GANGMASTERS LICENSING APPEAL TRIBUNAL

Appellant: FS Commercial Limited

Respondent: Gangmasters Licensing Authority

HELD AT: Manchester **ON:** 19 – 22 June 2012
3, 5, 6 September 2012
In chambers: 12, 26 September 2012,
5 October 2012

Appointed Person: Employment Judge Porter

REPRESENTATION:

Appellant: Mr Giles Goodfellow, QC
Miss Helen Moorfield, QC
Assisted by: Mr Thomas Chacko, of counsel

Respondent: Mr Sam Grodzinski, QC
Assisted by: Mr David Yates, of counsel

RESERVED DECISION

Each of the appeals is dismissed. This decision is to take effect seven days after this is recorded as having been sent to the parties.

REASONS

Issue to be determined

1. This is an appeal against: --

   1.1. the respondent's decision of 14 January 2011, refusing to grant the appellant ("FSC") a license to operate in the sector regulated by the respondent ("GLA") (Appeal number 49/ E/R) and

   1.2. (by consent) the respondent's decision of 12 June 2012, refusing to grant the appellant ("FSC") a license to operate in the sector regulated by the respondent ("GLA") in the terms set out in the appellant's skeleton argument dated 1 June 2012 (Appeal number 60/ E/R).

2. The GLA decided not to grant FSC a licence because it was not satisfied that FSC would comply with critical Licensing Standards 2.1 and 2.2 which require that:

   2.1. a licence holder must accurately deduct tax and national insurance ("NI") from all workers' pay and pay the correct amount to H M Revenue and Customs ("HMRC") in a timely manner;

   2.2. workers employed by the licence holder must be paid at least the national minimum wage ("NMW").

3. In essence FSC asserts that:-

   3.1 either of its proposed models (PDPD or coding method) comply with existing PAYE and NIC legislation as enacted;

   3.2 in the alternative, it is unlawful for the appointed person, as a representative of a public body, to dismiss the appeals, unlawful for the GLA to refuse a licence, on the basis of interpretations of the existing PAYE and NI legislation which discriminate contrary to EU law;

   3.3 the fee mandated to FSEV Ltd does not reduce effective remuneration for the purposes of the NMW regulations.

4. In essence, GLA asserts that:-

   4.1 both proposed models breach the existing PAYE and NI legislation as enacted. FSC is seeking approval for what it regards as a "fairer"

scheme. It is not for FSC, GLA or the Appointed Person to decide how PAYE and NI legislation ought to be made;

4.2 both proposed models are a collateral attack on the introduction of regulation 31(1) (j) of the NMW Regulations, and an attempt by FSC to bypass the High Court's judgement in the case of **R (Cordant Group plc) v Secretary of State for Business Innovation and Skills [2012] EWHC 3442 (Admin) ("Cordant")**;

4.3 the allegation that the current legislation is discriminatory is not well-founded and was determined in the **Cordant** case.

5. Both parties have invited me to determine these appeals by deciding whose interpretation of the relevant PAYE and NI legislation is correct.

Orders

6. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders I considered the Gangmasters (Appeals) Regulations 2006 ("the Regulations") and in particular the overriding objective. Orders included the following.

7. Additional evidence from Mr Nolan. The appellant made application for leave to introduce into the evidence the second witness statements of Harry Grierson and Alan Nolan. The respondent did not object to the introduction of the second witness statement of Harry Grierson, albeit that this statement was presented late, outside the timeframe set out by the Appointed Person. Mr Grodzinski indicated that he would be able to deal with any new evidence in cross-examination. Mr Grodzinski did object to the introduction of the second witness statement of Mr Nolan on the grounds that it was submitted late, it was largely irrelevant or inadmissible and its late introduction would prejudice the respondent's right to a fair hearing. I considered all the circumstances including in particular the following:

7.1. the directions of the Appointed Person included a direction that witness statements be exchanged by 5 January 2012;

7.2. the first witness statements of Harry Grierson and Alan Nolan were served in accordance with the direction;

7.3. throughout these proceedings the parties have sought to clarify the issues by way of various amendments to the pleadings;

7.4. the appellant's skeleton argument dated 1 June 2012 put forward two proposed models of operation for the income tax and national insurance treatment of certain travelling expenses incurred by and borne by its employees namely: --

7.4.1. the pay day by pay day model ("PDPD" Model);

7.4.2. or, in the alternative, if HMRC can properly refuse to accept the PDPD model, and the GLA are entitled to refuse the appellant a licence on the basis that it proposes to use such a model, then the appellant will adopt what I will call the Coding Model.

7.5. In preparation for this Hearing, Counsel for both parties discussed a possible jurisdictional problem arising from, in part, the late adoption of the alternative Coding Model. It was accepted by both parties that the original application for a licence and therefore the appeal under Appeal number 49/E/R related only to the PDPD model;

7.6. Both parties were anxious that this four-day hearing should deal with both Models;

7.7. Therefore, the parties agreed that a fresh application for a licence, based on the two models contained within the appellant's skeleton argument, would be made by the appellant, refused by the respondent and listed for appeal, to be heard concurrently with the existing appeal. It was agreed that the existing pleadings, evidence and skeleton arguments would stand, and that any time requirements specified in the Regulations would be waived in respect of the new appeal. The GLA's agreement to this course of action was expressed to be without prejudice to its ability to object on case management grounds to any changes made to the business model advocated by the Appellant since December 2011;

7.8. As a result of that agreement, I as the Appointed Person, agreed and ordered that the new appeal, under Appeal number 60/E/R, should be heard concurrently with the existing appeal, as agreed by the parties;

7.9. The parties agreed that the pleadings evidence and skeleton arguments in the existing appeal should stand in the new appeal. Counsel for the parties did not consider, at the time, the possibility of the introduction of new witness evidence;

7.10. Solicitors for both parties worked together to produce agreed bundles of documents which including recent correspondence between Mr Nolan and the HMRC about the proposed PDPD Model and Coding Model;

7.11. By letter dated 23 May 2012 solicitors for the appellant asked the Appointed Person to make a direction for the service of any additional witness evidence by not later than 10 working days before the Hearing.

7.12. By letter dated 6 June 2012 I informed the parties that the submission of any additional statement outside the agreed time limits should be considered independently on its merits and, in particular, whether the late submission would prejudice either party's right to a fair hearing.

7.13. The unsigned second witness statements of Mr Grierson and Mr Nolan were served on 1 June 2012; signed copies were provided on 7 June 2012. The unsigned witness statements were therefore served within the 10 working days before the Hearing provided for in regulation 17, but were outside the time limit provided for by the directions of the Appointed Person.

7.14. It is therefore right that the introduction of the two new witness statements should be the subject of a formal application for leave to present out of time. This is a long standing case. The respondent did not, when agreeing to the introduction of the new Appeal, agree to the introduction of any new witness evidence.

7.15. Although the second witness statement of Mr Nolan was submitted late it does, for the large part, deal with the points of issue well known to the parties, points of issue which both parties were keen to be determined at this Hearing. A large part of Mr Nolan's second witness statement are matters that can be easily addressed either in submission or in cross-examination. Some matters are repetitive of points raised in the first statement, some points raised are points of submission on the law, some points relate to the correspondence with HMRC contained within the agreed bundles.

Having considered submissions from both counsel, on balance I agreed with Mr Goodfellow that it was in the interests of justice, and in accordance with the overriding objective, to allow the complete second witness statement to form part of Mr Nolan's evidence. Questions of relevance, and how much weight it would be appropriate to give the evidence, are matters that can be addressed in the determination of the issues. It would not be appropriate to exclude the evidence at this stage.

8. Attendance of Mr Nolan in the Hearing Room. Counsel for the respondent made application that the second witness, Mr Nolan, be excluded from the hearing room while Mr Grierson was giving his evidence. This application was

opposed by the appellant. Having heard submissions from both counsel I rejected the application bearing in mind that:

8.1. the regulations made no specific reference to this procedural point;

8.2. the regulations provides that this is a public hearing;

8.3. neither counsel could assist on the usual practice in these hearings;

8.4. I noted that in the employment tribunal, whilst exclusion of witnesses is the practice in Scotland, exclusion of witnesses in the Employment Tribunals of England and Wales is an unusual step and only granted in circumstances when the employment judge is satisfied that the attendance of a particular witness in tribunal may prejudice either party's right to a fair hearing;

8.5. in the circumstances, bearing in mind the specific regulations and the overriding objective I decided that a similar principle should apply in this tribunal;

8.6. I was not satisfied that counsel for the respondent had reasonable grounds to support an assertion that the attendance of Mr Nolan in the tribunal would prejudice the respondent's right to a fair hearing. A written witness statement has been provided and any inconsistencies in oral evidence can be addressed in cross-examination in the usual way.

9. At the end of day 4 the appellant concluded giving evidence. I ordered that no further evidence would be allowed. The adjourned hearing would deal solely with submissions.

10. I granted the appellant's request that they use a transcript service.

11. I refused the request for an order that the GLA contribute towards the cost of that service.

12. I allowed the appellant to introduce into the evidence, on the final day of the hearing, the skeleton argument and a witness statement presented in the **Cordant** case.

Evidence

13. I heard and have considered all the evidence from two witnesses, Mr Harry Grierson, Business Development Director of FSC, and Mr Alan Nolan, Senior Partner of Aspire Business Partnership LLP ("Aspire"). I have considered the written evidence of Mr Mark Forman.

14. The respondent called no witnesses.

15. Agreed bundles of documents were presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Submissions

16. I have considered with care the oral and written submissions of Mr Goodfellow and Miss Mountfield for the appellant and Mr Grodzinski for the GLA. I do not rehearse the submissions in full here.

Facts

17. Having considered all the evidence I have made the following findings of fact. Where a conflict of evidence arose I have made the findings on the balance of probabilities. In making my findings I note that Mr Grierson was at times very candid in his evidence, was at times evasive and inconsistent. Mr Nolan was, at times, extremely evasive in answering the question and, at times, clearly sought to avoid telling the truth.

18. FSC is an umbrella company. It does not find work for its employees and it does not find workers for its clients. A worker finds work with an end client through an employment agency. The overall cost of the worker's service (in terms of salary and reimbursed expenses) is fixed by the deal struck between the agency and the end client. FSC has no involvement in that deal, has no involvement in assessing the workers' pay.

19. In certain circumstances neither the employment agency nor the end client is willing to become an employer. In certain circumstances the employment agency will consider the use of an umbrella company, will ask the worker whether they are already employed by an umbrella company, and, if not, will recommend that they become so employed.

20. Where FSC is engaged as an umbrella company it employs the worker on a long-term overarching contract of employment. FSC's employees are only paid when on an assignment with the end client. FSC thus supplies temporary workers under an overarching contract of employment that spans their various temporary assignments to do work at the premises of various end-user clients. Therefore, except in the unusual situation where the assignments are expected to last for 24 months or more, the workplace of the end user clients is not a permanent workplace as a worker does not expect to work there for all or for almost all of the period for which they are employed by FSC, and they are there to perform a task of limited duration.

21. If the worker was employed directly by the end user clients then his expenses of travelling from his home to his place of work would not be deductible

for tax purposes as such expenses would be regarded as ordinary commuting expenses. However, the travelling expenses from home to place of work of workers employed by an umbrella company under an overarching contract of employment, and sent on temporary assignments from time to time to various end-user clients, are deductible as an expense under section 338 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). It is Mr Grierson's clear evidence, and I find, that a worker employed by the agency would be in the same position as if employed by the end user clients as the agency does not operate an over arching contract of employment and therefore travel expenses of the worker from his home to his place of work would be non-deductible as being ordinary commuting expenses.

22. If an employer reimburses qualifying travel expenses which an employee has incurred, relief for tax and National Insurance Contributions ("NICs") for such expenses can be granted immediately and the employee does not have to make a claim to HMRC on an annual basis.

23. If an employer does not reimburse qualifying travel expenses, it would be the normal practice for each individual worker to claim such travelling expenses as a deductible expense and on an annual basis to recover tax by filing with HMRC a tax return or form P 87.

