). The deeming provision in reg 15(1) (now reg 32), therefore had no application.

210. The court held that otherwise, a finding that the employees were only working when actually dealing with phone calls would have made a 'mockery of the whole national minimum wage system'.

211. The Supreme Court in *Royal Mencap Society* reviewed the *British Nursing Association* case and ruled that it had been wrongly decided. Lady Arden (at [58 and 59]):

> *"It would be anomalous if the regulations had the effect that the employee who was required to be* ***available*** *for work at home (but not actually working there) could be treated as working during the time they were expected to sleep while the sleep-in worker away from home was only entitled to have the time actually spent working taken into the calculation for NMW purposes. There is no reason why the regulations should put the employee who is at home in that preferential position, and it is*

therefore reasonable to assume that this was not the intention of the legislator."

"The better view in my judgment is that the effect of the home exception in reg 15(1) is that such an employee, i.e. an employee who is expected to sleep during his shift at home, and only to be woken infrequently, is not working but only available for work. The further effect of the home exception is that he is outside the extended meaning of work in reg 15 [now reg 32] and so, for his time to be included in the calculation for NMW purposes, he has to show that he is actually working. He can do this when he is actually performing duties as part of his employment. That puts him in the same position as the sleep-in worker who has to be available away from home. The case of the worker who would be a sleep-in worker but for the fact that by arrangement he sleeps at home has therefore not been omitted from the regulations as this analysis flows from the regulations when the basic distinction between working and being available for work is taken into account. It is significant, not
*happenstance, that the sleep-in provision and the home exception in reg 15(1) are attached to availability for work, and not to working**."***

212. The Supreme Court in *Royal Mencap Society* also overruled the Scottish Court of Session in ***Wright v Scottbridge Construction Ltd [2003] IRLR 21***where the Inner House of the Court of Session held that the night watchman was required to be on the employer's premises fell within the basic definition of time work in under what is no **reg 30,** even though at times the claimant had very little to do and actually spent some of his shift sleeping and that reg 32 had no application to the case.

213. Lady Arden in the Royal Mencap case made the following observation within her analysis;

(a) The meaning of "work"

*35. These appeals raise questions of **statutory interpretation,** and, in my judgment, I should not approach them with any preconception as to what should entitle the worker to a wage. It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work. Nor does the legislation proceed on the basis that the worker must be paid a living wage. Nor in my judgment is the NMW dependent on the extent to which the work produces value for the employer or enables the employer to say that he has fulfilled his duty to someone else: that would make the NMW depend on the terms of a contract between private parties.*

36. The objectives of the NMW as a social and economic measure are no doubt complex. It clearly helps to redress the law of supply and demand where there may be market failure, and the worker is not able to obtain basic recompense

for his labour, but there are no doubt other policy objectives which it serves. [Tribunal Stress]

Analysis

214. The starting point for my analysis of this case, is to consider whether the Workers when waiting and travelling to the sites, were entitled to be paid for that time pursuant to the contract of employment. If they were, they satisfy the *definition* of time work set out in regulation 30 and that is the end of the matter; the entire period will count in the national minimum wage calculation. However, if those hours do not fall within regulation 30, only then will it be necessary to consider the 'deeming provisions' in regulation 32 or 34 i.e. does that time nonetheless fall within what the statute *deems* to be work regardless of the contractual arrangements in place .

215. It is important not to confuse the legislation and jurisprudence on the Working Time Regulations and the NMW.

216. In terms of the construction of NMW and its application, I accept the Respondent 's submissions that it is for this tribunal to determine the applicability of the NMW regulations and the issue is not whether the Respondent was reasonable in its interpretation of the legal principles or what the legal rationale of the Officers concerned was. They may have arrived at the correct legal decision by incorrect legal reasoning.

The contractual terms

Express Terms

217. The express terms of the standard form contract of employment issued to the Workers during the period of review, provides that payment during travelling time to the first Assignment Work (not defined) and after the last Assignment are "*not normally payable*". It does not state that the parties agree that it will never be payable. The clause is vague about when this type of travel may or may not be paid for.

