Appeal No. UKEAT/0458/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 10 March 2014
Judgment handed down on 16 September 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS — APPELLANT

(1) MR P JONES
(2) MRS E JONES
(3) MISS S JONES
(TRADING AS HOLMESCALES RIDING CENTRE) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ASHLEY SERR (of Counsel) Instructed by: HM Revenue & Customs Legal Department Bush House, South West Wing 3rd Floor Strand London WC2B 4RD
For the Respondent	MR MARTIN BUDWORTH (of Counsel) Instructed by: Harrison Drury & Co Ltd 1a Chapel Street Winckley Square Preston PR1 8BU

SUMMARY

CONTRACT OF EMPLOYMENT

Apprenticeship

Whether established

Appeal on the issue of whether workers at a livery stable were employed under contracts of work on apprenticeships for the purposes of the **National Minimum Wage Act 1998** and the **National Minimum Wage Regulations 1999**. The Employment Judge was in error in finding on the detailed facts they were employed under contracts of apprenticeship. Appeal allowed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and Reasons of Employment Judge Sherratt, sitting alone in Manchester on 6-7 and 18 June 2013. The latter day was in chambers. The Employment Judge was hearing an appeal under section 19C of the **National Minimum Wage Act 1998** against a Notice of Underpayment dated 14 August 2012, although by the time of the hearing of the appeal a replacement Notice of Underpayment had been issued on 3 May 2013 and it was against that replacement Notice that the appeal proceeded.

2. The Employment Judge decided that none of the workers referred to in the Notification of Appeal were covered by the definition set out in Regulation 2 of the **National Minimum Wage Regulations 1999** but, with the exception of Lisa Roberts, they worked under contracts of apprenticeship for the purposes of Regulation 12.

3. The Employment Judge also found (a) that each worker (with the exception of Lisa Roberts in respect of whom no evidence was given) worked an average of five-and-a-half days each week and (b) there were 49.75 working hours in each seven-day working week (assuming that there were two evening lessons on each Tuesday and Thursday). So each of them worked for 39 hours, six minutes plus 30 minutes spread over two evenings, giving a total working week of 39 hours, 36 minutes.

4. The Appellant is represented by Mr Ashley Serr of Counsel. The Respondent is represented by Mr Martin Budworth of Counsel. I am grateful to both Counsel for their written and oral submissions.

The Factual Background

5. This case is fact-sensitive. It is therefore important to set out the findings of fact made by the Employment Judge. They were as follows:

> **"9. Peter Jones, Eleanor Jones and Sarah Jones trade together in partnership as Holmescales Riding Centre. The Tribunal did not hear from Peter Jones who is married to Eleanor Jones and the father of Sarah Jones. Eleanor Jones and Sarah Jones both gave evidence to the Tribunal and they called evidence from Ms M McQuade, Ms C Horn and Mrs A Lupton. The respondent to the appeal called Ms R Owens and Ms G Chapman who had worked for the appellants and the Inspector also gave evidence. There was a bundle of documents.**
>
> **10. The appellants have a residential property to which there is attached a Riding School/Equestrian Centre and the business is open to the public for the provision of riding lessons and livery services. The investigation followed a complaint by the family of a worker.**
>
> **11. Within the bundle was a document headed 'Job Description for Trainee/Employees'. The first heading in the document was 'Duties in the Home' and stated 'all trainees live in as family in the family home and, along with the rest of the family, are expected to help with general household duties such as vacuuming, stacking and unloading dishwater, cleaning and tidying, kitchen/bathroom/bedroom etc., helping with the preparation of food and such other normal tasks. Meals are provided and all food, toiletries, etc.**
>
> **12. The next heading was 'Duties on the Yard' and it stated in respect of horse-riding:**
>
> > **'You will receive formal riding instruction towards exams and also the opportunity for leisure riding, both in work and free time. Duration of time for this will vary depending upon time of year.**
> >
> > **Mucking out – empty wheelbarrows.**
> >
> > **Grooming and handling various types of horses.**
> >
> > **Feeding horses and dealing with various feedstuffs – unloading feed. Filling hay nets, preparing feeds.**
> >
> > **Teaching lessons, taking rides out, assisting with lessons and rides.**
> >
> > **Keeping the yard tidy in reception areas.**
> >
> > **Dealing with clients in a pleasant and efficient manner.**
> >
> > **Answering the phone, taking bookings, messages, etc.**
> >
> > **Dealing with clients' fees and taking responsibility for money.**
> >
> > **Working as a team.**
> >
> > **General yard maintenance – yards, equipment, indoor school.**
> >
> > **Training for examinations.**
> >
> > **Maintaining the safety of all clients on the yard and around the horses at all times.**
> >
> > **Holding horses when required for inspections, etc.**
> >
> > **Bringing horses in from the field and turning out, maintaining safe procedure at all times, using appropriate equipment and wearing appropriate clothing for safety when dealing with horses.'**
>
> **13. Annual leave was 28 days including bank holidays, with five days allocated over Christmas. Holidays not taken would not run on to the following year.**

