29 Harley Street
London
W1G 9QR
Tel: 020 7016 2786
Fax: 020 7637 0419
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

22 September 2006

# National minimum wage and the accommodation offset

## Response by the Association of Labour Providers to DTI Consultation Document

**Contact: Mark Boleat, Chairman**
**Tel: 07770 441377**
**E-mail: mark.boleat@btinternet.com**

### Introduction

On 14 July 2006 the DTI published a consultation on proposed guidance *National minimum wage and the accommodation offset*, http://www.dti.gov.uk/consultations/page31917.html. Comments are sought by 6 October 2006.

This paper sets out the views of the Association of Labour Providers (ALP). The Association was formed early in 2004 by 18 labour providers. It now has 120 members and is recognised as the representative voice for those labour providers that serve the agriculture and food industry. (Full information about the Association and its work is available on its website: www.labourproviders.org.uk.) Labour providers are particularly affected by the offset arrangements. For the most part, they bring workers to the UK who undertake low paid work. Because the workers are newly arrived in Britain many are not easily able to make their own accommodation arrangements, and their income restricts the rent that they are able to pay on the open market. The issue is therefore very important to those labour providers that wish to provide accommodation. Indeed, it was because the Association raised the issue that the Low Pay Commission undertook its investigation the results of which appear in its latest annual report.

### Executive summary

The accommodation offset arrangements are based on the false premise that they apply to a tied accommodation situation in which the employer has a benefit in exchange for restrictions on the rent that can be charged. This does not apply to labour providers. The effect of the guidance is that other than in exceptional circumstances labour providers will no longer provide accommodation. This does nothing to benefit low-paid workers.

The proposed definition of when an employer is also an accommodation provider is of questionable legality and is unreasonable in practice. It is also unclear through use of the word "may". The guidance is of little help to those employers considering providing accommodation.

**The context**

The Low Pay Commission report on the accommodation offset confirms that the arrangements were designed to apply to tied accommodation. The point is made in paragraph 4.79 that "the offset is not intended to reflect the full costs of providing accommodation or rents on the open market since this would fail to recognise the advantages to the employer of housing workers at, or close to, their place of work." And the commission accepted that the accommodation provided by some farmers and labour providers for migrant workers was in a different category. The Commission concluded that the "while there is a case in principle for distinguishing between workers who are given a free choice about accommodation and those obliged to accept housing from their employer, there are significant practical difficulties associated with any such distinction". The Commission concluded that the accommodation offset provisions should apply to all workers housed by their employer in all circumstances.

The Association cannot accept that reasoning. The Commission did not ask the Association for its views on whether there could be any such test. They are a number of areas were workers can agree to opt out of into arrangements which without such a decision would be unlawful. For example, a worker has to agree to opt out from the 48-hour working week in writing, and a worker has to agree to any deductions from pay in writing. A reasonable test is that the worker would be under no obligation to occupy the housing and has consented to the arrangement in writing. The test that the Commission did not believe could exist already is applied in respect of workers subject to the agricultural minimum wage. Moreover, there is no reason why any labour provider should wish to provide accommodation to a worker who does not want to live in it. Accommodation is provided because the workers are migrant workers new to Britain who in many cases would otherwise find difficulty in arranging their own accommodation. It is not done as a profit-making business.

The accommodation offset arrangements are based on the assumption that the employer derives a benefit from having the workers on-site and therefore reasonably accept a lower than market rent. Labour providers are not in that position as they are providing workers to a third party. They may not know where the workers will be working.

The effect of the report of the Commission is that labour providers are ceasing to provide accommodation. The Commission seemed to have no regard for the accommodation costs faced by low-paid workers except for the small fraction of such workers who have the option of obtaining accommodation, often at a below market rent, from their employer. This is a blinkered approach. The Association is proposing to the Commission that it examines the accommodation position facing low-paid workers in its work programme next year.