218. Clause 3.3. states that time spent travelling to and from the client at the beginning and end of the day are unpaid, but it also states that this does not apply where the travel is 'on Assignment Work". Assignment Work is not defined in clause 3.3 however clause 3.1 refers to travel to the first 'Assignment Work' of the day. This would seem to imply that the first site of the day may be included within the meaning of 'Assignment Work' . It is unclear therefore what travel time is expressly excluded under 3.3.However, I do not consider that clause 3.3 is of particular assistance because it is headed ' working time directive' and the clause refers to the definitions being for those purposes and it is not on all fours with clause 3.1

219. Counsel for the Respondent quite rightly points out that in an employment context there has to be consideration of whether what is set out actually reflects of the contractual
arrangement. It is not about improving the contract because the court or tribunal considers that the contract is unfavourable to one party (outside

of statutory protections which may imply terms such as an equality clause). The role of the courts or tribunal is to ascertain the actual contractual arrangement between the parts.

220. It may be unpalatable for low paid workers to travel hours to reach their worksite, whether the deal is a good one or not however, it is not for this tribunal to interfere with and improve the contract terms. It is not alleged, and nor do I find that the Workers were operating under any duress, that was not the Respondent 's case in any legal sense, nor was there any evidence from the Workers to that effect.

What contractual terms did the parties actually agree?

221. There is no express clause in the contract of employment requiring the Workers to travel to the Appellant's workplace to be collected and taken to site from there. There is no express term limiting the amount of travelling time. There is no express term applying any disciplinary action or penalty for failing to take the minibus to site. There is no express term requiring the Workers to use the Appellant's vehicles to get to site. We therefore need to consider whether to imply terms from the arrangements as they operated in practice.

Obligation to travel from Appellant's premises and on a company vehicle

222. There was no express contractual obligation to travel to the Appellants' premises before commencing the journey to the first assignment. However, Mr Martin Taylor during the first meeting on 8 December 2016 [64], referred to this as the ' official' line. The Appellants did not give evidence to dispute the evidence of Mr Gladwin that when not convenient to the Appellants (because he lived out of the locality) he was required to attend their site to be collected by the minibus and he did so. As presented by the Appellants in the various interviews, the Workers could choose to be collected from home however, I conclude that this was something the Appellants were content to accommodate where it was convenient for them to do so. Where it was not convenient to the Appellant, they could compel the Workers to attend site first. The Appellants did not give evidence to contest the evidence of Mr Woods either, that on occasion he attended site to be picked up at the request of the driver.

223. I find that the reality of the arrangements, was that the Workers were contacted by the drivers and told when they would be picked up from home. However, if this was not convenient for the Appellants or driver, the Workers would be required to attend the employer' s premises first and did so. This therefore I find formed part of the contractual arrangements as understood by the parties.

Obligation to travel in a company vehicle

224. The Appellants at the 12 February 2019 meeting mentioned the various problems that they would encounter if the Workers used their own transport (MOT, insurance, cross contamination etc) and that they would go out of business if the Workers did so . There is no evidence

from the Workers that they wanted to use their own transport or ever asked to do so and this was refused. The evidence also does not however support a finding that the Workers had in reality a choice. They were never told they had a choice and they did not I find, from their replies to the questionnaires, understand that there was one.

225. As set out in the findings, the Workers were required in practice to travel to site by a company vehicle. This was the consistent arrangement in place in practice and it was an important part of the Appellants business model. This therefore I find formed part of the contractual arrangements as understood by the parties.

226. There was no consistent picture of a system of penalties or disciplinary action in the responses from the Workers, albeit quite a few referred to not being picked up the next day or for the rest of the week if they missed a pick-up . The Appellants at the 12 February 2019 meeting went some way to indicating that failing to be picked up may cause issues in the team. I conclude that the arrangements were ad hoc, and that there were occasions when if a Worker missed a pickup, they were not given further shifts perhaps for the next day or rest of the week but there was no clear structure or policy behind this. I do not find sufficient evidence to support a finding of money being deducted from wages for missing the minibus and this was never directly put to the Appellants.

227. In practice I find that unofficially however there could be consequences if a Worker missed a pick-up and there were occasions when they were not given work the next day or for a number of days and that this was condoned by the Appellants. The Appellants certainly did not give any indication that they attempted to prevent this practice. In any event, the Workers understood that they could not make their own way to the site and the minibus would not return for them (unless very close by) and would therefore as a minimum lose a day's work and that this also formed part of the contractual arrangements as understood by the parties .