14. Examinations on agreement with both parties: 'British Horse Society' ("*BHS*") examinations will be paid for when both parties agree that you are ready to take a qualification'.

15. There was provision for one week's sick pay per year.

16. There were rules on the yard in which it was the duty to keep personal appearance tidy whilst on the yard, to treat clients with respect and good manners at all times, not to strike the horses and to treat them pleasantly and safely at all times, and to put away in the appropriate place and use in a safe and careful manner and equipment on the yard.

17. The final section of the document dealt with hours worked, stating, 'You will work flexible hours, approximately 37 hours per week, to include 4½ hours of formal riding instruction and approximately two hours of leisure riding. Also included in the hours will be training for examinations, bandaging, grooming, preparing and changing tack, in total approximately up to three hours per week. Apart from when on duty on the yard, you are not required to be at the stables but are welcome to stay if you wish. There is opportunity to ride and train in your own leisure time without charge, including joining any group lessons that are taking place during the day and in the evening.'

18. Also in the bundle was a standard explanatory letter for new and prospective students, although this was undated. It referred to it being a training position working toward BHS qualifications. 'You will receive from £100 per week, also training and riding instruction to include three lessons plus per week and full family accommodation to include all meals and other requirements, such as washing powder, etc. Your examination fees will be paid when you are ready to take the relevant qualification. Extra riding will be available at various times. Should you have your own horse you will be allowed to bring it to Holmescales after an initial trial period of four weeks and full livery will be provided. You will also be allowed to ride in your leisure time and join in lessons at no charge.'

19. The Contract of Employment used in November 2006 stated that the person was employed as an Equestrian Trainee. 'Live as family accommodation provided. Except in the case of gross misconduct, you are entitled to one week's notice of termination of employment.' There was a requirement to give one month's notice of leaving.

20. A 2008 version of that document said that the employment was as a working pupil rather than an Equestrian Trainee.

21. A 2011 version of that document again referred to employment as Equestrian Trainee.

22. The workers responded to advertisements placed by Holmescales in relevant publications.

23. Taking together the evidence from the appellants and from the various employees and former employees called on both sides, I find that the workers, Peter and Eleanor Jones, lived in one property. Sarah Jones lived elsewhere. There was a sitting room used by the Joneses and another sitting room used by the workers. There was a communal kitchen in which Mr and/or Mr Jones would cook, and they provided the food. The workers would generally each in the kitchen or in their sitting room, which was off the farmhouse-type kitchen. The bedrooms and bathroom used by the workers were off one staircase and the bedrooms and bathroom used by the Joneses were off another. In general, each side kept to their own side of the house but the workers could gain access to Mr or Mrs Jones by knocking on the door of their part of the accommodation. The workers called by the appellants seemed to have enjoyed, or still enjoy, a better relationship with the Joneses than the former workers called by the respondent.

24. Members of the Jones family and the workers would sometimes socialise together on occasions such as birthday parties and the annual Agricultural Show.

25. The workers kept clean their bedrooms and sitting room and would clear up the kitchen after meals, but they had no responsibility for or obligation to clean the parts of the house used by the Joneses. Their activities were consistent with the duties in the home described on the job description.

26. The evidence given on both sides as to the duties on the yard was consistent with the job description and the workers, as well as caring for the horses, taught lessons to pupils of Holmescales Riding Centre in respect of whom charges were levied by the Joneses for their tuition. The workers were, therefore, earning fees for the Jones as instructors of riding skills.