24. In deciding the price for a job and the level of pay for the temporary worker the agency and the end user client will take into account the availability of deductible travel expenses. As Mr Grierson explained, if the temporary worker lives next door to the end user work premises he would have no deductible travel expenses and the umbrella company would not be involved. His weekly pay will be the rate agreed for the job, say £300.00 per week. However, if the temporary worker lives a considerable distance from the end user work premises, he would have deductible travel expenses if he was employed by the umbrella company (as explained above) and those travel expenses were reimbursed. In these circumstances the umbrella company is engaged and the employer and employee will agree that the travel expenses would be reimbursed but that the salary will be correspondingly reduced. Thus the rate agreed for the job would be the same, £300.00, but agreement would be reached for £50.00 to be paid as reimbursed travel expenses, £250.00 as the rate of weekly pay.

25. The reimbursement of deductible travel expenses provides tax and NIC savings for both the employer and employee. In the above example, the worker living next door to the end user premises is paid £300 per week and pays tax and national insurance contributions on £300 per week under the PAYE system. Contrast the worker living a considerable distance away, engaged to do the same job, employed under an umbrella contract, who, following agreement to be paid £250 per week plus £50 travel expenses, will pay tax and NICs on £250 per week. There is a saving for the employer as with this worker employer's NICs are calculated on the £250 per week. For completeness, an employee of the end

user, living a considerable distance away from the work premises and incurring £50 travel expenses per week, would be paid £300 per week and would pay tax and NICs on that £300 per week as his travel expenses are not deductible, being ordinary commuting expenses. Employer's NICs would also be calculated on the £300.

26. Prior to the introduction of regulation 31 (1)(j) of the NMW regulations and the **Cordant** case, FSC, and the relevant agency and end users, operated this system for all its employees whatever their level of income. Thus, for example, if the rate agreed for the job was £250 per week, if the worker had £50 in deductible travel expenses, agreement could be reached for a taxable weekly pay of £200 per week plus reimbursement of £50 travel expenses. This worked to the advantage of both employer and employee.

27. Certain employment businesses developed these schemes further, devised and implemented schemes known as "salary sacrifice schemes". As above, the worker agrees to sacrifice part of his contractual remuneration which would otherwise be taxable and liable to NIC. The worker is paid a sum in respect of travel and subsistence expenses, which are tax deductible under section 338 ITEPA. The section 338 expenses are not subject to income tax, or employer or employee NICs. The employer does not pay NIC (currently 13.8%) on a proportion of the sums that it pays to the worker, and the worker receives a proportion of the monies paid to him free of income tax and NIC deductions. However, under the salary sacrifice scheme the section 338 expenses that the employer pays to the worker are less than the amount of the remuneration that the worker has given up. The element, which may be called the "lost sacrifice", accrues to the immediate benefit of the employer. However, the section 338 expenses when added to the remuneration paid, are typically more than the net amount (that is remuneration less income tax and employee NIC) that would otherwise have been payable. In essence, the worker, who agrees to be employed by an umbrella company, agrees to receive part of his pay by way of reimbursement of deductible travel expenses, receives a tax and NIC saving. Under the salary sacrifice scheme he gives up some of that advantage to the employer. Thus, both the employer and worker benefit from the scheme, but figures presented in the **Cordant** case showed that, typically, the benefit to the worker is marginal: the employer gains the most advantage.

28. Although FSC is the employer of the temporary worker it does not take advantage of the full NIC saving from this arrangement. As Mr Grierson explained, FSC only makes money from being the employing umbrella company by taking a cut [which Mr Grierson describes as the margin and which Mr Goodfellow referred to as a fee] of the employer's NICs saving made by the agency. Under the terms of the agreement between FSC, the agency and end user client, the agency pays to FSC the worker's agreed pay, the employer's NICs and FSC's fee. As described by Mr Grierson, when the agency company makes a saving on their national insurance contributions, FSC receives as their

fee an undisclosed percentage of that saving. It follows that if there is no national insurance contributions saving to the agency there is no profitable work for FSC in this business (unless its fee is calculated by an alternative method).

29. Following the introduction of regulation 31(1)(j) NMW Regulations and the **Cordant** case, umbrella companies such as FSC were unable to operate the same pay model system, the salary sacrifice scheme, for workers employed at or near the NMW. As Aspire noted in its press release (core bundle page 147A) this "signals the end of salary sacrifice arrangements for low-paid workers".

30. If the overall sum available to reward an employee is above the NMW by a smaller amount than the amount of deductible travel expenses incurred by the employee, it will not be possible for the employer and employee to replace salary with expense reimbursement to the whole extent of the employee's expenses. For employees employed at the NMW replacement of salary with expense reimbursement is not possible.

31. Aspire's Press Release states:-

> "There is no doubt that employment businesses will wish to avoid removing their travel scheme for low-paid workers in favour of a strict PAYE model that would significantly increase payroll costs and reduce take-home pay."

The press release expresses Aspire's view that "The answer may lie in a passing comment" made by Mr Justice Parker in the Cordant case, acknowledging that the alignment between tax and NIC legislation and the NMW Regulations is not perfect. Aspire refers to Mr Justice Parker's statement that "qualifying business expenses under Section 338 ITEPA 2003, which are met by the worker himself (and not paid by the employer) are deductible for the purpose of tax and national insurance". Aspire advertised an "expenses and benefits solution" (core bundle page 147C) devised by them to resolve the problem, to replace the salary sacrifice scheme. This is the PDPD model adopted by FSC.

32. FSC operates as an umbrella company outside the GLA sector. It employs a temporary workforce of roughly 9000, of whom approximately 4000 are actively assigned to end users at any one time. Approximately 70% of FSC's temporary workforce are normally non-UK nationals including Polish, Slovakian, Lithuanian, Russian, Czech, Indian, Australian and New Zealander. Approximately 30% are British.

33. FSC's current workforce is made up disproportionately by migrant workers and come from minority ethnic backgrounds, compared to the workforce as a whole.

34. Workers at around the minimum wage are disproportionately migrant workers and come from minority ethnic backgrounds, compared to the workforce as a whole.

35. Workers in the GLA sector are disproportionately migrant workers and come from minority ethnic backgrounds, compared to the workforce as a whole.

36. Agency workers paid at around the minimum wage are disproportionately migrant workers and come from minority ethnic backgrounds, compared to the agency workforce as a whole.

37. FSC has put forward, in its applications for a licence from GLA, a proposed model of operation (the PDPD system) which will involve the following steps from a PAYE and NIC perspective:

37.1. Where a worker provides satisfactory evidence that he or she has incurred and borne deductible travel expenses for a payment period FSC will take account of the deductibility of such expenses in determining the amount of PAYE which should be deducted from the payment of wages for the period;

37.2. Subject to the provision of satisfactory evidence, in computing the amount of a worker's earnings on which primary and secondary class 1NIC are to be charged, FSC will deduct an amount equal to the deductible expenses incurred and borne by the worker in the earnings period. Accordingly, both the amount of the primary and the secondary class 1 NIC will be smaller and these smaller amount will fall to be deducted from the worker's weekly or monthly payments. The appellant will pay the smaller secondary class 1 NIC out of its own resources and will recharge such secondary class 1 NIC to the agency, to which it is supplying the services of the workers.

37.3. The appellant will offer its employees the opportunity to engage the services of a separate, associated company, FSEV Ltd ("FSEV"), to advise and assist the employees on the deductibility of travel and subsistence expenses, the preparation of claims and their entitlement to other state benefits such as Working Tax Credits. Services will be provided to the employee in return for the payment of a fee by the employee to FSEV. The employee will be required to mandate FSC to pay the fee to which FSEV becomes entitled out of his or her wages.

38. In the alternative, in its application for a licence from GLA, FSC put forward the Coding Model.

39. The Coding Model is another model which would allow the employee to take the advantage of the deductible travel expenses through the payroll system. On joining FSC the employee would be asked to complete a travel and subsistence questionnaire. The information on the questionnaire would be used to estimate the employee's likely travel and subsistence expenses for the remainder of the tax year. FSC would then submit these annual estimates to HMRC for new joiners every week and would ask HMRC to issue new tax codes for such employees. In this way the employee would be gaining the advantage of the estimated tax relief throughout the tax year. At the end of the year there may have been overpayments or underpayments of tax depending on the employee's actual travel and subsistence expenses. In the case of overpayments the employee may decide to complete a self-assessment tax return. In the case of underpayments a coding adjustment could be made for employees still in the employ of FSC. If the employee was no longer in the employment of FSC HMRC would need to take steps to recover the tax under deducted.

40. HMRC has not approved either model.

41. Under either model FSC will calculate and deduct tax under the PAYE scheme and employees' NICs not from the worker's gross pay but from his pay after deducting the travel expenses incurred and borne by the employee. In this way FSC will give the worker his tax relief, not on an annual basis, but on a "payday by payday" basis, and will give relief from NICs contributions.

42. Further FSC will calculate and pay the employer's NICs based not on the worker's gross pay but on the worker's gross pay less the qualifying travel expenses borne by the worker himself, thereby significantly reducing the employer's liability to NICs.

43. In order to be satisfied with the accuracy of the expenses claims, FSC will require its employees to engage the services of either FSEV or some other "competent service provider" to prepare and evidence the claims. The worker is clearly encouraged to engage the services of FSEV. The worker is not provided with any alternative service provider in the joining instructions and other information given by FSC. It is not clear on what basis FSC will assess whether any alternative service provider put forward by any worker is competent and therefore accept them. FSC makes much play of the inability of the workers to understand the legislation, or to take it upon themselves to make the appropriate claim for repayment at the end of the tax year. It is not clear on what basis FSC assumes that such a worker would have the wherewithal to find and appoint an alternative competent service provider.

44. There is or will be a Service Agreement between FSC and FSEV under which FSC will provide information to FSEV in return for a flat fee of £1,000 per month plus VAT. A signed copy of such Service Agreement is not available. It is not clear if this agreement is yet in operation. It is noted that the clear draft

provided at core bundle page 121 is intended to be signed by Mr Harry Grierson, Business Development Director of FSC, on behalf of FSEV.

45. Under the terms of the agreement between the worker and FSEV the company agrees to provide advice to workers on their expense claims, benefits and claims for Working Tax Credits ("WTCs"). Advice will be provided via telephone advice lines. No satisfactory evidence has been provided as to the extent, depth and quality of such advice, to what extent any such worker shall take advantage of this advice. This system is not yet in operation as FSC does not yet operate in the GLA sector (by reason of the refusal of the licence).

46. FSC acquired the business of Pavilion Management Services Ltd in June 2011.

47. In June 2010 HMRC granted FSC a "Dispensation for Particular Expenses payments and other matters" (Core bundle page 208). The Dispensation applies only to the expense payments and benefits expressly set out therein. It provides "Payments and benefits that are in any way different, or are provided in circumstances that differ, from those set out below will not be covered by this dispensation and should be reported in the normal way."

48. The Nature of the Payments and Benefits included in the Dispensation include:-

> "Travel (excluding a mileage allowance)
>
> Reimbursement of the costs actually incurred by employees... on journeys undertaken for business purposes by road ..., rail, air and sea, but excluding ordinary commuting."

49. FSC operated the PDPD model for its current employees prior to its first application for a licence (under Appeal No. 49/E/R). In doing so FSC, in calculating income tax and NICs under the PAYE system, deducted from gross pay qualifying travel expenses borne by the employee, contrary to the Dispensation they had received from HMRC, which made it perfectly clear that the Dispensation related only to travel and other expenditure reimbursed by the employer. Nevertheless FSC, on the advice of Aspire, operated the PDPD model for employees who paid for their own travel expenses. FSC knew that it was acting contrary to the Dispensation in so doing. That is Mr Grierson's clear evidence. FSC did so with the benefit of the advice of Aspire, including Mr Nolan. It is perfectly clear that Mr Nolan, a man of many years experience in this field and indeed a man who used to work for the HMRC, knew that this was in direct contravention of the terms of the Dispensation. Mr Nolan's evidence that his understanding was that the Dispensation related to travel expenses not reimbursed by the employer was wholly unsatisfactory. His explanation that the reference in correspondence by HMRC to the word "facilities", (see page 208),

and the fact that the application by FSC for dispensation included a policy document (page 218), which did not explicitly state that the expenses were reimbursed by the employer, meant that HMRC has approved the PDPD model for expenses paid by the employee, is wholly unsatisfactory. I do not accept it. It is simply not credible that a man with Mr Nolan's experience could reach, or did reach, that understanding.

