EMPLOYMENT TRIBUNALS

Appellant: Alpha-Omega Securities Limited

Respondent: The Commissioners for H M Revenue and Customs

Heard at: Manchester (by CVP) **On:** 19 May 2023

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Appellant: Mr S Redpath, Counsel
Respondent: Mr S Lewis, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. To the extent that the notice of underpayment issued against the appellant included sums paid by Mr C Muller for his accommodation from November 2018 onwards, the notice will need to be rectified in accordance with section 19C(8) of the National Minimum Wage Act 1998.

2. In respect of all other grounds of appeal, the notice will not require rectification.

REASONS

Introduction

1. The appellant was issued with a notice of underpayment by the respondent under sections 19 and 19A of the National Minimum Wage Act 1998 on 25 August 2022. The appellant has appealed and sought rectification of the notice of underpayment with regard to the sums said to be due to the workers and the financial penalties imposed, to the extent that those notices of underpayment related to three workers employed by the appellant: Mr John Gibson; Mr Paul Cartwright; and Mr Christopher Muller. The issues in dispute all related to the provision of accommodation and arose from the limits upon deductions which can be made in

respect of living accommodation detailed in Regulation 14 of the National Minimum Wage Regulations 2015.

2. The respondent maintains that it was right to take the position that it did in respect of the provision of accommodation.

Claims and Issues

3. Regional Employment Judge Franey made a Case Management Order on 16 January 2023 which was sent to the parties on 18 January 2023. In that order the issues were set out. Those issues were the same as those which had been recorded in an agenda prepared by the parties in advance of the order being made.

4. The issues to be determined were as follows:

(1) Was the respondent correct to treat as a reduction amounts for the provision of living accommodation as provided by Regulation 14 of the National Minimum Wage Regulations 2015?

(2) In the case of each worker, was the appellant entitled to make any deduction, or to receive any payment from a worker, as respects the provision of living accommodation in any of the pay reference periods for the purposes of Regulation 14 or at all?

(3) Did the appellant provide living accommodation to these workers in the relevant pay reference periods?

5. At the start of this hearing, it was confirmed that those were the issues to be determined.

Procedure

6. Each of the parties was represented by counsel at the hearing. The hearing was conducted entirely by CVP remote video technology.

7. An agreed hearing bundle was provided which ran to 255 pages. The parties also provided a bundle entitled *"Authorities, Legislation and Guidance"* which ran to 253 pages. Where a number is referred to in brackets in this Judgment it is a reference to the page in the bundle. Where the number is prefaced by an "A" then it is a reference to the page in the authorities bundle.

8. The Tribunal heard evidence from Mr Ken Lawton, a director of the respondent and a 97% shareholder. He provided a written statement in advance of the hearing. He confirmed the accuracy of his statement under oath and was cross examined by the respondent's representative before being re-examined.

9. The Tribunal also heard evidence from Mr Christopher Muller, a former employee of the appellant. He also provided a written statement and was briefly cross examined by the respondent's representative.

10. In the afternoon, evidence was heard from Mr Dan Atkins, a Compliance Officer, who gave evidence on the respondent's behalf. He was cross examined by the claimant's counsel and briefly re-examined.

11. At the start of the hearing the appellant provided a skeleton argument and made an opening statement, something to which the respondent's counsel did not object. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's submissions were made by way of a skeleton argument and oral submissions. The appellant's counsel made closing submissions orally, referring to the content of the skeleton argument which had been provided at the start of the hearing.

12. Judgment was reserved and accordingly the Tribunal provides the Judgment and Reasons outlined below.

Facts

13. The relevant facts as they applied to this case were largely not in dispute, save for some limited points.

14. The appellant is a company which provides security guarding, door supervision, CCTV, events and keyholding services. It was formed by Mr Kenneth Lawton in 1997 and incorporated in May 2001. It employs approximately 200 people at any given time, although the nature of the sector means that there is a high turnover of staff.