Travel times

228. In terms of the travel arrangements and how they were conveyed to the workers, (question 7) the replies were fairly consistent in terms of the arrangements, in that they were notified the day before either verbally or by text ;

" Travel arrangements were always made the previous day. This would be verbally communicated if I was physically with the driver/foreman at the time. Otherwise it would be communicated via text or phone in the evening." Mr Wood [287]

" Foreman would ring round and give each individual time" [295]

"BW said that they normally knew where they were going to the next day as often it was the same destinations for 3 days or so. People could also go to the office and find out where they were going if they wanted to." [351]

"Estimated travel with a minimum of 4 hours to a 7 hours round trip including pick up" [295]

"Daniel said the farms were in remote locations and they had no clue where they were travelling… Daniel said …only the drivers knew the postcodes. He said the pick times were at times 2am or 3am… He said the drivers would find out from the office about locations and start times for assignments and would then notify the workers of times of collection" [357]

229. I do not accept from the replies received that it was reasonable to form the view, and nor do I find the evidence supports a finding, that the workers often did not know how long the journeys would be. The evidence suggests they were given information not about the precise location
but the pick-up times at least the day before, and I find they would have been put them on notice of the likely journey times at the latest at that point.

230. The Appellant's recruited locally and by Facebook or word of mouth. I am satisfied that on accepting the job they understood in broad terms that travel to sites would be involved and that this may involve long journeys and they accepted the job on that basis.

Payment

231. As set out above, the contract of employment provides that payment during travelling time to the first Assignment Work and after the last Assignment are "*not normally payable*". The clause does not expressly provide that payments are at the discretion of the employer.

232. There was no consistent evidence from the Workers on what their understanding was of the arrangements about being paid for travel.

233. The Appellants' evidence in December 2016 was that travel was paid to sites, but not at the same rate paid for work carried out on site. They were paid a lesser amount for travel; " *because they were just sitting in a van*". The First Appellant paid for one-way travel to site but not the return journey and then in 2015 they changed the practice to pay for both journeys but again a lower rate, until August 2015. On the evidence the Appellant's provided, they paid for travel albeit they varied the amounts and arrangements in practice but never committed this into writing.

234. Mr Gregory who was a credible witness, gave evidence that he left because they would only pay for hours he worked and not travel. He received payments but the first Appellants presented it as something they were not required to do.

235. I find on balance of probabilities, that travelling hours were paid but the arrangement was unclear to the Workers and never formalised but that in practice payments were.

236. As counsel rightly points out, if the contract attempts to contract out of the NMWA that would be a void term. What counsel however argues is the payment is a factor to consider when deciding whether the time spent on the bus should be viewed in reality as time work and that payment reflects an understanding of that in practice.

237. Counsel for the Respondent argues that the Worker's were under the control of the Appellants in that they had to be on the minibus during certain periods and during that time were under their control and that this is an important factor.

238. I remind myself of the comments of Lady Arden in the Royal Mencap case; "*It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work" and "The further effect of the home exception is that he is outside the extended meaning of work in reg 15 [now reg 32] and so, for his time to be included in the calculation for NMW purposes, he has to show that he is actually working. He can do this when he is actually performing duties as part of his employment.*

239. However, I have also considered the comments of Mr Justice Langstaff in the EAT who when considering whether the claimant's travel in that case, between shifts was 'work' he observed that "*work is not to be equated to any particular level of activity . The saying "they also serve who only stand and wait" is true but it does not necessarily assist in knowing whether the standing and waiting is work or whether it is not." And "authorities show that where a persons' presence at a place is part of their work , the hours spent there irrespective of the level of activity are classed as time work".*

240. Difficult cases may arise where workers are obliged to be present at a particular place but not carry out activities as such. Their presence may amount to their working. Conversely it may not.

241. The EAT held that the time when Mrs Whittlestone was travelling between assignments , where that time had been within the general control of the employer who had been arranging the assignments, was time work.

242. In carrying out a realistic appraisal of the circumstances and the context; the Workers in the case before us were not performing activities as Flock Technicians while being driven to the first site and back again. The Workers in accepting the job had to be prepared to travel long distances, sometimes the journey times were very significant, it could be for example an 8 hour journey on top of a working day.

243. On an ordinary definition of 'work', denoting some activity, the Workers were not performing work while sat on the minibus. However, the context is all important in determining whether they were in reality performing work for which they should have been paid under the contract. The travelling arrangements were within the control of the Appellants', the workers were required to attend the place and time specified by the Appellant even if that required them to wait for the minibus to arrive (this could be at their home or at the end of the street). When not convenient for the Appellant regardless of the inconvenience or cost to the Worker, (as in the case of Mr Gladwin) the Workers were then required to attend the business offices to be taken by minibus. If

they failed be present at the place arranged at the time specified, they would more often than not, not work that day and lose a day's pay. They may find that they would lose further shifts albeit this was not I find, a formal penalty system but one I find was in practice condoned by the Appellant.