50. Nevertheless prior to applying for the GLA licence, FSC did not make application to HMRC for approval to the PDPD model. Mr Nolan's evidence on this has been wholly unsatisfactory and inconsistent. He at times says that it is impossible to make application for advance approval of any new scheme by HMRC, at times asserts that application had been made for advance approval.

51. Prior to FSC's first application for a licence the clear evidence is, and I find, that FSC knowingly and deliberately deducted the employer's secondary NICs from the employee's pay. This was revealed following an inspection of FSC's accounts following the first GLA licence application. FSC has now stopped this unlawful practice. There is no satisfactory evidence before me that this is widespread industry practice. Following this change, FSC decided that a fee would be charged to the workers involved in the PDPD model. The original plan was that the fee would be charged by a subsidiary of FSC for the service of arranging the processing of their expenses and for providing advice. This is the clear evidence of Mr Grierson.

52. In July 2011 HMRC issued a statement relating to "pay day by pay day tax relief models" (authorities bundle 5 page 1516). The HMRC clearly indicated therein that:-

- The PDPD model (as operated by FSC, as advised by Aspire) does not comply with the Taxes Act or Social Security Acts and associated regulations.
- An employer operating a PDPD model is not accounting for the correct income tax (PAYE) and employers and employees NICs.
- No NIC disregard was available where the employee pays for his travelling expenses from his total income, where there is no reimbursement by the employer.

53. On or about 29 or 30 August 2012 HMRC published further guidance (authorities bundle 5 page 1518A and B), confirming its view that PDPD models were not compliant with tax and social security legislation stating:-

- Expenses that are not made to or provided for any employees by the employer cannot be included in, or afforded the protection of, a dispensation.

- Where a dispensation has been issued in respect of travelling and subsistence payments, and an employer separately and distinctly makes such a payment, it may be assumed that the payment will be disregarded for NICs purposes.

- HMRC could seek to take action to collect additional tax and NICs (without disturbing the dispensation) because the administration of tax relief in this way (the PDPD model) is not sanctioned by the protection of the dispensation and NIC "relief" is not available unless separate and distinct payments of expenses have been made.

54. The FSC and other umbrella companies can still operate the salary sacrifice scheme where the worker's pay exceeds the NMW after deducting the qualifying travel expenses

55. The majority of workers in the GLA sector are paid at the NMW level. (That is the uncontested evidence of Mr Grierson).

56. On the current fee arrangements with the agencies/end user clients, FSC will have no profitable place in the GLA market unless it can operate a system which produces a NIC saving for the employer.

57. FSC has one director/shareholder, Mr Peter Charles Hudson.

58. FSEV Limited ("FSEV") incorporated on 9 February 2012, has one director/shareholder, Mr Peter Charles Hudson.

59. As stated above, FSC currently runs the PDPD model for its existing employees. FSC provides advice to its employees relating to expenses claims. It is not clear to what extent FSC currently provides any additional advice to its current employees, for example, relating to benefits and WTCs.

60. For GLA workers, if the worker does not engage FSEV or other adviser, the PDPD system will not be applied to them. As Mr Grierson explained, the PDPD system, the checking of travel expenses, is a costly exercise for FSC.

61. It is not clear if FSC intends to insist that all its other employees, outside the GLA sector, will be required to engage FSEV or other service provider as a condition of being allowed to remain in the PDPD system.

62. Under the PDPD model the saving to the employer in the proposed deduction at source of deductible travel expenses, paid by the employee, is significant. The employer will make a saving of 13.8% employer NIC contributions on qualifying travel expenses paid for by the employee.

63. The PDPD scheme will bring significant income to FSEV, which will charge a fee equal to up to 50% of the tax and NI saving made by each worker.

64. An average worker, working on average 40 hours per week at the NMW will, according to the information relied upon by FSC, incur the average amount of section 388 expenses of £50 per week. The financial weekly benefits to such an average worker of the PDPD system will be:-

- income tax relief at source: £50 x 20% = £10
- reduction in primary class NIC: £50 x 12% = £6
- Total £16

65. FSEV, according to the example provided by Mr Goodfellow, will take 50% of that saving as their fee, namely £8 per week (inclusive of VAT).

66. For the same average worker a saving in the employer's secondary NIC will be £6.90 per week (£50 x 13.8%).

67. The average worker who chooses not to engage FSEV or some other service company, who would be excluded from the PDPD system, would be able to claim tax relief on deductible travel expenses at the end of the tax year by making a tax return or filing a Form 87. Such a worker would retain any saving in full, but would be required to keep all documentary evidence to support his claim.

68. It is not clear what would happen if an employee refused to engage the services of FSEV or other competent adviser and who was thereby excluded from the PDPD system. There is no satisfactory evidence to support a finding that such an employee would be employed by FSC if such worker's pay was at or near the NMW. The clear evidence of Mr Grierson is that if there is no NIC saving for the employer, there is no fee for FSC. It is more than likely, and I find, that such a worker would not still be employed by FSC as it would not be commercially viable for such a worker to be so employed.

69. By letter dated 8 March 2012 Aspire, on behalf of FSC, provided HMRC with information in response to the notice under paragraph 1 of schedule 36 to the Finance Act 2008 issued on 6 December 2011 in connection with FSC's current payroll calculation.

70. By letter dated 4 April 2012 HMRC replied confirming that all the information was being reviewed and, responding to a request for a meeting, provided suggested available dates throughout May 2012.

71. By letter dated 11 April 2012 Aspire, on behalf of FSC, sought approval from HMRC with regard to the payroll mechanism it was then operating – the PDPD model. This is the first time FSC made such an application. The letter

dated 8 March 2012 has not been disclosed and I am not prepared to accept the evidence that any application for approval of PDPD was made in that letter.

72. In the application of 11 April 2012 Aspire set out its view of the comparative advantages and disadvantages of the PDPD model and the Coding Model concluding amongst other things:-

> "The coding mechanism simply is much less likely to comply with section 685(1)(a) or section 685(1)(b), whereas the deduction through the payroll mechanism (PDPD) does comply. ... Furthermore .. it is crystal clear that it would be totally irrational to select the coding process when compared with the deduction through the payroll process (PDPD)."

Mr Nolan put forward three alternatives to applying the coding mechanism:-

> (a) To reverse the change in the NMW Regulations, thereby allowing employees paid at or near the NMW to make salary sacrifices and the PAYE process as currently designed would comply with section 685.
>
> (b) Change the PAYE Regulations and allow the "deductions through the payroll process" to be applied in cases where HMRC are satisfied with the expense control and audit procedures.
>
> (c) HMRC may allow "deduction through the payroll process" to be applied in cases where HMRC are satisfied with the expense control and audit procedures, in accordance with section 684(7)(a) of ITEPA 2003.

In conclusion Mr Nolan advised HMRC that a hearing had been fixed before an appointed person starting on 19 June 2012 and sought HMRC's response prior to that date.

73. By letter dated 18 April 2012 Mr Morehead of HMRC indicated his understanding that the proposal put forward by Aspire on behalf of FSC was a proposal for the future. He indicated that the HMRC statement of July 2011 dealt with this situation and it needed no further amplification. However he did indicate that it was now his role to establish whether the business model then operated by FSC did comply with the Taxes Act and social security legislation and advised that if, following investigation, HMRC concluded that the business model currently operated by FSC did not comply, then FSC would have the opportunity to either appeal HMRC's view or amend its business model to one which HMRC accepts is compliant. Mr Morehead asked Mr Nolan for his preferred dates for a meeting.

74. Mr Nolan did not respond to Mr Morehead's request to establish a meeting. There is no satisfactory evidence to support that he did so.

75. By letter dated 9 May 2012 Aspire wrote to a different HMRC office, in Bootle, referring to its correspondence with Mr Morehead, and indicating that Mr Morehead had failed to provide approval for the alternative arrangement (PDPD model) or to confirm that the Coding Model was appropriate. Aspire then provided details of 4,459 employees and made a detailed application for the employees' codes to be adjusted.

76. That letter was passed on to Mr Morehead, who by letter dated 22 May 2012 advised Aspire that HMRC could not deal with the request for recoding of the 4,459 employees as such requests must come from the employee or their agent of record and Aspire was not the agent of record for those employees.

77. On 14 May 2012 Mr Nolan corresponded with HMRC concerning a meeting and he was provided with further dates, each of which post-dated the start of this Hearing.

78. In its investigation of FSC's tax records, HMRC has not notified FSC that it is acting in breach of the relevant tax and NIC legislation.

79. Cordant Group plc is assisting FSC in pursuance of these appeals.

The Law

80. I have considered the relevant statutory provisions and authorities referred to in submissions including in particular the following.

81. The Gangmasters (Licensing) Act 2004 provides:

> **6 Prohibition of unlicensed activities**
>
> (1) A person shall not act as a gangmaster except under the authority of a licence.
>
> (2) Regulations made by the Secretary of State may specify circumstances in which a licence is not required.
>
> **7 Grant of licence**
>
> (1) The Authority may grant a licence if it thinks fit.
>
> **8 General power of Authority to make rules**
>
> (1) The Authority may make such rules as it thinks fit in connection with the licensing of persons acting as gangmasters.
>
> (2) The rules may, in particular –

(d) prescribe the requirements which must be met before a licence is granted;

10 Appeals

(1) The Secretary of State shall by regulations make provision for an appeal against any decision of the Authority –

(a) to refuse an application for a licence

(2) The regulations shall make provision –

(a) for and in connection with the appointment of a person to hear and determine such appeals ... and

(b) as to the procedure to be followed in connection with an appeal.

82. The Gangmasters (Licensing Authority) Regulations 2005 provide:-

Regulation 12 –(1) For the purposes of the exercise of its functions under sections 1, 7, 8 and 9 of the 2004 act and rules made under section 8, in determining –

(a) the criteria for assessing the fitness of an applicant for a licence or a specified person, and

(b) the conditions of a licence and any modification of those conditions,

the Authority shall have regard to the principle that a person should be authorised to act as a gangmaster only if and in so far as his conduct, and the conduct of a specified person, comply with the requirements of paragraph (2).

(2) The requirements referred to in paragraph (1) are –

(a) the avoidance of any exploitation of workers as respects their recruitment, use or supply; and

(b) compliance with any obligations imposed by or under any enactment in so far as they relate to, or affect the conduct of, the licence holder or a specified person as persons authorised to undertake certain activities.

83. The Gangmasters (Appeals) Regulations 2006 provide:-

Regulation 2 – The overriding objective

(1) The overriding objective of these Regulations is to enable the appointed person to deal with appeals justly.

(2) Dealing with an appeal justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with the appeal in ways which are proportionate to the complexity or importance of the issues; and

(c) ensuring it is dealt with expeditiously and fairly.

(3) The appointed person shall seek to give effect to the overriding objective when he –

(a) exercises powers given to him by these Regulations; and

(b) interprets any provision

84. Regulation 21 – Appeal decisions

(1) The appointed person shall allow or dismiss the appeal.

85. The Gangmasters Licensing Authority Licensing Standards of 2009 provide:-

Standard 2.1 Critical: PAYE, NI and VAT

- A licence holder who employs workers under a contract of employment, contract of service, engages them under a contract for services or where the provisions of Chapter 7 of Part 2 of the Income Tax (Earnings and Pensions) 2003 apply must:
  - be registered with HM Revenue and Customs and have a valid PAYE number, and
  - accurately calculate and deduct tax and National Insurance from all workers' pay and pay the correct amount to HM Revenue and Customs in a timely manner.