15. Mr Kenneth Lawton is the Managing Director/CEO and statutory Director of the appellant company. He is also a 97% shareholder in the company. The remaining 3% of the shares is held by another individual who is the Operations Director. Regular Directors' meetings are held, and Mr Lawton was keen to emphasise that he and his co-director make most decisions jointly. However, based upon the size of Mr Lawton's shareholding I find that in practice he is the controlling mind of the appellant, and he would have the ability to make key decisions where they were opposed.

16. The appellant owns two commercial premises. It does not own any residential properties.

17. Mr Lawton, in a private capacity, owns a number of properties. Those properties are rented out to individuals. Those properties include 38A Edleston Road.

18. On 1 August 2016 an employee of the appellant, John Gibson, rented the property at 38A Edleston Road. I was provided with an assured short-hold tenancy (33). That provided that Mr Lawton was the landlord and Mr Gibson the tenant. The agreed rent was £450 per month inclusive of bills. Mr Gibson rented the premises for approximately three months until 31 October 2016. He then left the premises. After leaving the premises, Mr Gibson continued to be an employee of the appellant until 5 February 2020.

19. Whilst I was not provided with such a document, Mr Lawton's evidence was that he believed that Mr Gibson would have entered into an agreement comparable

to that entered into by Mr Muller (99). That is that he would have signed a document on the appellant's headed paper which gave the appellant the authority to deduct monies from his wages in order to pay the rent for the relevant property. That document would have been signed by Mr Gibson.

20. Another employee of the appellant, Paul Cartwright, rented the apartment at 38A Edleston Road from 20 April 2017 until 2 July 2017. I was provided with an assured short-hold tenancy agreement made on 20 April 2017 (50). The landlord was Mr Lawton with a contact address stated to be the appellant and the appellant's address. The tenant was Mr Cartwright. The rent was £450 per calendar month, to include bills. The term of the agreement was for a period of six months, albeit it did not in practice last that long. Mr Cartwright continued to work for the appellant after leaving the premises, until 11 May 2019, and he was re-employed by the appellant between March 2022 and January 2023. As with Mr Gibson, Mr Lawton's evidence was that Mr Cartwright would have signed a document entitling deductions to be made from his wages equivalent to that signed by Mr Muller (99).

21. In the case of both Mr Gibson and Mr Cartwright, during the period when they were tenants of Mr Lawton's premises, the rent due for those tenancies was deducted from their wages by the appellant and thereafter paid to Mr Lawton.

22. In his evidence, Mr Lawton was keen to emphasise that the fact that the individuals were employed by the appellant had no bearing on the lease arrangement, and he said that the fact that the individuals remained employed after they left the premises demonstrated that the accommodation and the employment *"were not connected"*. Contrary to what Mr Lawton said in evidence, I find that there was clearly a connection between the employment and the accommodation because the rent was deducted by the appellant from the wages due, but I accept that none of the individuals were required to reside in the premises, and their doing so was not a component part of their employment.

23. On 1 December 2010 Mr Lawton purchased a property at 117 and 117A Edleston Road. The purchase was made jointly with a friend, Mr Darren Stanley. The evidence before me was that Mr Stanley had no relationship to the appellant. Mr Lawton's evidence was that he and Mr Stanley were, as two individuals, registered owners as tenants in common. The flats were let jointly, and rent paid into a collective bank account which used the initials KKDL. Those initials indicated that it was a joint account which had been held by Mr Lawton and his then partner, Mr Stanley and his partner. In his evidence, Mr Lawton confirmed that in fact his partner had ceased to be a part of the joint account prior to the date when Mr Muller became a tenant in 117A. Mr Lawton was effectively therefore the recipient of half of the rent paid by Mr Muller; the other half being for the benefit of Mr Stanley and his partner.