27. The British Horse Society ('BHS') provides professional qualifications for those involved with horses. From the BHS website I observe that Stage 1 in the professional qualifications is the first step on the professional ladder to show that a person has the competencies to apply basic principles of horse care. Stage 2 provides competencies to apply general principles for the management of horses' health and wellbeing. Stage 3 allows honing of the skills practised in stages 1 and shows that the person has the competencies and ability to look after up to four horses in stables and at grass. The Preliminary Teaching Test gives the competencies to apply the basic principles of coaching and to improve the rider's horsemanship by following a progressive plan. The BHS Assistant Instructor Certificate can be awarded after achieving Stage 3, the PTT and completing a coaching portfolio. Stage 4 shows that a person is able to take responsibility for yard organisation, taking charge and looking after a number of horses and ponies in a variety of situations. There are other courses at higher levels that are not relevant save that mention was made of a recreational qualification in riding and road safety, which educates riders in road safety to minimise the risk involved when riding on the roads. Evidence was given by former trainees that the BHS qualifications they had gained whilst at Holmescales were recognised throughout the equestrian world and that having left Holmescales they went on to work in the equine sector, either in an employed or a self-employed capacity.

28. The workers were given training each week towards the BHS examinations. Mrs Jones kept no formal written records of the level of competence of each worker at any time as to how far along the track they were towards readiness for BHS examinations, but she retained this information in her head. There was no timescale. Each worker was different. There was no fixed period within which the workers were expected to attain their qualifications. Some would take longer than others. Regardless of the stage to which each worker was progressed, they still have to be involved in the work of the yard, such as mucking out.

29. The workers would tend to leave when they had attained the level of qualification they wished to attain. There were no vacancies at Holmescales for instructors at a higher level. This work was done by Eleanor and Sarah Jones.

30. Rachel Ardley was called on behalf of the respondent. In her witness statement she said that she saw an advertisement for the role of working student/pupil advertised on the yard and groom website. At interview she was told the job involved working in the business on yard duties, leading on hacks and tracks and some teaching with small children/beginners. She would be able to study for her BHS exams and she would be helped with her studies and the examinations would be paid for. She worked from the end of July 2010 until 1 March 2011. She did not think she was in apprenticeship. She was a worker with accommodation provided. She kept her own horse in livery at Holmescales. Having left in March she attained her BHS Level 1 in April and paid for the exam herself. Most of the time she ate in the kitchen. The family did not eat breakfast with her. The family prepared the lunch but did not eat it with them. In the evenings she had to make her own tea with food she bought. She never ate meals with the family and was never invited into their side of the house. When shown around the property by Eleanor Jones she was only shown the rooms for use by the workers. The family did not come into the workers' lounge apart from an occasional visit by a granddaughter . The workers used three double and one single bedrooms. There was one bathroom for use by the workers with bath, toilet and sink. The workers cleaned their own side of the house. She went to Kendal show with the family. She was paid £90 a week in cash each Thursday. Her horse was stabled at Holmescales but she did not allow it to be used in the giving of lessons to pupils. The company took £20 from her wage before she received it but she did not receive any bills for the livery of her horse and she was responsible for fees paid to the vet and farrier.

31. In cross-examination she said that no-one else in the area offered a similar package which would involve work and on-the-job training for BHS examinations. It was attractive to her. It was not a bad deal as she was paid whilst studying for BHS examinations. If she gained the qualifications and the experience then they would be valuable to her in the future. If she had continued to stages 2 and 3 she would be employable elsewhere. She was learning all the time, dealing with different horses and different pupils and she gained valuable experience. The BHS course was practical and a bit of theory. More than 50% was riding proficiency and practical horse-related skills. If she did not want to do the BHS exams then there was no point in her being there. She saw the building in which she lived as two houses. The door to the side of the house used by the Joneses was closed.

32. Rachel Ardley dealt with hours of work in cross-examination. On Monday work was from 07.00-08.00. There was a break for breakfast between 08.00 and 09.00. They worked from 09.00 to 12.00 and then had lunch from 12.00 to 13.00. On Monday between 13.00 and 14.00

they would sometimes ride for pleasure and thus not be working. They worked again from 14.00 to 16.30.

33. On Tuesday they worked from 07.00-08.00 and then breakfast from 08.00 to 09.00. They worked from 10.45-12.00 then had lunch from 12.00-13.00. They worked from 13.00-15.30 then had a break until 18.00 when they were involved in evening lessons until 19.45.

34. On Wednesday they worked from 07.00-08.00 then breakfast followed by a lesson from 09.00-10.45 and then work until 12.00. After lunch they worked from 13.00 until 16.15. The pattern on Thursday was the same as on Tuesday and on Friday it was the same as Monday, save that there was no ride between 13.00 and 14.00.