Standard 2.2 Critical: Minimum Wage

- A worker must be paid at least the National Minimum Wage (NMW) or, if applicable, in accordance with the appropriate Agricultural Wages Order (AWO).

86. The Gangmasters Licensing Authority Licensing Standards issued in 2012 introduce some stylistic changes to these standards which otherwise remain the same. In assessing compliance it is stated "The GLA adopts a proportionate approach when applying the licensing standards. The GLA is concerned with identifying the more persistent and systematic exploitation of workers rather than concentrating on isolated non-compliances, unless such a non-compliance is "critical" in its own right. The GLA will work closely with other government departments and agencies and exchange information through legal gateways. This forms part of the licensing process and assessment of compliance with the standards" (page 1440 and 1479).

87. The principle of judicial review, as set out in the case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223 HL**, establishes that the courts may quash a decision if they consider it to be so demonstrably unreasonable as to constitute "irrationality" or "perversity" on the part of a decision-maker. Lord Green held:-

> "If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere ... but to prove a case of that kind would require something overwhelming ..."

The onus is on the appellant to establish irrationality or perversity. However, the threshold will be a lower one, that of proportionality, when European Union law or Human Rights Act breaches are involved. In general terms, the concept of proportionality requires a balancing exercise between, on the one hand, the general interests of the community and the legitimate aims of the state and, on the other, the protection of the individual's rights and interests.

88. Sections 337 and 338 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") provides:-

337 Travel in performance of duties

(1) A deduction from earnings is allowed for travel expenses if –

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.

338 Travel for necessary attendance

(1) A deduction from earnings is allowed for travel expenses if –

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

(2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.

(3) In this section "ordinary commuting" means travel between –

(a) the employee's home and a permanent workplace; or

(b) a place that is not a workplace and a permanent workplace.

89. Income and Corporation Taxes Act 1988 ("TA 1988") provides:-

Section 131 Chargeable emoluments

(1) Tax under Case I, II or III of Schedule E shall, except as provided to the contrary by any provision of the Tax Acts, be chargeable on the full amount of the emoluments falling under that Case, subject to such deductions only as may be authorised by the Tax Acts, and the expression "emoluments" shall include all salaries, fees, wages, perquisites and profits whatsoever.

Section 198 Relief for necessary expenses

(1) If the holder of an office or employment is obliged to incur and defray out of the emoluments of the office or employment –

(a) qualifying travelling expenses, or

(b) any amount (other than qualifying travelling expenses) expended wholly, exclusively and necessarily in the performance of the duties of the office or employment,

there may be deducted from the emoluments to be assessed the amount so incurred and defrayed.

(1A) "Qualifying travelling expenses" means –

(a) amounts necessarily expended on travelling in the performance of the duties of the office or employment, or

(b) other expenses of travelling which –

(i) are attributable to the necessary attendance at any place of the holder of the office or employment in the performance of the duties of the office or employment, and

(ii) are not expenses of ordinary commuting or private travel.

What is ordinary commuting or private travel for this purpose is defined in Schedule 12A.

90. The Social Security (Contributions and Benefits) Act 1992 ("SSCBA") includes:-

1 Outline of contributory system

(2) Contributions under this Part of this Act shall be of the following [six] classes –

(a) Class 1, earnings-related, payable under section 6 below, being –

(i) primary Class 1 contributions from employed earners; and

(ii) secondary Class 1 contributions from employers and other persons paying earnings;

3 "Earnings" and "earner"

(1) In this Part of this Act and Parts II to V below –

(a) "earnings" includes any remuneration or profit derived from an employment; and

(b) "earner" shall be construed accordingly.

(2) For the purposes of this Part of this Act and of Parts II to V below other than those of Schedule 8 –

(a) the amount of a person's earnings for any period; or

(b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,

shall be calculated or estimated in such manner and on such basis as may be prescribed [by regulations].

(3) Regulations made for the purposes of subsection (2) above may prescribe that payments of a particular class or description made or falling to be made to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings.

91. The Social Security (Contributions) Regulations 2001 (SI 2001/1004) ("the 2001 Regulations") provide:-

Calculation of earnings for the purposes of earnings-related contributions

24 For the purpose of determining the amount of earnings-related contributions, the amount of a person's earnings from employed earner's employment shall be calculated on the basis of his gross earnings from the employment or employments in question.

This is subject to the provisions of Schedule 2 (calculation of earnings for the purposes of earnings-related contributions in particular cases) and Schedule 3 (payments to be disregarded in the calculation of earnings for the purposes of earnings-related contributions).

Payments to be disregarded in the calculation of earnings for the purposes of earnings-related contributions

25 Schedule 3 specifies payments which are to be disregarded in the calculation of earnings from employed earner's employment for the purpose of earnings-related contributions.

Schedule 3

PAYMENTS TO BE DISREGARDED IN THE CALCULATION OF EARNINGS FOR THE PURPOSES OF EARNINGS-RELATED CONTRIBUTIONS

Regulation 25

Introduction

1-(1) This Schedule contains provisions about payments which are to be disregarded in the calculation of earnings for the purposes of earnings-related contributions.

(2) Part II contains provisions about the treatment of payments in kind.

(3) Part III and IV specifies payments by way of assets which are not to be disregarded by virtue of paragraph 1 of Part II.

(4) Part V specifies non-cash vouchers which are to be disregarded by virtue of paragraph 1 of Part II.

(5) In computing earnings there are also to be disregarded –

(a) the pensions and pension contributions specified in Part VI;

(b) the payments in respect of training and similar courses specified in Part VII;

(c) the travelling, relocation and overseas expenses specified in Part VIII;

(e) the miscellaneous payments specified in Part X.

Under Schedule 3 Part VIII

Travelling, relocation and incidental expenses disregarded

1 The travelling, relocation and other expenses and allowances mentioned in this Part are disregarded in the calculation of an employed earner's earnings.

Travelling expenses - general

3 A payment of, or a contribution towards, [travelling expenses] which the holder of an office or employment is obliged to incur and [pay as the holder of that office or employment].

For the purposes of this paragraph –

(a) "[travelling expenses]" means –

(i) amounts necessarily expended on travelling in the performance of the duties of the office or employment; or

(ii) other expenses of travelling which are attributable to the necessary attendance at any place of the holder of the office or employment in the performance of the duties of the office or employment and are not expenses of ordinary commuting or private travel (within the meaning of [section 338 of ITEPA 2003 (travel for necessary attendance)].

Specific and distinct payments of, or towards, expenses actually incurred.

Paragraph 9(1) For the avoidance of doubt, these shall be disregarded any specific and distinct payment of, or contribution towards, expenses which an employed earner actually incurs in carrying out his employment.

92. In **HMRC v Forde and McHugh Limited [2012] EWCA Civ 692** the Court of Appeal decided by a 2:1 majority that "earnings" in the National Insurance contributions context was different from and wider than the term "emoluments" in the tax context. In his Judgment Mr Justice Ryder said

> *"72. For my part, I am of the view that the court should be very careful to tread by inference into territory where enactment is clearly necessary and where Parliament has not gone. That is even more so where Parliament has made changes which have the effect of separating or keeping separate the statutory schemes when it could have done otherwise.*
>
> *74. I agree that in this context the court should be very careful before making an assumption that the approach to national insurance and income tax should be the same. I accept Mr Jones' submission on behalf of the Revenue that the change effected in 1973 [Social Security act 1973] means that without a legal or public policy rationale the income tax cases on emoluments do not provide helpful guidance as to the interpretation of earnings for the purposes of section 6(1) SSCBA 1992."*

Lady Justice Arden commented:-

> *"The court must in my judgment focus on the statutory language under consideration, and not on the judicial interpretation of statutes dealing with a separate subject matter."*

93. I have considered sections 682, 683, 684 ITEPA 2003 relating to the PAYE scheme and the PAYE Regulations. I note in particular section 684 (7A) which provides:-

> "Nothing in PAYE regulations may be read –
>
> (a) as preventing the making of arrangements for the collection of tax [or other amounts] in such manner as may be agreed by, or on behalf of, the payer and [an officer of Revenue and Customs], or
>
> (b) as requiring the payer to comply with the regulations in circumstances in which [an officer of revenue and customs] is satisfied that it is unnecessary or not appropriate for the payer to do so."

94. The right to receive the National Minimum Wage (NMW) is governed by the provisions of the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 1999 (the Regulations). The standard rate applies to workers aged 21 and over and from 1 October 2011 was £6.08 an hour. The Regulations contain detailed provisions governing which elements of pay and deductions from pay should be taken into account for the purposes of calculating

NMW pay. In essence NMW pay is the total gross pay (i.e. the pay the worker receives from the employer before deductions for tax and national insurance):-

- less elements of gross pay which are excluded for NMW purposes.
- less other payments and deductions which do not count towards NMW pay

95. Regulation 31 identifies the sums that do not count for the purpose of meeting the obligation to pay the National Minimum Wage. In the **Cordant** case the Cordant Group plc challenged the introduction of the proposed new regulation 31(1)(j), the effect of which was that "any money payments made by the employer to a worker in the pay reference period in respect of travelling expenses, that are allowed as deductions from earnings under Section 338 of the Income Tax (Earnings and Pensions) Act 2003" will not count towards meeting the obligation to pay the National Minimum Wage. Cordant Group challenged the introduction of this proposed Regulation on essentially three bases:-

(i) a common law allegation of failure to take account of relevant considerations, the taking into account of irrelevant considerations and irrationality;

(ii) an alleged failure to comply with the general equality duty under the Race Relations Act 1976;

(iii) discrimination contrary to Article 45 of the Treaty on the Function of the European Union ("TFEU"), Regulation 1612/68 and Directive 2000/43/EC

96. In his Judgment Mr Justice Kenneth Parker noted that the proposed amendment, the introduction of the new Regulation 31(1)(j) would remove the regulatory mismatch that is "for the purposes of income tax and NIC, section 338 expenses are deductible in calculating chargeable remuneration. For the purposes only of assessing whether the National Minimum Wage is being paid, home to work travel expenses paid by the employer are treated as remuneration of the employment: they do not fall to be deducted from remuneration under any of the categories of deductions set out in Regulation 31 of the NMW Regulations. Workers being paid at or around the rate of the NMW can sacrifice wages under a travel scheme (or in an umbrella company which operates in a similar manner to a travel scheme), provided that the total of actual remuneration and expenses paid under the travel scheme taken together does not fall below the NMW rate. Following the proposed amendment the amount of pay chargeable to income tax and NIC would be the same as that used for determining the minimum wage. In his Judgment Parker J stated:-

"26. For the purpose of determining the amount of remuneration chargeable to income tax and NIC, section 338 expenses are discounted. ... Such expenses are necessarily incurred in the performance of the employee's duties qua employee. He or she cannot perform the job without incurring them. Such expenses, therefore, may not fairly and reasonably be treated as forming part of the worker's remuneration, or the pay that he or she would otherwise take home and could otherwise apply to current consumption or saving, and so should not form part of the amount upon which income tax and NIC are charged. It does not matter whether the worker has paid the expenses (he deducts the expenditure from chargeable income), or the employer has reimbursed the worker for the expenditure, or the employer has paid the expenditure on behalf of the worker (in the latter cases, the amounts received or paid do not form part of the chargeable emoluments of the employment, or if they did, would be immediately deductible as legitimate expenses of the job)."

38. It is true that a worker, well-organised, keeping full and accurate records, and understanding the not altogether straightforward applicable income tax regime, and having the time and resources and incentive, could deduct for herself the section 338 expenses in her income tax return, and so reduce chargeable income to the same net amount. However, particularly for low paid and/or migrant workers, such a scenario might at the moment be considered questionable."