24. Mr Muller began working for the appellant in August 2016. In August 2018, Mr Lawton provided Mr Muller with a lift home on a couple of occasions. As a result, he identified that Mr Muller was sleeping rough. Mr Lawton offered Mr Muller the flat which was 117A Edleston Road. The flat was vacant at that time. It was Mr Lawton's evidence that Mr Muller had suggested that the rent could be paid straight from his wages at first. The rent for the flat was initially £525 per month including bills.

25. Mr Muller signed an assured short-hold tenancy agreement on 17 August 2018. That described the landlord as Mr Lawton and Mr Stanley. It provided the appellant's contact address as the address for both of them. It also provided Mr Lawton's email address at the appellant as the contact email address. The tenant was Mr Muller (60). The term was for six months, to continue monthly thereafter. Mr Muller's evidence was that the landlords were Mr Lawton and Mr Stanley, and that Mr Stanley had no connection to the appellant as far as he knew, and he met Mr Stanley once or twice when he came to do maintenance on the flat.

26. Mr Muller signed a document on 24 August 2018 which was on the appellant's headed paper, which stated that Mr Muller gave the appellant the authority to deduct money from his wages in order to pay for his rental of 117A Edleston Road. That provided that deductions would be £525 per month for months one to six (that rent included the monthly rent of £450 plus £75 towards a month's rent in advance), and £450 from month seven onwards. The payments were stated to commence on 31 August 2018 (albeit it is not clear whether they did so) (99).

27. The Tribunal was provided with three of Mr Muller's payslips with the appellant, each of which recorded that £525 had been deducted for rent. These were payslips for 31 August 2018 (101), 28 September 2018 (108) and 26 October 2018 (104).

28. The respondent also provided some online bank transfer authorisation forms. These provided for funds to be transferred from the appellant to a payee for the stated purpose of *"rent C Muller"*. Each of the forms stated that the payee was Mr Lawton. The form of 10 September 2018 (100) contained an account number that Mr Lawton identified was his own personal bank account. The forms for 16 October 2018 (107) and 31 October 2018 (103) contained a number which Mr Lawton explained was the KKDL account, to which he had a 50% entitlement (albeit the forms only recorded the payee as Mr K Lawton).

29. It was Mr Lawton's evidence that, from November 2018, Mr Muller paid rent for the flat from his own bank account directly to the KKDL bank account, by a standing order which was set up with his bank. From November 2018 no deductions were made from Mr Muller's wages in respect of rent. Mr Muller continued to remain a tenant in the property and paid rent for all the pay reference periods from 1 November 2018 to 31 March 2021.

30. There was some dispute about what prompted the change in the arrangements for payments for the accommodation from Mr Muller. Mr Rehman, the first Compliance Officer who had dealings with the appellant, had visited the appellant and identified concerns with the payments made to Mr Muller at around the time when the arrangements were changed. There appeared to be some suggestion from Mr Lawton's oral evidence (albeit it was not in his witness statement) that he changed the arrangement on the advice of Mr Rehman. There was no other evidence that showed that was the reason why he had done so or that advice had been provided. The respondent argued strongly that Mr Rehman would not have provided advice. In any event, it was clear that a catalyst, at least in part, to the change in the arrangements for Mr Muller's rent payments was the interest of the respondent in the relevant arrangements.

31. The bundle included a significant amount of correspondence between the parties which it is not necessary for me to recount in this decision. The process culminated in a notice of underpayment of 25 August 2022 being issued (1) which required the payment of £13,777.31 of total arrears due to workers and £23,682.38 of penalty to be paid to HMRC. The matters which were in dispute in this appeal were only a part of the notified underpayments.

32. I was provided with extracts from the Low Pay Commission report of 2006 into the National Minimum Wage. That recommended that the Government should implement legislative measures to prevent employers using the device of a separate accommodation company to evade the accommodation offset. It also recommended that guidance should be made available (A164).