The Low Pay Commission was correct in saying that migrant workers are vulnerable to being exploited in respect of their accommodation. Its report and subsequent government policy decisions do nothing to ease that vulnerability; indeed they worsen it. An employer wants to get the best out of his labour force and he will not do that by exploiting them through unreasonable charges for accommodation. There is ample scope for others to exploit workers through the provision of accommodation, often their own countrymen. Some businesses that have provided both labour and accommodation may take the view that it is better to be an accommodation provider than a labour provider so they can take their profits from providing accommodation and pass on the workers to a labour provider free of the accommodation offset restrictions.

The consultation paper makes the comment in paragraph 3.1 "we believe it is still be (sic) financially viable for most employers to provide accommodation alongside the provision of

work" with the application of the accommodation offset rules. The Association has asked the DTI for the evidence on which this statement is based. The Department's response was: "We do not have separate DTI research on the accommodation offset. However, as you know the Low Pay Commission undertook comprehensive research and gathered evidence from workers, employers, employer representatives and trade unions before arriving at their recommendations on the accommodation offset". The DTI seems to be basing its statement on the LPC report, but there is nothing in the Commission's report that enables such a statement to be made. Policy cannot be made in a make-believe world when all the evidence points to the contrary.

In its submission to the Commission (published on the ALP website) the Association did provide some hard evidence –

> "The following information has been obtained from one of the largest residential letting agencies in Stamford, an area of low accommodation prices. The lowest rent quoted in its current listing is £335 pcm, that is £77 a week, for a one-bedroomed flat. The cheapest two-bedroomed flat was £375 pcm, that is £86 a week or £43 if shared between two people. Most two-bedroomed accommodation was in the £400-£500 range, that is £92-£110 a week. The local newspaper, The Rutland and Stamford Mercury, in its edition of 6 August 2005, had advertisements from another agent in which the lowest rent was £350 pcm for a one-bedroomed cottage, with the lowest rent for a two-bedroomed property being £450. This figure was typical of other agents. The lowest rent quoted anywhere was £300 for a studio apartment. To comply with the minimum wage Regulations, the maximum rent that can be charged would be £114 a month and not a single property came anywhere near this, even allowing for multiple occupation."

The Association also pointed out that King's College Hospital NHS Trust was currently offering accommodation to hospital staff at between £72 and £83 a week.

The government cannot make policy in a make-believe world. How can a labour provider in such circumstances provide accommodation for £29 a week?

The Commission seems to see its mission as being to provide workers with the minimum wage free of deductions other than those required by statute. It is difficult to see how a worker benefits by being paid £5.05 an hour but has to pay £80 a week to a commercial landlord compared with a position in which he is paid £5.05 an hour but pays £50 a week in rent to his employer. What matters to low-paid workers is their overall standard of living. To suggest that this is adversely affected because a particular payment is to their employer for an optional service is untenable.

Having made these points the Associations accepts that the government has made its decision. Accordingly the rest of this paper takes the position as given and comments on the draft guidance.

**The definition of employer**

The key part of the draft guidance is Section 4.4 "when is accommodation provided by the employer". The Association has no problem with the first two bullet points in which the employer is deemed to provide accommodation where this is part of the contract of employment or where continued employment is dependent on occupying particular accommodation. The Association has more difficulty with the third point, that a worker's occupation of accommodation is dependent upon remaining in a particular job. There are many employers who provide accommodation that would not meet this test. For example, a hospital authority cannot

be expected to provide cheap accommodation to nurses who then become agency nurses, and similarly a farmer cannot be expected to provide cheap accommodation to someone who was not working for him.

However, labour providers could possibly live with this particular requirement provided that they were free to charge a market rent to someone who was not their employee. In question 4 of the FAQs it is suggested that workers can obtain accommodation by contacting their local council office for advice on hostels or bed-and-breakfast accommodation. If they do so they are likely to get a fairly terse response from most. In any event, many migrant workers have not come to Britain to live in hostels or bed-and-breakfast accommodation. It is insulting to such workers to suggest that they should be treated like that.