48. However, the Secretary of State does not accept that low paid workers at or near the minimum wage have a real choice to decide to opt out of salary sacrifice schemes. He points to the economic incentives. The employer – this is common ground – incurs significant costs in setting up and operating salary sacrifice schemes. The financial benefit and cost savings of such schemes to employers ... are very substantial; and the employer has every incentive to urge the worker to enter into a salary sacrifice arrangement. The employee, for his part, may see an immediate tangible financial benefit, and no obvious detriment, in entering into such an arrangement. He may fear (whether or not the fear is well grounded) that if he were to refuse to accept the offer of salary sacrifice, he might not be offered employment under an "overarching" contract (as distinct from a traditional agency arrangement); or that, other things being equal, he might not be preferred for work placements (because the employer would be financially better off by placing a worker who had accepted a salary sacrifice agreement).

49. In the consultation there were indeed representations from the TUC and Unite that the notion that low paid workers had a real choice of opt out from salary sacrifice schemes was an economic illusion."

75. An equality impact assessment was conducted as part of the Final Impact Assessment which formed an annex to the consultation response document. The impact assessment addressed race equality. ... The assessment highlighted the fact that ethnic minority and migrant (including migrant EU)

workers were more likely than the general population to be temporary workers and more likely still in the case of migrant and EU migrant workers to be temporary workers paid at or near the NMW."

79. But in any event both the TUC and Unite did respond to the consultation document. Those representative bodies submitted that salary sacrifice schemes were not in the best interests of low paid workers and they strongly supported the proposed amendment to the regulations.

86. The REC and LFS data available to the Secretary of State suggest that ethnic minorities are twice as likely to work as temporary workers than others. The LFS data suggests that EU national form a higher proportion of the workforce employed in temporary work paid at or near the NMW level than they do of the general workforce (18% as against 4%). The Secretary of State accepts that if there is a provision that disadvantages temporary workers paid at or near the national minimum wage there would be disparate impact."

87. The Secretary of State had good reason to believe that low paid workers, comprising a higher percentage of ethnic or EU migrant workers, would not suffer significant reduction in net pay as an unavoidable consequence of the amendment, which validly corrected a regulatory mismatch; and that, even if they did so, the countervailing benefits to such workers, and the removal of indefensible discrimination as between such workers which constituted legitimate aims, fully justified the amendment ... the amendment is appropriate and necessary to achieve those aims."

97. Mr Justice Parker rejected all three grounds of challenge.

98. The introduction of the new Regulation 31(1)(j) was therefore implemented with effect from 1 January 2011.

99. The NMW Regulations 32(1) provides that certain specified deductions have the effect of reducing the amount of NMW pay received by the worker. Therefore, the employer must ensure that by making these deductions, the worker's pay does not fall beneath the prevailing NMW hourly rate. The deductions are:-

(a) any deduction in respect of the worker's expenditure in connection with his employment;

(b) any deduction made by the employer for his own use and benefit (and accordingly not attributable to any amount paid or payable by the employer to any other person on behalf of the worker), except one specified in regulation 33.

100. A deduction can be for the employer's own use or benefit even if it also benefits the worker. In **Revenue and Customs Commissioners v Leisure Employment Services Limited [2007] ICR 1056** the Court of Appeal held that a

£6 utility charge taken from workers' pay packages in respect of living accommodation provided was a deduction caught by regulation 32(1). Although the workers benefited from the charge (which was less than they would have had to pay for gas and electricity if they had been charged directly by the utility companies), it was for the employer's use and benefit because it discharged its liability towards the utility companies.

101. Under Regulation 35 of the NMW Regulations payments to the employer that would otherwise reduce earnings for NMW purposes are ignored if "in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment".

102. Cross and Harris in the Precedent in English Law describes the ratio decidendi as follows:-

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.
>
> ... A statutory rule, whose interpretation is not in question, may constitute an essential step in a judge's reasoning but it will not, of course, be what is called *'ratio decidendi'.* If, however, the meaning of a statute is disputed and the judge rules, as part of the justification for his conclusion, that it has one meaning rather than another, this ruling is his *ratio decidendi.*"

103. The Race Equality Directive (Council Directive 2000/43/EC) provides:-

> Article 2
>
> Concept of discrimination
>
> 1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
>
> 2. For the purposes of paragraph 1:
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 3

Scope

1. ... this Directive shall apply to all persons ... including public bodies, in relation to:

(e) social protection, including social security and healthcare;

(f) social advantages.

104. Regulation No 492/2011 of the European Parliament and of the Council of 5 April 2011 on the freedom of movement for workers within the Union ("Freedom of Movement Regulations") provide at preamble (6):-

"The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country."

Article 7

"1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers."

105. In the case of **O'Flynn** (case C-237/94) (in relation to Article 7 of Regulation EEC No. 1612/68 Freedom of Movement for Workers Regulations) reference was made to the court for a preliminary ruling on three questions on the interpretation of Article 7 in proceedings between Mr O'Flynn and the Adjudication Officer concerning the refusal of a funeral payment under the Social Fund (Maternity and Funeral Expenses) Regulations 1987 (The 1987 Regulations). Under Regulation 7(1)(c) of the 1987 Regulations a funeral payment is made only if "the funeral takes place within the United Kingdom". Mr Flynn applied for a funeral payment but was refused on the ground that the burial had not taken place in the United Kingdom. Regulation 7(2) of the 1987 Regulations provided that the funeral payment was to be an amount sufficient to meet the essential expenses met by the responsible member. It covered all the costs normally associated with burial or cremation at a place near the deceased's

home, and if necessary the costs of transporting the body within the United Kingdom to that home. On the other hand, it did not cover the cost of transporting the coffin to a place of burial or cremation which is distant from the deceased's home. In that case the additional cost of transporting the coffin had to be met by the responsible member. Mr O'Flynn appealed against the refusal, his contention being that Regulation 7 indirectly discriminated against migrant workers. The parties disagreed on the criteria to be applied to determine whether the Article constituted discrimination. Mr O'Flynn submitted that the condition at issue, being a territorial condition, was by its nature indirectly discriminatory against migrant workers. The Court held:-

> *"20. It follows ... that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.*
>
> *21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of this freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.*
>
> *23. To make payment of any expenses incurred by a migrant worker in his capacity as responsible member subject to the condition that burial or cremation take place within the United Kingdom therefore constitutes indirect discrimination, unless it be objectively justified and proportionate to the aim pursued."*

106. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** Lady Hale considered the Employment Equality (Age) Regulations 2006, the means by which the United Kingdom transposed into UK law the requirements of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Lady Hale considered the definition of indirect discrimination put forward in that Directive (indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having ... a particular age ... at a particular disadvantage compared with other persons) with Regulation 3 of the Age Regulations whereby:-

> "For the purposes of these regulations a person ('A') discriminates against another person ('B') if –

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage."

Lady Hale considered the EAT and Court of Appeal's finding that what put Mr Homer at a disadvantage was not his age but his impending retirement. Lady Hale considered the meaning of Regulation 3(2) which requires that the relevant circumstances in the complainant's case must be the same, or not materially different, from the circumstances in the case of the persons with whom he is compared. Lady Hale disagreed with the argument that Mr Homer must be compared with anyone else who was nearing the end of their employment for whatever reason because it was the end of the employment which caused the difficulty and not the age group to which he belonged. Lady Hale stated:-

"13. *This argument involves taking the particular disadvantage which is suffered by a particular age group for a reason which is related to their age and equating it with a similar disadvantage which is suffered by others but for a completely different reason unrelated to their age. If it were translated into other contexts it would have alarming consequences for the law of discrimination generally. Take, for example, a requirement that employees in a particular job must have a beard. This puts women at a particular disadvantage because very few of them are able to grow a beard. But the argument leaves sex out of account and says that it is the inability to grow a beard which puts women at a particular disadvantage and so they must be compared with other people who for whatever reason, whether it be illness or immaturity, are unable to grow a beard.*

14. *Ironically it is perhaps easier to make the argument under the current formulation of the concept of indirect discrimination, which is now also to be found in the Equality Act 2010. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. .. The new formulation was not intended to make it more difficult to establish indirect discrimination ... it was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that protected*

characteristics are more likely to be associated with particular disadvantages

17. *The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic."*

107. In **Secretary of State for Defence v Elias [2006] EWHC 1435** Mr Justice Elias considered an application for judicial review by the claimant, Diana Elias, in relation to a finding that she was not allowed to benefit from the Far Eastern Prisoner of War ex-gratia compensation scheme ("the Compensation Scheme"). The claimant's parents were both Jewish; her mother was from Iraq and her father from Iraq or India. Mrs Elias was born in Hong Kong on 9 January 1944 and she was registered, as a British subject, with the British High Commission in Hong Kong. She was still in Hong Kong when the Japanese forces invaded that territory in 1941. The British authorities gave a list of British subjects to the Japanese. Mrs Elias' name was included on that list together with her parents and siblings. Her home was raided and she and her family were all interned by the Japanese, by virtue of being British civilians. Under the terms of the Compensation Scheme a single ex-gratia payment of £10,000 is made to those who qualify. So far as civilian internees are concerned, in order to qualify they either have to have been born in the United Kingdom or have a parent or grandparent born here ("the birth link criteria"). Mrs Elias did not meet that requirement and this was the reason why she was not allowed to benefit from the Compensation Scheme which was set up to "repay the debt of honour" owed by the United Kingdom to British civilians interned by the Japanese during the war. In considering the claim of indirect discrimination Mr Justice Elias noted that the Secretary of State had rightly conceded, albeit late in the day, that the criteria involved in this case inevitably involves indirect discrimination on the grounds of national origin. The scheme treated less favourably those who were of non-British origin. Mr Justice Elias commented:-

"It surely did not need specific statistical evidence to establish that conclusion. Moreover, the Court of Appeal has held, after reviewing the case law of the European Court of Justice, that it is not necessary in all cases to adduce statistical evidence to establish disparate impact: see Secretary of State for Work and Pensions v Bobezes [2005] EWCA Civ 111 per Lord Slynn at paragraph 24. Where the effects are obvious or intrinsic to the scheme being adopted, as in my opinion they clearly are in this case, then a broad approach is justified."

108. In **Ministry of Defence v DeBique [2010] IRLR 471** the claimant brought Employment Tribunal proceedings complaining of indirect sex and race discrimination. Miss DeBique came from St. Vincent and the Grenadines, and in 2001 joined the British Army and moved to the UK. As a serving soldier she had

to be available to be deployed 24 hours a day seven days a week ("24/7"). In 2005 she gave birth to a daughter. The claimant faced disciplinary proceedings by reason of her childcare difficulties. In order to solve her problems the claimant wanted to bring one of her sisters, a national of St Vincent and the Grenadines, to the UK to help look after her child. However the sister, being a foreign national, could not, under immigration rules, enter the UK other than as a visitor and could not stay for more than six months. Accordingly Army policy prohibited "foreign and commonwealth soldiers" from bringing adult relatives to live with them for childcare purposes, either in a paid or unpaid capacity. The Tribunal held that the employer had applied a PCP that required her to be available for duty on a 24/7 basis. However it further considered that viewing the 24/7 PCP in isolation failed to reflect the claimant's particular disadvantage. Unlike soldiers who were UK nationals, the claimant could not have an adult relative live with her according to Army policy and the immigration rules. The Tribunal identified this as the immigration PCP. The Tribunal considered the combined effect of the two PCPs. In the EAT Mrs Justice Cox held:-

> *"(1). The employment tribunal had not erred in considering the immigration PCP. Parliament gave jurisdiction to employment tribunals to determine complaints of direct and indirect race discrimination in the employment field, including complaints made by those serving in the armed forces. Parliament did not intend to take away that jurisdiction if the PCP identified in an indirect discrimination claim is found to arise from the exercise of functions by another government department. It is irrelevant that the PCP identified arose from the operation of the immigration rules, or that those rules have a statutory source and are applied by the Secretary of State for the Home Department when making immigration decisions, which may or may not be susceptible to challenge by way of judicial review.*
>
> *Moreover, it is an unnecessary and impermissible gloss on the words of the statute to require that the PCP had to be applied to the claimant by her employer 'acting in its capacity as employer'.*
>
> *In the present case, it followed that the claimant could rely on the immigration PCP as part of her complaint. The claim did not amount to a challenge to the immigration rules themselves.*
>
> *(3) The employment tribunal had not erred in considering the combined effect of the two PCPs.*
>
> *The nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience*

In the present case, the claimant considered that the particular disadvantage to which she was subject arose both because she was a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted. The tribunal had not erred in recognising that this double disadvantage reflected the factual reality of her situation."