33. I was also provided with Guidance from the Department for Business and Trade on calculating the minimum wage ("the Guidance"). It was common ground that the guidance had originally clarified the law in 2007. The current guidance was provided (A237). That contained a detailed passage about when living accommodation would be considered to be provided by the employer. That stated the following:

> *"You will be considered as providing living accommodation in the following circumstances, whether or not the accommodation is provided by you or a third party:*
>
> - *the accommodation is provided in connection with the worker's contract of employment.*
> - *the worker's continued employment is dependent upon occupying particular accommodation.*
> - *the worker's occupation of accommodation is dependent on remaining in a particular job."*

34. The guidance went on to say:

> *"Even where the provision of accommodation by you and the worker's employment are not dependent upon each other, you may still be considered to be providing living accommodation if one of the following applies: …*
>
> - *Your and the landlord's businesses have the same owner, or business partners, directors or shareholders in common.*
> - *You or an owner, business partner, member, shareholder or director of your business receives a monetary payment and/or some other benefit from a third party acting as landlord to the workers"*

35. The Guidance also said:

> *"The accommodation offset will apply whenever you are providing living accommodation, regardless of whether the worker can choose whether or not to occupy the accommodation. Even if the provision of a living*

accommodation is optional, where the worker chooses to accept the offer, the accommodation offset will apply."

36. As the appellant's representative highlighted, a previous version of the Guidance made clear in the document the limitations which apply to it (A205):

"It is important to note that the information and examples contained in this note are intended to provide general guidance. They reflect the Government's understanding of the way the law operates in practice and are <u>not</u> to be regarded as complete or authoritative statements of the law."

37. The Tribunal was also provided with the HMRC manual NMWM10040 (A234) ("the Manual"). That contained guidance which broadly mirrored that contained in the above Guidance save that the relevant list which detailed matters which might be considered to be circumstances where the provision of living accommodation would apply, instead appeared to be stated to be circumstances in which it was mandatory that the company would be considered to be the provider of the accommodation, rather than being optional matters which might do so.

38. In his evidence, Mr Atkins explained the steps that had been taken by the respondent and provided evidence about the steps undertaken by the four different Compliance Officers who had handled the case. It had been Mr Atkins who had been dealing with the case at the time that the notice was issued. He explained why he had taken the position which the respondent had taken on the accommodation costs. In answers to questions, Mr Atkins emphasised that he had not simply followed what had been said in either the Manual or the Guidance, but rather he had considered all the circumstances alongside the Manual and the Guidance. Mr Atkins confirmed in re-examination that a letter which he had sent to Mr Lawton on 15 July 2022 explained the position by reference to both the Manual and the Guidance (214). I accepted Mr Atkins' evidence that he considered all the circumstances including the Manual and the Guidance, when he made his decision.

The Law

39. In his skeleton argument, the appellant's counsel provided a useful account of the relevant provisions that applied. He started by highlighting section 1(1) of the National Minimum Wage Act 1998 which provides that:

"A person who qualifies for the National Minimum Wage shall be remunerated by the employer in respect of his work in any pay reference period at a rate which is not less than the minimum wage."

40. In this Judgment I will refer to the relevant provisions as applying to the National Minimum Wage, albeit that, following the development of the law, it now applies for those of the requisite age to the National Living Wage.

41. The key provision under consideration in these proceedings was Regulation 14 of the National Minimum Wage Regulations 2015. That provides the following:

"(1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the

> *worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16, unless the payment or deduction falls within paragraph (2).”*

42. This case did not involve consideration of Regulation 14(2). Regulation 15 also did not need to be considered. Regulation 16 provides a maximum amount which can be taken into account in respect of living accommodation, described as the accommodation offset amount.

43. The term “*employer*” is not defined in the 2015 Regulations. It is, however, defined in the National Minimum Wage Act at section 54. That says that, in relation to an employee or a worker, “*employer*” means the person by the whom the employee/worker is employed. It was not in dispute that the decision of the Employment Appeal Tribunal in **Revenue and Customs Commissions v Ant Marketing Limited [2020] IRLR 744** confirmed that the word “*employer*” (and the related other provisions) were limited to the employer as defined in the Act.