35. On Saturday and Sunday work was 07.00-08.00, 09.00-12.00 and 13.00-16.30.

36. Twice a week they would be involved for approximately 15 minutes in the evening checking on the horses and locking them up for the night. On Tuesday and Thursday there was a 20 minute break during the shift. She worked five days one week and six days the next, giving an average of 5½ days per week. She had off every Friday and every other Thursday.

37. Katie Davies was another witness called on behalf of the respondent. In cross-examination she said that she had three tuition sessions. She was learning all the time. She learned useful skills and a lot faster. She passed her stage 1 BHS at college; did stage 2 theory at college and was working towards stage 2 practical. She wanted to start working in a horse environment rather than to stay at college. Someone with BHS qualifications was employable. It was a good opportunity to bring her riding on. She expected to be able to ride at Holmescales. She wanted to improve her riding and Eleanor Jones usually gave her riding lessons. In re-examination she said that the timing of the lessons varied every week. It was a joint lesson with the other workers. Sometimes clients came and joined in the lessons.

38. Ashton Crockett (formerly Lupton) was called on behalf of the Appellants. In her view she had a training role not an apprenticeship as it was more work based. Studying was included in work time. She was trained on the job. There were 3 x 1 hour riding lessons a week. It was general tuition of people with mixed abilities. When she started she used to sit down for a sort of lecture. This happened in the winter rather than the summer. Sarah or Eleanor Jones would be there to help and advised if they did not know how to do things, e.g. bandaging. There was only ever one person who did not do any exams and that was Lisa Roberts.

39. The hours of work generally finished around 16.30 other than on Tuesday and Thursday when there were evening lessons. Evening lessons would finish at either 19.45 or 20.30 depending on whether there were one or two sessions.

40. Mrs Crockett had done BHS stages 1 and 2 with Holmescales. She did teaching of lessons. She took rides out. She did pony club. She was doing the teaching which was also a learning experience for her. In the house she felt it was no different from a normal functioning family, save that there were two flights of stairs and two living rooms. She could have gone up their stairs but it was a matter of keeping privacy. When she left Holmescales she went to work at a county club but it was too big. She had moved to work at a smaller yard. At the county club she was one of two head girls. They did show-jumping, lessons and livery. The other head girl had no qualifications.

41. Claire Horn was called by the appellants. She had reached BHS stage 3. She had her own business having left Holmescales. She gave riding lessons to people on their own horses and took horses for breaking and schooling. When she started at Holmescales she had stage 2 but she had not done teaching. She was shown how to deal with the clients. She was taught about the child protection side and did a first aid course in connection with equine matters. There was no official appraisals but she was appraised verbally and it helped. It was ongoing as they were beside the Joneses all day every day. It was not an official apprenticeship. It was like a working pupil. Part of the time was working and part was training and studying. For her it had an end. She needed stage 3 and the PTT to have her own yard.

42. Sarah Jones, a partner in the appellants, said that she had been an apprentice for years. Lisa Roberts had been there for ten years. She was supposed to sit stage 1 but she decided she could not do it. What they offered at Holmescales was a unique scheme. Training was an ongoing thing. Everyone but Lisa Roberts got at least one BHS exam. They did the exams when they were ready. There were discussions as to when they would be ready. In the horse industry there was little paperwork. It was hands on and verbal. They discussed it with the workers as to readiness for examinations. The workers did not want to fail. They were there

to learn as they worked. It was very much a unique industry. Their goal was potentially to get the approved instructor qualification. Lessons were £25 an hour. The workers usually left when they had BHS stage 3.

43. As a part of the investigation into the allegations of underpayment the Joneses and their accountant were interviewed by the respondents. When the Minimum Wage legislation was introduced they took advice and it was to the effect that they were exempt under NMWR 2(2) and they had the advice of counsel to this effect. At interview the workers were said to be trainees not apprentices. There was no timescale on the training.

44. Eleanor Jones in cross-examination said that her accountant never suggested the workers were apprentices. The first ground of appeal was not based on apprenticeship but living within the family. They considered them to be trainees not apprentices for the purposes of minimum wage but they realised they fulfilled the criteria for apprenticeship. They stay until they have achieved their goals or leave for other reasons. The teaching done by the workers was part of their training and part of the business. The workers did not get any extra pay for carrying out teaching. Clients were charged for the lessons given by the workers."

The Employment Judge's Conclusions

6. Having heard extensive submissions from both Counsel on the law and the facts: Reasons paragraphs 45-63, the Employment Judge reached the following conclusions: Reasons paragraphs 64-74.