Mrs Justice Cox stated:-

"146. In recent years this Appeal Tribunal has also advocated a more flexible and less mechanistic approach to an assessment of the sufficiency of disparity. In ***Chief Constable of Avon and Somerset Constabulary v Chew [2001] All ER 101*** *the EAT held that it was not always necessary to rely on statistics, and that the Tribunal can and should take a flexible approach to disparity, having regard to the circumstances of the case and the underlying purpose of the legislation. We agree. In that case, in the context of sex discrimination, it was held, for example, that the Tribunal was entitled to consider whether the objectionable provision was inherently more likely to produce a detrimental effect, which disparately affected a particular sex.*

147. In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

Determination of the Issues

(including, where appropriate, any additional findings of fact made in the same manner as indicated at paragraph 17 above)

109. There is some disagreement between the parties as to the nature of my role: should I consider the GLA's decision afresh, should I consider whether the GLA's decision to refuse a licence was appropriate and proportionate, should I grant the licence subject to conditions.

110. Dealing with the latter point I would agree with Mr Grodzinski that my role is restricted to either allowing or dismissing the appeal. It is not within my power to grant the licence subject to the imposition of my own conditions.

111. As to whether it is my role to consider the GLA's decision afresh, or by review under the **Wednesbury** principles, I note that the grounds of appeal are, in essence, that the GLA, in deciding that the appellant breached critical standards 2.1 and 2.2 simply got the law wrong – the application of an accurate interpretation of the relevant legislation would have led to a finding that standards 2.1 and 2.2 were not breached and the licence would have been granted.

112. I have been invited by both parties to examine the relevant national legislation and to make a decision on what is the correct interpretation of the law. In essence, I am being asked to decide the matter afresh. I do so with considerable reluctance as both parties have repeatedly stated during the course of this hearing that this is the wrong jurisdiction for this argument, that these arguments should be determined in a tax tribunal. However, FSC has chosen not to use that route. I have therefore considered the relevant law.

113. FSC is an umbrella company. The use of the umbrella company and travel or salary sacrifice schemes is a tax and national insurance avoidance measure. There is nothing wrong with that in principle. As I remarked in the June hearing, if the rich can take advantage of tax avoidance measures to reduce income tax and national insurance liability, then why cannot the poor.

114. As Mr Grierson said, the umbrella companies do not dictate how much the employee is paid. It is the end user and agent who agree a weekly wage, the value of the job. Of course, the value of the job must be assessed on the value of the work performed by the employee in the performance of his or her duties. The value of the job is not affected by the amount of travelling expenses to and from work. For example, three employees perform the same job, which the end user decides is worth a salary of £300 per week for a 40 hour week. It is worth £300 per week whether or not worker A lives next door to the factory, worker B lives ten miles away or worker C lives fifty miles away. As Mr Grierson says, the end user puts a value on a job and is not going to pay travelling expenses on top of that.

115. It follows therefore that the reimbursement of travelling expenses from home to place of work to the worker in certain circumstances is a device, a tax avoidance measure. In my example, if each of the three workers remain in the employ of the end user, any travel expenses to and from work are ordinary commuting expenses and no tax relief is available on them. No NI saving is available if the employer chose to reimburse those expenses.

116. In deciding whether to utilise an umbrella company, in the above example, worker A, who lives next door to the factory, has no travelling expenses, there is no possible tax and/or NI saving. His salary would remain at £300 per week. On Mr Grierson's evidence worker A would remain in the employ of the agent/end user. However, workers B and C do have travelling expenses, an umbrella company is therefore used and becomes the employer, to make the travelling expenses deductible, as the factory is now worker B and C's temporary place of work (so long as they are employed under an overarching contract of employment and the other relevant conditions are satisfied). A negotiation then takes place as to how much of the £300 is paid as wages, how much as travel expenses. No evidence has been received as to how that negotiation takes place but clearly worker B and worker C will have different travel expenses – B may be £50 per week, C may be £100 per week. There is no evidence as to

whether the agency/umbrella company/end user limits the amount of travelling expenses. In the examples given in the hearing before me, for ease of calculation, the sum of £50 weekly travelling expenses has been used, but one could anticipate the possibility, and indeed probability, that the negotiation would maximise the possible tax saving geared to the actual/reasonable travelling costs of each worker. Thus, in the above example, worker B would be likely to be paid a salary of £250 plus £50 travelling expenses, worker C a salary of £200, plus £100 travelling expenses.

117. The amendment to Regulation 32(1)(j) NMW Regulations changed this arrangement as reimbursement of travelling expenses were not counted towards the NMW. In the above example, worker B could still be paid £250 plus £50 travelling expenses. However, worker C's wage could not be split to reduce his wage below the weekly minimum wage.

118. The biggest problem of the amendment to Regulation 32(1)(j) was for workers earning at the NMW level. None of their earnings could be paid as travelling expenses as the employer would be in breach of the NMW Regulations. Thus a worker doing a job which was valued by the agent/end user as being worth only the National Minimum Wage, and who had weekly travelling expenses of £50 per week, had to be paid the National Minimum Wage. He could then claim tax relief under Section 338 at the end of the tax year. However, no part of his wages could be paid as travelling expenses. The potential saving on the level of NI contributions for both employer or employee by the reimbursement of qualifying travel expenses was no longer available.

119. This amendment was a problem for the umbrella companies. As Mr Grierson explained, if there was no NI saving for the employer there was no place for the umbrella company. No deductible travel expenses, no NI saving to the employer, no "cut" for the umbrella company. All workers paid at the level of the National Minimum Wage were in the same position as the worker who lived next door to the factory: his employment would remain with the agency/end user.

120. This problem for the umbrella companies was recognised by Mr Nolan of Aspire and he put forward a new device to get around this problem. Let us not underestimate the problem. Evidence before me is that the majority of the jobs in the gangmasters' arena are paid at the NMW rate. Unless and until a new scheme is devised to provide a saving in employer's NI contributions (or a new fee arrangement is agreed between the umbrella company/agency/end user) the umbrella companies such as FSC are excluded from the market: they are involved when the use of an umbrella company and overarching contract of employment create a temporary place of employment for the worker, creates an opportunity for payment of part of the wages as travel expenses, which creates a saving in employer's NI contributions for the agency/end user, which provides a cut for the umbrella company. (I appreciate that FSC and other umbrella companies may have other lines of work but their business in this area is

severely restricted. That is the clear evidence of Mr Grierson.) Of course FSC is an umbrella company operating outside the GLA market. It faces the same problem with any employees who are paid at the level of NMW, where its fee is based on the NIC saving to the employer.

121. FSC has turned to Mr Nolan for advice, and for its non-GLA market, has started operating the PDPD model espoused by Mr Nolan on his website.

122. FSC is not a company which shies away from operating procedures for the avoidance of tax and national insurance contributions. That is self-evident from its decision to deduct employer's national insurance contributions from the wages of its employees, until it was notified that it was unlawful. It is disappointing that Mr Goodfellow should attempt to brush this aside, asserting that Mr Nolan's uncorroborated evidence that this was widespread industry practice should be accepted. There is no satisfactory evidence before me that this is an acceptable or widespread industry practice. It is clearly unlawful.

123. Mr Grierson also accepts that FSC started operating the PDPD model in breach of its Dispensation from the HMRC.

124. FSC adopted the PDPD model knowing that it was in contravention of the terms of its Dispensation from HMRC, continued with the model after the HMRC July 2011 statement, and only sought approval for that model earlier this year, after it had made application for licence to the GLA to work in the GLA sector operating that PDPD model.

125. The question for me is whether the PDPD or Coding Models comply with the relevant legislation, comply with GLA'S Standard 2.1. Under either model, in computing the amount of an employee's "earnings" on which primary and secondary Class I NIC are to be charged, FSC will deduct an amount equal to the deductible travel expenses incurred and borne by the employee in the earnings period.

126. Thus, in our example above, employee B, working 40 hours per week, on a gross weekly wage at NMW level - £243.20, would be treated by FSC as having a gross weekly wage, for NI purposes, of £193.20. Neither the employer nor the employee would pay NICs on the £50 travel expenses paid by the employee.

127. Mr Goodfellow asserts that paragraph 3 of Part VIII of Schedule 3 to the NIC Regulations should be construed purposively, with the meaning of words being informed by the statutory context in which they are used and any relevant legislative history. Mr Goodfellow argues that: "a payment of, or a contribution towards, travelling expenses" were intended to be, and should be read as, two separate limbs:-

- a payment by the employee; and
- a contribution by the employer.

128. Having considered oral submissions and the relevant law I find:-

128.1. Under Section 3(2) SSCBA the amount of a person's earnings, or the amount of earnings to be treated as comprised in any payment made to him or for his benefit, shall be calculated or estimated in such manner and in such basis as may be prescribed by regulations.

128.2. Section 3(3) provides that such regulations "may prescribe that payments of a particular class or description made ... to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings;

128.3. That statutory provision clearly distinguishes between a payment **to** a person, which may be disregarded, and payment **by** a person, which may be deducted.

128.4. Regulations 24, 25 and Schedule 3 Part VIII, Paragraph 1 make clear reference to travelling expenses as mentioned in Schedule 3 Part VIII being "disregarded".

128.5. The plain meaning of paragraph 3 of Schedule 3 Part VIII is that it allows the disregard of payments to the employee in respect of, amongst other things, travelling expenses for necessary attendance within the meaning of Section 338 ITEPA 2003.

128.6. The words of the statute should be given their natural or ordinary meaning. If the words of the statute are in themselves precise and unambiguous then there is no need to refer to other means of interpretation. The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some inconsistency with the rest of the instrument. If the words of the statute are vague and ambiguous then assistance with interpretation may be found within the statute itself, for example, in any definitions/interpretation clause. If ambiguity remains the Tribunal may adopt a purposive approach which seeks to give effect to the true purpose of the legislation.

128.7. The construction placed on paragraph 3 of Schedule 3 Part VIII by FSC is an artificial construct, which would require paragraph 1 of Part VIII to be interpreted to include provision for payments by the employee to be deducted from his earnings.

128.8. There is a clear distinction in the NI legislation between "disregard" and "deduct". The fact that other legislation, including Social

Security legislation, supports the construction of "disregard" to include "deduct" or "leave out of account" is of no assistance in this case.

128.9. The construction put forward by Mr Goodfellow is a completely novel one, unsupported by any academic argument or authority.

128.10. The principles of law, the relevant legislation, relevant to the calculation of earnings for NIC and emoluments for income tax purposes are not the same. The fact that Section 338 of ITEPA 2003 allows a deduction from earnings for such travel expenses, borne by the employee, for income tax purposes does not mean that such a deduction should be made for NIC purposes. There is no specific regulation which allows for such a deduction for NIC purposes.

128.11. The case law relating to the interpretation of the law for IT purposes, of the definition of emoluments for income tax purposes, is of no assistance in this case. That is confirmed as a matter of principle in the Court of Appeal in **HMRC v Forde and McHugh Limited**.