44. The Judgment in the **Ant Marketing** case was one upon which both parties placed emphasis. In that Judgment the President of the Employment Appeal Tribunal, Choudhury J, had gone on to consider an issue that was outside those that needed to be determined in that appeal, but which he considered important and relevant. That was whether “*the provision of living accommodation by the employer*” in regulation 14(1) covered the provision of living accommodation which the employer did not own. What he said was the following:

> *“43. It seems to me that, as a result of the way the appeal was brought before the Tribunal, the Tribunal was constrained to consider the interpretation of Regulation 14 in an unduly restrictive manner by focusing entirely on the meaning of “employer” and paying no regard at all to the remainder of that regulation, and, in particular, to the words, “as respects the provision of living accommodation”. It is quite possible (and I put it no higher than that) that had it done so, even on the basis of the agreed facts, the Tribunal might well have come to a different conclusion. (Although the parties were agreed that the accommodation was not provided by Mayfield Properties on behalf of the Respondent, it does not appear to me that that properly amounted to an agreed fact; it is, rather, the statement of the legal position, which ought properly to have been a matter for the Tribunal to determine.)*
>
> *44. However, that is not the way the matter was put before the Tribunal, nor was it the basis on which the Revenue pursued the appeal in the EAT. Having raised with counsel yesterday the possibility that the broader result which the Revenue seeks to establish could be achieved by applying a broad, purposive approach to the construction of the words “provision of living accommodation”, rather than by seeking to distort the meaning of the 1998 Act, Mr Serr very fairly conceded that the current approach based on the definition of the word “employer” could not succeed. He sought to persuade me that the appeal should, nevertheless, succeed on the basis that the Tribunal erred in its construction of Regulation 14 as a whole. However, it seems to me that short of a wholesale amendment to the appeal (which was not sought), I must determine this appeal on the basis of the grounds that were permitted to*

proceed; anything else would be unfair to the Respondent at this late stage, and may also be prejudicial to either party given that the approach to the agreed facts might have been somewhat different had the issue been put on that wider basis. On the narrow basis that the appeal is brought, I have concluded that the Revenue's appeal must fail. There is no warrant for interpreting the term "employer" in any way other than that contained in the definition in s.54 of the 1998 Act.

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

46. However, I cannot leave this issue, which is likely to have important repercussions for those seeking to comply with it and those seeking to enforce the accommodation offset provisions, without saying a little more about the phrase, "as respects the provision of living accommodation by the employer" within the meaning of Regulation 14. In my view, had the issue in this appeal been whether or not an employer could be said to be a provider of accommodation, even though it is not the owner or landlord in such accommodation, I would have unhesitatingly answered in the affirmative. Although Mr Tunley initially sought to maintain the position that Regulation 14 can only apply if the employer is itself a landlord, he accepted, upon reflection, that there will be situations where Regulation 14 will apply even though the employer is not a landlord or owner of the property. It seems to me that that concession is inevitable.

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

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

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

45. In his submissions, the appellant's counsel submitted that the word "entitled" in regulation 14 must mean legally entitled and connote an enforceable right. He relied upon the ways in which the word was used in other legislation, including the Employment Rights Act 1996, and cited the case of **Secretary of State for Employment v Wilson and BCCI [1996] ICR 408**. The respondent's counsel submitted (in summary) that the word "*entitled*" in the Regulations should not be read in the way contended for on the appellant's behalf and argued that to do so would undermine the Regulation and the application of the Regulations more broadly.