"64. Looking first at the contention that the workers came within NMWR 2(2), I keep in mind the words of Lord Justice Pill in *Nambalat* to the effect that:

> **'In each case it is for the Tribunal to assess having regard in particular to the factors stated in (a)(2) whether the worker is treated as a member of the family. The Tribunal must keep in mind that it is for the employer to establish that the conditions in regulation 2(2) are satisfied and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for achieving cheap domestic labour.'**

65. From the factual matters set out above, I am unable to conclude that the workers involved in this Appeal provided domestic labour for the Joneses. They did not do work relating to the employer's family household. The workers kept their own areas of the property clean. They did not keep clean the area used by the Joneses nor did they carry out other domestic tasks for the Joneses, other than sharing in the cleaning of the kitchen after the lunch that everyone ate. Had the workers not lived in the property then seems to me that the Joneses would have done no more or less of their own domestic labour.

66. The Joneses, as a family, ran a family business in the form of Holmescales Riding Centre. The workers were in my judgment employed for the benefit of that business, given that they looked after the horses in the yard in respect of which the Joneses received livery fees and they gave some of the riding lessons for which the Joneses received tuition fees.

67. The duties involved in the Riding Centre were onerous and were done for a family business rather than to support the family in a hobby or leisure pursuit. I have no hesitation in finding that the workers were not doing work related to the employer's family household and so were not covered by the NMWR regulation 2(2).

68. I have given consideration to the submissions of Mr Budworth on the principle against doubtful penalisation. It seems to me that when drafting the minimum wage legislation it was the intention of the legislature to protect low paid workers and I note that the burden of proof is reversed in cases under the NMWA. I find that the legislation is there to protect workers and not employers.

69. Were the workers employed under contracts of apprenticeship? I find that they received money payments, they were instructed and trained and acquired skills which would be of value to them for the rest of their lives, and they were given status because with their BHS qualifications they were off to a good start in the labour market.

70. There was, however, no fixed period of apprenticeship. There was the power to dismiss for gross misconduct. There was no formal structure of teaching and learning. There were no formal records kept. The amount of instructions was around three hours a week in group lessons. There was no requirement to actually undertake any prescribed course of qualification.

71. I remind myself of the comments of the Lord Chief Justice in *Edmonds* noting the inference that Parliament intended a relatively unlegalistic view to be taken of what modern apprenticeship entails, with Parliament probably intending to cover contracts of apprenticeship strictly so-called and also relationships equivalent thereto, which would be quite as appropriate to learned professions as to skilled trades or crafts.

72. The evidence from the workers is that they went to Holmescales expecting to be trained and with a view to them taking and passing the examinations set by the BHS, which is a recognised body within the equine industry. On the evidence, all of the workers but one achieved at least one qualification during their stay at Holmescales.

73. Taking a relatively unlegalistic approach I do not regard the existence of the power to dismiss for gross misconduct or the lack of any fixed term to the arrangement to be fatal to it being an apprenticeship for the purposes of the NMWR. On the evidence, I find that each worker varied in the time needed and/or taken to progress towards the qualifications and thus a fixed period of apprenticeship would not have been appropriate. I find that Eleanor Jones retained in her head sufficient knowledge as to the rate of progress of each worker towards their next goal.

74. I therefore conclude that a contract of apprenticeship was provided to the relevant workers by the appellants, save in respect of Lisa Roberts, who is a special case because it must have been apparent that she did not wish to take examinations leading to qualifications from the time of her first refusal. I have no evidence as to when this was, but if the parties are endeavouring to resolve matters on the basis of the findings in this judgment, it seems to me not unreasonable to allow a year for this to have become apparent. If any formal finding is to be made on the question of Lisa Roberts then it can only be on the basis of evidence. This must also be the case in relation to her hours of work."

The Law

7. The relevant law is contained, first, in the **National Minimum Wage Act 1998**:

"1. Workers to be paid at least the national minimum wage.

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is an individual who—

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract; and

(c) has ceased to be of compulsory school age.

(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.

(4) For the purposes of this Act a 'pay reference period' is such period as the Secretary of State may prescribe for the purpose.

(5) Subsections (1) to (4) above are subject to the following provisions of this Act."

Section 19C:

"Notices of underpayment: appeals

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

(a) the decision to serve the notice;

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

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

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

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

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

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

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

(6) An appeal under subsection (1)(c) above must be made on the ground that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason).