128.12. **Cordant** is not relevant binding authority, does not provide the appropriate authority to support FSC's interpretation. The statement by Mr Justice Parker is clearly obiter. Whether or not travelling expenses paid by a worker, and not reimbursed by the employer, were deductible for NIC purposes was not an issue to be determined by him. There is no indication in the approved judgment that Mr Justice Parker's statement that "Section 338 expenses are deductible for the purposes of income tax and NIC", was made following a dispute as to the meaning of the relevant NIC legislation. There is no indication at all that this subject was in dispute before Mr Justice Parker. As stated in Cross and Harris on Precedent in English Law, a statutory rule, whose interpretation is not in question, may constitute an essential step in a Judge's reasoning but it will not form part of the ratio decidendi. In reaching this decision I have considered the approved Judgment in **Cordant**. It is not appropriate to look behind that for a different meaning, to consider the transcript of the Judgment, and/or skeleton arguments and/or part of the evidence considered by Mr Justice Parker. I am in the extremely privileged position of having before me extremely learned counsel who have full knowledge of the argument before Mr Justice Parker. However, I cannot accept that it would be appropriate for the *ratio decidendi* to be determined by reference to such documents, made available to me only by reason of the involvement of learned counsel in the **Cordant** case.

In all the circumstances I find that there is no merit in the argument that non-reimbursed travel expenses, travel expenses paid for by the employee, should be disregarded for NI purposes. There is no merit in the argument that the provision should be interpreted to allow employers to deduct non-reimbursed

travel expenses when calculating NICs. That may be unfair. However, it is not for FSC, Mr Goodfellow or me to rewrite legislation. In my view the wording of the statute is clear and unambiguous. There is no binding authority to support FSC's interpretation. Qualifying travel expenses under s.338 ITEPA, borne by the employee and not reimbursed by the employer, cannot be deducted from the employee's gross pay when calculating NICs.

129. The next question is whether FSC, in operating the PDPD model, accurately deducts tax from the workers' pay and pays the correct amount to HMRC in a timely manner. The appellant asserts that where a temporary worker incurs travel expenses in circumstances where such expenses are deductible (e.g. in accordance with the conditions set down in the ITEPA 2003 Sections 337 or 338), effect can and should be given to that deduction through the PAYE system rather than requiring the worker to apply to the HMRC for a refund after the end of the tax year. Having considered all the circumstances and the submissions and relevant law I note in particular as follows:-

129.1. The aim of the PAYE system is that the right amount of tax is paid, spread across the year, on the assumption that the employee's income is evenly spread across the year.

129.2. Regulations have been put in place for regulation of the PAYE system.

129.3. No PAYE regulation specifically allows deduction by the employer at source under a PDPD system or similar, of Section 338 expenses borne by the employee.

129.4. Expenditure incurred by employees on qualifying travelling expenses is deductible for income tax purposes under ITEPA Section 338. It is open to the employee to make application for a deduction of these expenses from income, and any consequent tax repayment/relief, at the end of the tax year by submission of a tax return or Form P87.

129.5. HMRC is permitted to allow non-standard methods for operation of the PAYE system.

129.6. FSC has a Dispensation in relation to deductible travel expenses reimbursed by the employer and can deduct those at source under the PAYE scheme.

129.7. FSC has no such Dispensation in relation to deductible travel expenses which are not reimbursed by the employer.

129.8. HMRC has given a clear indication in its July 2011, and August 2012, statements that it will not allow a PDPD model as a non-standard method of operation for PAYE.

129.9. FSC has operated the PDPD model, deducting Section 338 travel expenses borne by the employee at source when calculating the amount of tax to be paid. This is in clear contravention of the terms of its Dispensation from HMRC. It is noted that HMRC has not taken any action against FSC in relation to this breach. There is no evidence before me that such a breach has been waived by HMRC.

129.10. Essentially FSC assert that HMRC has got it wrong, that HMRC has not allowed deduction at source for income tax purposes under the PAYE system, contrary to the clear provisions of the relevant regulations and statute. It is asserted that GLA, in upholding that wrong interpretation of the law by HMRC and refusing the licence on the grounds that Standard 2.1 is not met, is also wrong. However, FSC has failed to identify a statutory provision which specifically allows for s.338 travel expenses borne by the employee to be deducted at source under the PAYE system. This is not a case of wrong interpretation.

129.11. It is asserted that it is irrational and improper for HMRC to refuse to exercise their discretion to allow the PDPD model, as a non-standard method of operation of the PAYE model, and that GLA cannot refuse the licence on the assumption that HMRC will refuse to exercise their discretion. GLA is not the HMRC. It is, of course, a public body. GLA and HMRC work closely. That is to be expected. There is nothing wrong with that. However, Government departments are separate, have their own separate functions. In deciding whether an applicant for a licence complies with Standard 2.1, GLA is reasonable in basing its decision on how HMRC operates and enforces the PAYE system, in what way HMRC permits non-standard methods of operation of the PAYE system.

129.12. In essence, in this case, FSC apply for a licence, operating a PDPD system for which no Dispensation has been sought and which is in direct contravention of the HMRC policy statement issued in July 2011. It is not for GLA to challenge that HMRC policy statement. It was reasonable and appropriate for GLA to refuse the licence on the grounds that Standard 2.1 had not been met. GLA would be in breach of its own duty to grant a licence to a company which chooses to flout the law, to disregard the HMRC guidance. The suggestion that GLA must grant the licence, let FSC operate in the GLA industry, while HMRC challenges FSC's interpretation of the law in a different arena is wholly without merit. GLA's duty is to refuse a licence to a company who does not comply with the current tax legislation. It would be in breach of its duty to grant a licence to such a company.

129.13. FSC had full opportunity to mount the appropriate challenge to the HMRC before it applied for a GLA licence. It knew its PDPD system

was in breach of its Dispensation. All it had to do was apply to HMRC for a variation of its Dispensation: it did not. FSC pursues this appeal on the basis that HMRC ought to exercise its discretion and grant a Dispensation for the operation of the PDPD model. Whether or not HMRC will exercise its discretion, ought to exercise its discretion, is not a matter for determination by either GLA or me. If FSC wishes to pursue its application for a licence then it can apply for such a Dispensation and, if necessary, challenge the HMRC in the appropriate jurisdiction.

In all the circumstances I find that deduction at source of Section 338 travel expenses paid for by the employee and not reimbursed by the employer is not allowed under the PAYE Regulations, is in breach of the Dispensation granted by HMRC to FSC. It was reasonable and wholly appropriate and proportionate for GLA to refuse a licence on the grounds that the PDPD model breached the critical standard 2.1.

130. As for the Coding Model, I have considered all the circumstances and note in particular the following:-

130.1. FSC does not pursue this alternative model with much vigour, acknowledging that it would be a very cumbersome procedure for both FSC and HMRC to amend codes for 9,000 employees on a potentially weekly basis.

130.2. FSC has not taken reasonable steps to pursue this model, to obtain the appropriate authority/dispensation from the HMRC for adoption of this model.

130.3. FSC made contact with HMRC very late, it did not take up the opportunity to discuss the proposal in a meeting with HMRC in advance of this appeal.

130.4. At the time of the applications for a licence the HMRC had not approved the Coding Model.

130.5. As stated above, it is not for GLA or me to second guess whether, at some time in the future, HMRC will grant approval for operation of the Coding Model.

130.6. In any event, it is highly unlikely that HMRC will approve the Coding Model bearing in mind that it is progressed on the incorrect assumption that this Model will also allow deduction of travelling expenses paid by the worker and not reimbursed by the employer for the purpose of calculating Class 1 and Class 2 NI contributions.

130.7. Further it is highly unlikely that HMRC will approve the Coding Model which is extremely cumbersome and costly from both sides.

In all the circumstances I find that it was reasonable and wholly appropriate and proportionate for GLA to refuse a licence on the grounds that the Coding Model breached the Critical Standard 2.1.

131. In all the circumstances I agree with GLA's interpretation of the relevant UK legislation.

132. I have considered FSC's alternative argument that such interpretation is contrary to EU anti-discrimination law.

133. Where EU law principles and national legislation conflict, Tribunals must strive to give national legislature a construction compatible with EU law, if the national legislation can reasonably bear such a reading. As acknowledged in **Vodafone 2 v HMRC [2009] STC 1480**, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is broad and far-reaching. This purposive approach permits departure from the strict and literal application of the words which the legislature has elected to use, it permits the implication of words necessary to comply with Community law obligations.

134. The general principles of the EU law, as set out by Miss Mountfield with admirable clarity, are not in dispute. I note that the appellant does not argue a breach of the public sector equality duty in Section 149 Equality Act 2010. It merely prays that duty in aid in its argument that GLA has not established a justification defence. There is some contest between the parties as to the scope of the applicable EU law, and in particular whether FSC can rely upon the Race Equality Directive in relation to a complaint in the field of tax and NICs. At first Miss Mountfield argued that it is "acte claire" that this Directive applies in the field of tax and national insurance contributions. There is no authority before me which supports that assertion, from which Miss Mountfield withdrew in later oral submissions. It is accepted that the Free Movement regulations require equality of treatment in tax and national insurance legislation. There was a dispute between the parties as to the scope and application of the free movement regulations, Mr Grodzinski arguing that even if there were discrimination within the legislation it could only assist migrant workers from the EU. However, it is my understanding that Miss Mountfield pursues her argument on the basis that:-

- if the legislation is discriminatory, it is void *ab initio*, it cannot be enforced; or

- if the legislation is discriminatory against EU migrant workers and it is not enforceable, and is not enforced, against them, then it would be directly discriminatory to enforce such legislation against non-EU migrant workers or UK workers.

135. I accept that there is some force in Miss Mountfield's argument on this point. However, whichever the basis of the challenge the fundamental question is whether there is any indirect discrimination as asserted. In asserting indirect discrimination Miss Mountfield relies, under either Directive, on the definition of indirect discrimination in Article 2(b) of the Race Equality Directive, as clarified in the cases of **O'Flynn**, **Homer** and **Elias**.

136. I note that detailed statistical analysis is not always needed to demonstrate a particular disadvantage to a particular group of people. It is appropriate to use evidence other than statistical evidence, often not available, to establish whether a particular group is disadvantaged by a provision, criterion or practice ("PCP"). In the Employment Tribunal it is appropriate to rely on general knowledge as an industrial jury to find, for example, that a requirement for full-time work puts women, who are more likely than men to have childcare responsibilities, at a particular disadvantage when compared to men. In Lady Hale's much-quoted example it would perhaps be surprising if a Tribunal did not find that the requirement to have a beard puts women at a particular disadvantage when compared to men.

137. However, there must still be, either under EU law or domestic law, a PCP which puts the relevant person at a disadvantage, there must still be an appropriate comparison. The slackening of the requirements for statistical evidence, the requirement to interpret legislation purposively, does not remove the requirement to find discriminatory treatment. A PCP may be unfair. That, by itself, does not make it discriminatory.

138. A difficulty has arisen in this case as the alleged PCP has developed over the days of the hearing. The appellant's written skeleton argument identifies the PCP as:-

- The respondent's refusal to allow the operation of the proposed model in the GLA licensed sector (and/or for workers paid at or around the minimum wage).
- No-one employed by a person with a GLA licence may be granted relief for qualifying travel expenses against national insurance or income tax in the manner for which the appellant contends.
- The respondent's interpretation of the PAYE and NI legislation.

139. This is developed in the supplementary skeleton argument to become:-

- The imposition of a licensing condition, that FSC may not assist affected workers in claiming income tax and NIC relief which they would not otherwise be liable to pay immediately or at all.

- Preventing workers paid at or around the NMW (but not others) obtaining any relief from NICs and income tax relief at source in respect of travel expenses.

140. In oral argument Miss Mountfield further developed the argument asserting:-

- The GLA is applying two separate PCPs.
- The first is that the employer must not pay travel expenses from income which is included in calculation of the National Minimum Wage. That is, it must comply with Section 31(1)(j) of the NMW Regulations.
- The second PCP is that the employer must not apply PDPD deduction of income tax or allow NIC relief in respect of travel expenses to a temporary workplace through the payroll in relation to expenses which, although they are deductible under Section 338 of ITEPA, are not paid by the employer directly.
- The challenge in this case is only to the second PCP.

141. Miss Mountfield's final clarification of the PCP was "the GLA policy that those who meet their own eligible travel expenses cannot benefit from PAYE income tax relief at source or any NIC relief on such travel expenses."