46. In his submission, the respondent's counsel relied upon the decisions of both the Employment Appeal Tribunal and the Court of Appeal in **HMRC v Leisure Employment Services Limited [2006] ICR 1094 and [2007] EWCA Civ 92**. That was a case in which the worker had paid money in respect of gas and electricity which was nonetheless found to fall to be considered under the accommodation offset. Elias J (as he then was) explained that he would adopt a purposive approach to the construction of the provisions (paragraphs 30 and 31). The respondent's counsel emphasised that adopting a purposive approach to the construction of the Regulations was appropriate and required. In his conclusion Elias J (at paragraph 57) said the following:

> *"For all these reasons, in my judgment this appeal succeeds and the enforcement notices must be restored. I have sympathy for the company in the circumstances of this case. On the face of it this was not an unreasonable arrangement and had they left it to the workers to pay for their own gas and electricity direct to the utility companies, they would not be liable to reimburse these payments. Moreover in this case the company was not, it seems, charging too much for the services offered (at least when assessed across the board; individuals may have had to pay more than they used). However, it seems to me that there is no way of regulating the employer who does seek to give what are, in effect, benefits in kind and who charges a distortionate price. The legislation has to take a strong line to ensure that the statutory minimum wage is properly secured for workers even if this means that certain arrangements, not objectionable in themselves, cannot be permitted."*

47. The respondent's counsel also placed some reliance upon the EAT decision in **HMRC v Middlesbrough Football and Athletic Co (1986) Ltd** UKEAT/234/19. He emphasised what was said by Judge Auerbach at paragraphs 79 and 80 of that Judgment when he addressed the purpose of the legislation, the difference between assessing National Minimum Wage and unauthorised deductions from wages, and the fact that Parliament had not allowed individuals to opt out of the legislation by written agreement.

48. On the issue of the reliance to be placed upon and use of guidance, the respondent's counsel relied upon the case of **Mohammed Mohsan Ali v London Borough of Newham [2012] EWHC 2970**. In particular, he emphasised what was said at paragraph 39 onwards. I will not reproduce all that Judgment. Mr Justice Kenneth Parker observed that there was some force in the submission that a court should be circumspect and careful so as to avoid converting what is non-binding

guidance into in effect mandatory rules. He however highlighted that: *"In law, context is everything"*.

Conclusions/Decision

49. The starting point in my decision must be the precise wording of Regulation 14 of the National Minimum Wage Regulations 2015. My role is to determine whether the terms of that provision have been correctly applied.

50. I have noted the Guidance and the Manual, to which I was referred at length during the hearing and during submissions. I accept the appellant's counsel's submission that the Manual appears to go further than what is stated in the Guidance when it states that certain factors lead to a mandatory conclusion rather than a possible one. The appellant's position was that that was misleading. As I have confirmed, I accepted Mr Atkins' evidence that he did not apply either the Manual or the Guidance on their own or without further consideration; rather he considered all the circumstances and both of those documents. As I am applying the law set out in the Act and the Regulations, I do not need to determine whether the appellant acted in accordance with the Guidance or the Manual. While clearly both documents are useful for employers when determining whether they are complying with the minimum wage requirements, I am not persuaded that the status of either the Guidance or the Manual is such that I should make determinations based upon what they say (not least because of the limitations expressed in the Guidance about the reliance which should be placed upon it). My role is to apply the law. The Guidance provides a sensible guide, but I do not need to determine whether it was complied with or not.

51. Regulation 14 applies to the amount of *"any deduction the employer is entitled to make"* or *"payment the employer is entitled to receive from the worker"*. I do not accept the appellant's counsel's contention that the use of the word "*entitled*" in the provision imports some particular legal concept or requires consideration of whether the deduction is one which is a legally enforceable right. I read the words used as providing a straightforward statement in plain English which I must apply, but which does not require a potentially complex analysis on any given facts about whether the deduction or the payment was one that the employer was legally and enforceably able to make.