The second group of bullet points in paragraph 4.4 seek to cover the position in which the employer and the accommodation provider are two different corporate bodies. If employers are in effect to be banned from providing accommodation then it is sensible to have such provisions. There is no difficulty with the first three bullet points which apply to situations where the employer and the landlord are in effect the same businesses in that the people controlling them are the same. There is a problem with the fourth bullet point which suggests that the employer can be deemed to be the same as the landlord where the employer received a monetary payment or some other benefit from the third party acting as landlord. As drafted this would seem to imply that if an employer refers his workers to an accommodation agency and receives a very modest commission in exchange then the employer will be deemed to be providing the accommodation. This is stretching the English language too far, and it is difficult to see how this can be within the meaning of the regulations, in particular Regulation 31(1) which refers to “the provision of living accommodation by him [the employer] to the worker”. There is nothing in the Regulations that entitles the DTI to stretch the definition of “employer” beyond its normal meaning.

Paragraph 4.4 states "where the provision of accommodation by the employer and the worker's employment are not dependent upon each other, the employer may be considered to be providing accommodation”. This is not helpful. "May be" presumably means "may not be". This is rather confirmed when it is stated that enforcement officers will look at the facts of each individual case "before determining whether an employer is providing accommodation". This means that an employer seeking to provide accommodation in any way simply does not know what the position is and will be at the mercy of decisions of the individual enforcement officers. Labour providers already face huge economic pressure and can ill afford to take on the authorities. If this is the approach that is to be adopted it would be almost better to ban the provision of accommodation outright, as indeed may well be the effect on what is proposed.

This section has on a number occasions questioned the legality of the guidance. Paragraph 3.1 states that "the government takes the view that the employer is providing accommodation in a broad set of circumstances". But it is not for the government to take a view. What matters is the interpretation of the Act and the Regulations, which the government seems to have no intention of amending. The Association asked the DTI for an explanation of the legal reasoning that led to this comment. The Department has simply asserted the legal position.

The illogicality of the DTI position is amply illustrated by the different position that applies to workers subject to the agricultural minimum wage. Somewhat hidden in the FAQs on the penultimate page of the consultation paper is the statement that “The accommodation-offset provisions of the Agricultural Wages Order apply in a narrower set of circumstances. They

apply where an agricultural worker is provided with accommodation by his employer and that accommodation is provided in accordance with the worker's contract of employment". This is exactly the arrangement that the Association seeks generally. How can the government justify this differential approach? Businesses are entitled to see some evidence of joined-up government here. Labour providers can find themselves supplying a worker whom is subject to National Minimum Wage regulations one week and Agricultural Minimum Wage Regulations the next. A rent that is acceptable under the latter may not be under the former.

**Utilities and other accommodation related charges**

Section 3.2 of the paper notes a decision of an Employment Appeal Tribunal that the accommodation offset covers charges due from the worker to the employer in respect of the provision of living accommodation and for example charges made by the employer for electricity and gas. This decision is being appealed and it is recognised that the final guidance will take account of this. For a business friendly government constant changes in the rules, or in interpretation of the rules, such as has been experienced in respect of the provision of accommodation by labour providers makes running a business very difficult. As the Tribunal itself admitted this was something of a perverse judgment in its effect. If the judgment is to stand then most providers of accommodation would react simply by installing prepayment meters rather than charging an amount with the rent to cover the utilities. This is of no benefit to workers and indeed in many respects might make them worse off.

**Technical points**

Question 7 in the FAQs is helpful is stating that deduction of rent from salary does not itself indicate that the employer is providing the accommodation. This allows a service to be provided to workers similar to the payment of trade union fees through deductions from pay. However, the wording is vague. It would be helpful to have a concluding sentence as follows; "Deducting rent to pay to a third party who does not meet the test in this guidance of being the employer may be done without itself being interpreted that the employer is providing accommodation."

Question 8 in the FAQs implies that if the landlord arranges employment for a worker with an employer other than himself then the accommodation offset provision shall be applied if the relationship is one that leads to the conclusion that the employer is providing the worker with accommodation. The reader is referred to section 4.4. This does not seem correct. 4.4 refers to a situation in which the employer received a monetary payment or some other benefit from the third party acting as landlord to the workers. There is no reference there to the reverse situation. If an accommodation provider introduces workers to an employment business and receives a commission for so doing it is difficult to see how the accommodation provider can possibly be treated as the employer.