142. In finalising that PCP Miss Mountfield also clarified that the comparison was to be of the effect of that PCP on those whose market rate of remuneration is at, below or around the NMW, and everyone else who has such expenses. Miss Mountfield further clarified that the reason that the PCP has that disparate adverse effect is that those paid at or around the NMW cannot have expenses deducted from their total compensation package consistently with Regulation 31(1)(j) of the NMW Regulations and, therefore, cannot get tax relief at source or NIC relief at all; whereas, those whose market rate is at or above the combination of the NMW plus their expenses have the facility of deducting expenses from their remuneration, the total remuneration package and, therefore immediate income tax relief and NIC relief. As Miss Mountfield helpfully pointed out, the explanation for that is contained in the HMRC guidance.

143. With the greatest of respect to Miss Mountfield, the way in which the PCP has been formulated, the way in which it has been redefined, clearly shows that this is, as asserted by Mr Grodzinski, in reality, a complaint about the effect of Regulation 31(1)(j) of the NMW Regulations, a challenge which has already been rejected by the High Court in **Cordant**, a challenge which I have no jurisdiction to consider. In making this finding I accept Miss Mountfield's assertion that the PDPD and Coding Models are not the same as the salary sacrifice schemes

discussed in **Cordant**. However, FSC's scheme has the same purpose, is designed to retain the NIC saving to the employer and to put the cost of operating the scheme on the employee. As with a salary sacrifice scheme, the benefit to the employer (and service provider) far outweighs the benefit to the employee. In the example set out at paragraphs 64-66 above, the purported saving to the employee is £8.00 per week. The purported saving to the employer is £6.90 per week and to FSEV £8.00 (inclusive of VAT).

144. Miss Mountfield's primary attack is not on the uniform application of the relevant legislation but on the GLA's refusal to allow a PDPD model, which has been designed to treat, for PAYE and NICs purposes, workers who pay their own travelling expenses in exactly the same way as workers who do not pay their own travelling expenses but who are reimbursed by their employer. In essence FSC are seeking, through this appeal, to challenge the HMRC's statement on PDPD models, such models having been designed to avoid the effect of **Cordant**. As I stated above, this is the wrong jurisdiction for such a challenge.

145. However, I do acknowledge the supremacy of EU law and the duty of the Tribunal, of the appointed person, to construe domestic legislation consistently with EU obligations. In asserting whether there is any breach of EU and discrimination law I must first consider the relevant PCP. The PCP applied by GLA was that FSC comply with Licensing Standard 2.1 – a licence-holder must accurately deduct tax and NI from all workers' pay and pay the correct amount to HMRC in a timely manner. FSC does not assert that GLA has treated it any less favourably in this regard. It is accepted that GLA applies the same condition to all applicants for licences and all licence-holders. The only effective challenge can be to the law itself. FSC asserts that the following tax and NI legislation falls foul of EU anti-discrimination law:-

> 145.1. The law that tax relief for Section 388 travel expenses is not available at source, the worker must make a claim for deduction at the end of the tax year by filing a tax return or Form 87.
>
> 145.2. The law that deductible Section 388 travel expenses paid by the worker and not reimbursed by the employer, are not deducted in calculating employer and employee NICs.

146. The cases to which Miss Mountfield has referred do not assist in this case. In the case of **O'Flynn**, the condition that a funeral payment was made only if the funeral takes place in the UK, a territorial condition, was intrinsically liable to affect migrant workers more than national workers. In the case of **Elias**, the Secretary of State rightly conceded that the "birth link criteria" inevitably involved indirect discrimination on the grounds of national origin. In the case of **Brehl v Administration DES Contributions DU Grand Duché de Luxembourg [1991] STC 575**, the criterion of permanent residence in the national territory applied to the ability to make a claim for overpayment of tax, a residence condition, was

intrinsically liable to affect migrant workers more than national workers. In **Gerritse v Finanzamt Neukölln-Nord [2004] STC 1307**, the national tax provision which refused to allow non-residents to deduct business expenses, whereas residents were allowed to do so, risked operating mainly to the detriment of nationals of other Member States and therefore constituted indirect discrimination. Once more the residence condition was intrinsically liable to affect migrant workers more. The case of **Zurstrassen v. Administration des Contributions [2001] STC 1102** is another example of a residency condition which was intrinsically liable to affect migrant workers more.

147. There is no residency or territorial condition applied to the claiming of relief under Section 388 ITEPA or the laws relating to the calculation of NICs. All workers are entitled to the tax relief, all workers may apply, all workers must apply at the end of the tax year by completion of a tax application or Form 87. No worker can claim Section 388 deductible expenses under the PAYE system at source. No employer can deduct Section 388 travel expenses paid by a worker when calculating employer and employee NIC contributions.

148. The laws under attack are not intrinsically liable to affect migrant workers more than national workers.

149. In identifying a relevant PCP I note that the key issue here is whether tax and NIC deductions are available at source. There are two pieces of legislation under challenge and two PCPs:-

> 149.1. The requirement that those workers who pay their own s.338 travel expenses should file a tax return or Form 87 to claim relief on an annual basis.
>
> 149.2. The condition that s.388 travel expenses paid by the employee and not reimbursed by the employer are not deducted in calculating employer and employee NICs.

Each is a PCP universally applied by operation of the relevant tax and NI legislation.

150. The next question is whether the PCP puts EU migrant workers at a particular disadvantage when compared with others. A dispute has arisen between the parties as to the identification of the appropriate comparator. Once again a number of alternative comparators have been suggested. I note that in determining the appropriate comparator like must be compared with like. Miss Mountfield seeks to draw a comparison with a completely different set of people to whom the relevant law does not actually apply. She seeks to draw comparison with the taxation and NIC treatment of employers and employees where the employer has reimbursed the s.338 travel expenses. That is a material, fundamental difference in circumstances. A completely different set of

legislation applies in those cases. The law of indirect discrimination, either at EU or national level, requires that the PCP is applied in the same way to the affected and comparator groups.

151. The only relevant disadvantage asserted by Miss Mountfield relates to the requirement that EU migrant workers and other non-UK nationals must apply for tax relief under Section 338 at the end of the tax year and that that places them at a particular disadvantage when compared with UK nationals. As indicated above, I note that detailed statistical analysis is not always needed to demonstrate a particular disadvantage. It is appropriate to use evidence, other than statistical evidence, to determine whether there is a particular disadvantage. However, FSC has brought forth no satisfactory evidence to support its assertion that EU migrant workers and other non-UK nationals would be put at a particular disadvantage when compared with others. No statistical evidence has been disclosed. No evidence has been received from any of the workers engaged by FSC. I note that every worker who makes a claim for tax relief under Section 338 must retain all relevant receipts until the end of the tax year. By the nature of the claim, all such workers are making a claim in relation to a temporary place of employment. It is not clear, in the absence of any direct evidence, why an EU migrant worker would find it any more difficult to retain the appropriate level of receipts than a UK national. FSC's assertion that such migrant workers may have difficulty as English is their second language is to be considered against FSC's evidence that they do not employ interpreters for all of the ethnic minority groups because most of them speak English and it is not necessary. In all the circumstances I find that there is no satisfactory evidence before me that EU migrant workers are put to any greater disadvantage than UK national workers, who are on the NMW, and like their EU migrant worker counterpart, have temporary employment throughout the country on an ad hoc basis. I would not disagree that tax law is difficult and complicated. However, it is difficult and complicated for everyone. There is no satisfactory evidence to support an argument that EU migrant workers are more adversely affected by the delay in getting the benefits of the deductible s.388 travel expenses. There is no satisfactory evidence to support an argument that EU migrant workers find it more difficult to keep receipts or fill in the appropriate Form P87. On balance I find that there is no particular disadvantage to EU migrant workers.

152. There is no satisfactory evidence to support an assertion that the relevant NIC legislation places EU migrant workers at a particular disadvantage when compared with UK national workers. The legislation applies equally to all workers who pay for Section 388 travel expenses themselves. No-one is entitled to make a claim for repayment. Any argument as to potential delay or difficulty in making a claim for repayment is not relevant. There is no particular disadvantage to EU migrant workers.

153. In all the circumstances I reject the assertion that the relevant tax and NI legislation is discriminatory, is contrary to EU law.

154. Turning to the question of breach of Standard 2.2, I have considered all the circumstances to decide whether the proposed deduction from the workers' wages to pay for FSEV's service falls within Regulation 32(1)(b) of the NMW Regulations. I note in particular the following:-

154.1. Until the recent inspection in connection with the application for this licence, FSC operated the PDPD model, dealing with receipts for travelling expenses for each of its workers, establishing whether they fell as deductible expenses under Section 338. As Mr Grierson explained, this was a costly administrative exercise for FSC.

154.2. To cover such a costly administrative exercise FSC deducted the employer's NIC contributions from the employees' pay.

154.3. FSC stopped doing this when it was notified that it was unlawful.

154.4. FSC could not afford to keep up the PDPD model and therefore devised a scheme whereby a separate company would provide those same administrative services but would charge the worker for those services.

154.5. It was originally envisaged that that company would be a subsidiary of FSC.

154.6. In fact FSEV was created, not as a subsidiary, but with the same director and sole shareholder as FSC.

154.7. The advice provided by FSEV, on FSC's PDPD model, secures a benefit to the employee but also a benefit to the employer – the reduction in employer's NIC contributions (an unlawful benefit but that is the intention behind the scheme).

154.8. The employer pays no fee to FSEV for that service.

154.9. FSC's fee from the agency/end user client is calculated as a cut of that NIC saving to the employer.

154.10. FSC receives a flat fee from FSEV as part of this scheme.

In all the circumstances I find that the deduction from wages to pay for FSEV's services is a deduction for both the employer's own benefit as well as a benefit to the worker. Applying the principles set out in **Revenue and Customs Commissioners v Leisure Employment Services Limited** this deduction falls under Regulation 32(1)(b). Deduction of the FSEV fee reduces the amount of NMW pay received by the worker. The scheme devised by FSC and FSEV clearly goes against the purpose of the NMW Regulations. FSC in effect was carrying out a payroll function and chose to make low paid workers pay for that

payroll function. The FSEV device is merely another way of making the low paid workers pay for that payroll function, which provides a huge advantage to both FSC and the agency/end user client. The deduction from the worker's wage of the fee due and owing to FSEV is a breach of the NMW Regulations, a breach of Licensing Standard 2.2.

155. In conclusion I find that both the PDPD and Coding Models rely on the deduction of Section 338 travel expenses for the calculation of employer's and employees' NICs. I find that both models breach Standard 2.1 in this regard. It is not appropriate to granf a licence to FSC which, in its current operation, breaches NIC legislation and proposes to do so for its proposed gangmasters operation. The fact that FSC has operated this system for a number of years, in breach of its Dispensation, and without appropriate action being taken against it by HMRC, is unfortunate but does not detract from the fact that the practice is unlawful, a breach of Standard 2.1.

156. I find that FSC's current and proposed PDPD model breaches the PAYE legislation. FSC has not obtained approval or Dispensation from HMRC for the operation of either PDPD or the Coding model.

157. GLA was correct in its determination that either of the proposed models, the PDPD or Coding method, was a breach of Critical Standard 2.1 and 2.2. The refusal of the licence was wholly appropriate and proportionate. On the evidence before me it is clear that if FSC were granted a licence it would breach both the Critical Conditions Standard 2.1 and 2.2. It is not appropriate to grant FSC a licence. Both appeals are dismissed.

158. For clarity I would add that each breach of the critical standards, the unlawful deduction of s.388 expenses borne by the employee in calculating NICs, the deduction of s.338 expenses at source under the PDPD model and proposed Coding model, the deduction of FSEV's fee from the worker's wage, would each separately and individually support my finding that each of the appeals is dismissed.

C Porter

Employment Judge Porter
15 November 2012

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15th November 2012
Alan Radlee
FOR THE SECRETARY OF THE TRIBUNALS

[DC]