52. In any event, when considering the facts of this case for all three individuals (as it applied to all but the payments made by Mr Muller directly from November 2018), during the period when the deductions were actually made from their pay by the appellant, those were deductions that the employer was legally entitled to make as a result of the agreement that the appellant had entered into with those individuals (provided to me in the case of Mr Muller (99), but evidenced as also having existed in the cases of Mr Cartwright and Mr Gibson by the evidence of Mr Lawton). The payments which were deducted from the wages payable to the three individuals during the period when deductions were actually made by the appellant, were deductions which the employer was legally entitled to make because the individuals had consented to the deductions being made. If it was what was suggested, I do not find that the use of the word "*entitled*" in regulation 14 required any consideration of who would ultimately receive the sum deducted or paid.

53. I considered what was said by Choudhury J in the **Ant Marketing** Judgment about the requirement in Regulation 14 that the payments or deductions must be *"as respects the provision of living accommodation by the employer to the worker in the pay reference period"*. I note that the relevant part of his Judgment was obiter and was clearly expressed to have been reached without argument. Nonetheless, I entirely accept what Choudhury J said about the circumstances in which living accommodation could be found to be provided by the employer. There is no requirement for the accommodation to be owned by the employer. A purposive approach must be taken to the application of those words.

54. In considering whether the accommodation owned by Mr Lawton (and for Mr Muller, both Mr Lawton and Mr Maloney) was provided by the appellant I particularly noted that:

a. the three individuals came to access the accommodation through their employment because they knew Mr Lawton. The accommodation was not obtained through independent means, such as having responded to an advert or through an agent;

b. Mr Lawton was the controlling mind of the appellant/employer and the 97% shareholder;

c. the accommodation was clearly linked to the appellant because deductions were taken from the employees' wages to pay the rent; and

d. (albeit a factor of limited importance) in the documentation for Mr Cartwright and Mr Muller, the landlords' contact details under the tenancy agreements was the appellant and used the appellant's address.

55. I have found in the circumstances of this case that the living accommodation was provided by the appellant to the worker, even though the living accommodation was owned by Mr Lawton or (in the case of Mr Maloney) by Mr Lawton and another individual. I have taken this view applying what was said by Choudhury J in his Judgment and taking the requisite purposive approach which I must do (particularly in the light of the Judgments in **HMRC v Leisure Employment Services Limited**).

56. The situation which I have found to have differed from the others I have considered, is the period when Mr Muller was making payments directly into the bank account for the benefit of Mr Lawton, Mr Stanley and Mr Stanley's partner, from November 2018 onwards. Regulation 14 only applies where "*The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker…".* I find that from November 2018, the payments being made by Mr Muller could not be stated to be either a deduction the appellant was entitled to make or a payment the appellant was entitled to receive. From November 2018, unlike the preceding three months, the appellant was not deducting amounts from Mr Muller's wages nor was it entitled to do so (as he was paying the landlords direct).

57. In his submissions, the appellant's counsel emphasised that here there were two totally different legal personalities involved in the employment and the payment

of rent. Indeed, in the rent payable by Mr Muller there were three distinct legal personalities, one of which was an individual unrelated to the appellant (or possibly two of four, if Mr Cartwright's partner was also taken into account). The part of the **Ant Marketing** Judgment which I have cited at length involved analysis of the words *"the provision of living accommodation by the employer".* Choudhury J did expressly record the fact that he had not received full submissions on the issue. For the point he was considering, I have accepted it as being entirely correct for me to follow what was said. However, Choudhury J's Judgment does not address the application of the Regulation where the employer is neither making any deductions nor entitled to any payments. If the evidence had been that Mr Muller had been making a payment to the appellant, albeit indirectly via a third party, Regulation 14 would have applied. However, in this case, Mr Muller was (from November 2018) making payments to two individuals who were (in a private capacity) the joint owners of the premises he was renting. I do not find that was a payment the appellant was entitled to receive from Mr Muller.

58. I understand the potential abuse which might arise in certain circumstances as addressed in the Low Pay Commission report. I also understand why the Guidance and, more prescriptively, the Manual, includes an approach which would appear to avoid that risk arising. I take account of the importance of taking a purposive approach to the Regulations, which it is clear I must do. Nonetheless, I do not find that payments made by the worker to an account for the benefit of two individuals and not the appellant, fell within the provisions of Regulation 14(1) because there was no deduction the employer was entitled to make or payment which the employer was entitled to receive.