244. The Workers worked on the sites arranged by the Appellants. The Workers had no control over where the work would be carried out. They were taken to the destinations chosen by the Appellant and were paid for the travelling hours at various rates determined by the Appellants, which were not paid dependant on the journey length (albeit bonus payments appear to have been paid for particularly long journeys e.g. Anglesey).

245. The Appellant's on the 12 February 2019 conceded that journeys of 2 to 4 hours was not commuting time. So what was it?

246. While being physically on the minibus and not performing the main duties for which they were employed to perform , they could if they wished sleep (but there was no modification to the vehicles to enable the Workers to sleep comfortably on the bus).

247. In conclusion; on the very specific facts of this case, I conclude that the travelling time to the first assignment/site of the day and back again, was ' time work for which ' in respect of which they were entitled to be paid under the contract. The Appellants could require the Workers to come to the business offices to take the transport. When mutually convenient the Appellants did not impose this obligation but both parties I find, understood that this was part of the contractual arrangement in place. The Appellant's paid for the travel time to sites albeit, the contract stated this was not 'normally payable' and they presented this to the Workers as something which was discretionary. The extent to which it was 'discretionary' was not set out in the express terms of the contract or in practice. In practice travel time was paid (based on the Appellant's own case) but at various amounts and terms.

248. The length of the journeys and the type of client is particularly important in this case because it meant that the Appellants had to control the arrangements for travel and dictate the mode of transport, collection times and route. They had to exert an unusual amount of control over the method and arrangements for travel.

249. The travel around the country to various sites was I find part and parcel of this job. While not carrying out any activities in the natural sense of the word, while on the minibus or in the car, they were not able to return home, they were under the control of their employer who was in control of where they were going, how far they would travel, what route they would follow.

250. The reality of the arrangements I find, was that the travel (which could be extreme and extremely variable), was part and parcel of this type of job in practice and was treated as such by both parties.

251. The business model required the labour to be moved around the country at the direction and control of the employer. This was not a normal commute; it was travel they could be contractually compelled to commence from the employer's premises to the premises of their clients. I do not find that the express terms of the contract excluded this travel as working time (other than for the purposes of the WTD) but in any event, the contractual arrangements in practice were such that the travel and waiting time, was part of the Assignment Work and treated as such.

252. I therefore conclude that on the specific facts of this case, the time spent travelling under the control of the employer to site and waiting to be collected for that purpose (when they were waiting at the stipulated collection time) and the travel back was part of their ' work' , they could not have carried out the work of a Flock Technician without also carrying out this type of extremely variable and at times extremely arduous, travelling under the control of the employer; it was in practice part and parcel of the work they were employed to perform.

Deemed/ Extra categories of time work

Regulation 32.

253. I do not need to go on to consider the deeming provisions but shall do so briefly.

254. I do not consider regulation 32 applies in this case other than in circumstances where the Workers are waiting at the client site or business premises, to be collected to travel to or from site. I have determined that the travel is itself ' time work' and therefore the time spent waiting to start the journey to or back from the sites, would be time when the Worker was '*required to be available for the purposes of working'.*

255. I have in any event determined that waiting time is in these circumstances also 'time work' (see above) but if not, it would be covered by regulation 32.

Regulation 34

256. Regulation 34 NMW Regulations are deeming provisions.

257. Where for example, a worker is working during a train journey (e.g. he is working for his employer by doing work-related reading or correspondence on the train) , then the hours will count as time work in any event.

258. If the worker cannot be said to be working during travelling time it is necessary to consider regulation 34 to see if the relevant hours are nonetheless deemed to be treated as hours of work. The starting point under both reg 34 is that hours spent travelling for the purposes of working, where the worker *'would otherwise be working'*, will be counted in the minimum wage calculation. This

would clearly cover business travel within the working day. However, time spent on the daily commute is not covered by regulation 34 , at least where the worker has a set start and finish time, as this is not time where the worker would *otherwise be working.*

259. Similar reasoning applies where the worker is required to work away from his usual place of work on a particular day (but is to start at his normal time); this commuting time would not count either as time work, even if the journey is significantly longer than normal.

260. Regulation 34(1)(a) *expressly excludes from the calculation hours spent travelling between the worker's home (or a place where the worker is temporarily residing other than for work) on the one hand, and a place of work or a place where an assignment is carried out on the other*. This wording may well be considered not necessary to exclude commuting time because, such hours (as I have stated above) are not time when the worker *would otherwise be working* and so are not covered anyway.

261. It is important to note that reg 34(2) provide two instances of travelling time when the worker would *'otherwise be working'*, and which are therefore treated as time work :

- Regulation 34 (2) (a): hours when the worker is *'travelling for the purpose of carrying out assignments to be carried out at different places* ***between which*** *the worker is obliged to travel, and which are not places occupied by the employe*r' . This applies to the peripatetic work where, for example, the worker travels from one customer or client to another during the working day such as in the ***Whittlestone v BJP Home Support Ltd***.

- Regulation 34 (2) (b): this covers the situation where the worker is travelling *'where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed'*

262. I do not find that we need to consider whether regulation 34 applies because I have determined that the travel is of itself 'work'. However, if this is not correct, and the travelling time is not time work under regulation 30, then the travelling time would not be hours when the Workers *would otherwise be working*. The Respondent does not allege that if the workers had not been picked up at 2am they would have been catching chickens etc from that time, they would have been doing this type of work only as and when they arrived at site, at for example 7am.

263. I have gone on to consider whether they would have 'otherwise been working' within the definition in regulation 34 (2).

264. Giving the statue its ordinary meaning, the words "*between which*", must mean that this subsection is intended to cover a situation where the worker is travelling from one place to another to do assignments. In this case we are concerned with the Workers time not spent travelling from one site to another, but

from home (or the employers' premises) to the first site. I do not consider therefore this applies. It would however apply to their travel *between sites.*

265. I have also considered regulation 34 (b); when the Workers are travelling to the first site, is it uncertain whether they would otherwise be catching chickens etc because their hours vary as to the length or times when they are to carry out this work? On the evidence, this does not apply. While the locations and start times varied, the Workers knew in advance what time they were due to start work. I do not accept that while travelling they did not know whether they would otherwise on the farms carrying out the physical activities of their role. They were told at least the evening before, about the arrangements.

266. Even if it the time on the minibus was time when they would *otherwise be working*, it is argued by the Appellants that this would be exempted anyway under regulation 34 (1) because they were travelling from their home to the place where the assignment was to be carried out (i.e. not from the employers premises). Contractually the Workers could be compelled to come to the employer's premises first, however in practice they did not (other than occasionally). The regulations simply refer to the hours spent travelling, they do not stipulate that what is relevant is where the worker can be contractually required to travel to.

267. Thus arguments about what is normal commuting is not, for these purposes relevant, the regulation does not refer to commuting, it refers to travel where ' *the worker would otherwise be working'* and applies exemptions to that.

268. Counsel for the Respondent invites the tribunal to apply a purposive approach to the regulations, but I find that what he is inviting the tribunal to do is put a gloss on the meaning of regulation 34.

269. The wording is clear, and it does not restrict the amount of excluded travelling time. It does not stipulate that it only relates to travel of a particular duration. Indeed counsel for the Respondent did not propose what such a restriction should be in any event; is it all travelling above 2 hours or what may be deemed reasonable ?

270. Counsel submits that the travelling hours in this case bear no relation to the much more limited travel to which the regulation 34 is directed – but what travel is it directed at? There is nothing to assist the tribunal in terms of what may have been intended and nor does counsel assist by directing the tribunal to any guidance.

271. Counsel also submits that regulation 34 should be construed so as to exclude protection by giving the employer the choice as to whether they are to commence the lengthy work-related journey either from home or at the employer's premises. However, there is nothing within regulation 34 which refers to the contractual situation regarding what the travel arrangements are.

272. In this case before us, the relevant travelling was between the Workers home and the first site and if not held of itself to be time work under regulation 30/the contract, would fall within the exception in regulation 34 (1) (a) and (b) **but** only of course, where the worker would *otherwise be working* (which is not applicable here because it is not argued by the Respondent that the Workers would otherwise be carrying out any work if they were not travelling on the minibus).

273. In summary, this is not a straightforward case. While time travelling may not normally be considered 'work' because it involves no activity as such, given the particular facts of this case, I conclude that the travel (which can be exceptionally lengthy, in some cases the equivalent of a whole working day, and varied and under the control of the employer) and waiting time to, and from the sites, was part and parcel of this type of job. The arrangements in practice were such that the Workers were carrying out *actual* 'time work' for which they should accordingly have been remunerated under the contract of employment.

274. The calculations are not challenged by the Appellants.

275. **Both the Appeals under section 19C (1) NMWA against the Notices served on the First and Second Appellant are not well founded and are dismissed in their entirety.**

276. **The decision to serve the Notices was correct. The amounts and arrears specified are correct.**

Employment Judge Broughton

Date: 8 September 2021

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER ON

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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