59. I contrast Mr Muller's payments from November 2018 onwards, with the deductions made by the appellant from employees' wages prior to that date. The actual deductions made from the wages of Mr Cartwright, Mr Gibson and (for the first three months of his tenancy) Mr Muller, were all deductions made by the appellant which the appellant was entitled to make. Those were deductions to which Regulation 14(1) applied.

60. I would add that the philanthropic motive identified by Mr Lawton for providing accommodation to Mr Muller did not alter the outcome in this case. I accepted the evidence that I heard from Mr Lawton and Mr Muller about the circumstances in which Mr Muller's tenancy arose. As was identified in the **Leisure Employment Services** Judgment, the policy behind the National Minimum Wage requires it to be applied irrespective of whether the particular benefit (and the cost of it) was appropriate in the circumstances. As the respondent's counsel submitted in his response to the appellant's counsel's submissions, if the appellant wished to provide accommodation to its employees for a philanthropic purpose, it could have limited the rent charged for the living accommodation to the amount provided for in the accommodation offset.

61. Therefore I confirm that my decision was as follows:

- For Mr John Gibson, I found that the deductions made from his wages for the period of three months from 1 August to 31 October 2016 were deductions that the appellant was entitled to make and were *"as respects the provision of living accommodation by the employer to the worker in*

the pay reference period". Accordingly, under Regulation 14(1) those payments were to be treated as a reduction to the extent that the deductions exceeded the amount provided for under Regulation 16 (at the time). The notice of underpayment does not require rectification as a result.

- For Mr Paul Cartwright, I find that the deductions made from his wages for the period of three months from 20 April 2017 to 2 July 2017 were deductions that the appellant was entitled to make, and they were *"as respects the provision of living accommodation by the employer to the worker in the pay reference period".* Accordingly, under Regulation 14(1) those payments were to be treated as a reduction to the extent that the deductions exceeded the amount provided for under Regulation 16 (at the time). The notice of underpayment does not require rectification as a result.

- For Mr Christopher Muller, I find that the deductions made from his wages for the period of three months from 1 August 2018 to 31 October 2018 were deductions that the appellant was entitled to make, and they were *"as respects the provision of living accommodation by the employer to the worker in the pay reference period".* Accordingly, under Regulation 14(1) those payments were to be treated as a reduction to the extent that the deductions exceeded the amount provided for under Regulation 16 (at the time). The notice of underpayment does not require rectification as a result.

- The payments made by Mr Muller directly to a bank account for the benefit of Mr Lawton, Mr Stanley and Mr Stanley's partner as payment of rent for the period from November 2018 until he ceased to be a tenant in the relevant premises, were neither a deduction the employer was entitled to make nor a payment the employer was entitled to receive from the worker, and therefore Regulation 14(1) did not apply to those amounts. The notice of underpayment does require rectification as a result.

62. As a result of this decision, I have allowed the appeal and the notice of underpayment issued on 25 August 2022 will need to be rectified.

63. In the course of submissions, the parties' counsel agreed that in the light of my decision on the principles, they believed that it would be possible for the parties to agree the amount by which the notice of underpayment would need to be rectified in the light of the decision made. I am not currently in a position to order the rectification of the notice as I do not know the precise relevant figures which will need to be included. The parties have eight weeks from the date that this Judgment is sent to the parties to liaise and endeavour to agree the figures that should be applied to the rectified notice. If the parties are able to agree the figures, they should confirm them in writing, and I will issue the relevant order rectifying the notice. In the event that the parties are unable to agree, or do not confirm agreement in writing within eight weeks, a further hearing will be listed in order to determine precisely the rectification required and the relevant amount.

Employment Judge Phil Allen
Date: 19 June 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 JUNE 2023

FOR THE TRIBUNAL OFFICE

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