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

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

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

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

Section 54:

"Meaning of 'worker', 'employee' etc

...

(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that

of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

Secondly, the **National Minimum Wage Regulations 1999**. Regulation 12 provide:

"Workers who do not qualify for the national minimum wage

(2) A worker who –

...

(b) is employed under a contract of apprenticeship or, in accordance with paragraph (3) is to be treated as employed under a contract of apprenticeship, and

(c) is within the first 12 months after the commencement of that employment or has not attained the age of 19

Does not qualify for the national minimum wage in respect of work done for his employee under the contract."

The above Regulation was subsequently revoked by the **National Minimum Wage Regulations 1999 (Amendment) Regulations 2010** and replaced with the following provision from 1 October 2010.

Regulation 13:

"Workers who qualify for the national minimum wage at a different rate

(3) The hourly rate of the national minimum wage is £2.50 for a worker who - (a) is employed under a contract of apprenticeship or, in accordance with paragraph (6), is to be treated as employed under a contract of apprenticeship, and

(b) is within the first 12 months after the commencement of that employment or has not attained the age of 19."

The Grounds of Appeal

8. This is an appeal by the Commissioners for HM Revenue and Customs. There is no cross-appeal against the finding by the Employment Judge that the Respondent was entitled to treat the small number of workers (no more than five at a time) as exempt from the national minimum wage on the basis that the work that they undertook was relating to the employer's family household under **Regulation 2(2)** of the **National Minimum Wage Regulations 1999**.

9. Before turning to the specific arguments put forward by Mr Serr on behalf of the Appellant, I accept his useful summary of the law in respect of contracts of apprenticeship:

9.1 The contract of apprenticeship is of a special character and a distinct entity from other contracts of employment as its essential purpose is training, the execution of work for the employer being secondary: **Dunk v George Waller** [1970] 2 QB 163 at paragraph 168 per Lord Denning MR; **Wiltshire Police Authority v Wynn** [1980] ICR 649 at 656PF per Lord Denning MR; **Wallace v CA Roofing Services Ltd** [1996] IRLR 435 at paragraph 10 per Sedley J (as he then was); **Whitely v Marton Electrical Ltd** [2003] ICR 495 at paragraph 9 per Mr Recorder Underhill QC (as he then was); **Chassis and Cab Specialists v Lee** UKEAT/0268/10/JOJ, handed down on 7 February 2011 at paragraph 21 per Underhill J (as he then was).

9.2 It is an essential characteristic of the relationship that education and training is provided in the trade or profession and that the apprentice agrees to serve, work and follow all reasonable instructions of the employer. The absence of such a contractual requirement (on either side) is fatal to the assertion that the contract is one of apprenticeship: **Edmonds v Lawson** [2000] ICR 567 at paragraphs 30-33 per Lord Bingham LCJ.

9.3 The fact that part of the training (for example an academic component) is provided through a third-party provider is largely immaterial particularly where the employer is required to provide time off and/or fund the cost of attendance for the third-party training under the contract: **Flett v Matheson** [2006] ICR 673 at paragraph 34 per Pill LJ.

9.4 A contract of apprenticeship must be for a fixed duration and have an objectively ascertainable end, although such an end may be defined by the happening of a certain event (such as the conclusion of a prescribed course of study or a training plan) rather than a specific date: **Wallace,** supra at paragraph 13 per Sedley J; **Whitely**, supra, at paragraph 7 per Mr Recorder Underhill QC; **Flett**, supra, at paragraph 29 per Pill LJ.

9.5 A contract of apprenticeship is not terminable at will as a contract of employment is at common law: **Wallace**, supra, at paragraph 13 per Sedley J.

9.6 The ordinary law as to dismissal does not apply to contracts of apprenticeship. It can be brought to an end by some fundamental frustrating event or repudiatory act but not by conduct that would ordinarily justify dismissal. It would appear that the frustrating event or repudiatory act must have the effect of fundamentally undermining the ability to teach the apprentice: **Wallace**, supra, at paragraphs 12-15 per Sedley J.

9.7 The use of the term or label "apprentice" within the contractual documentation or referred to orally by the parties is relevant but not determinative to the question: **Wallace**, at paragraph 32 per Sedley J; **Chassis and Cab Specialists** at paragraph 21 per Underhill J.

10. With those principles in mind, I turn to the submissions made by Mr Serr. His first submission was that there were a number of terms in the contract which were wholly inconsistent with a contract of apprenticeship. First, Mr Serr submits that the Employment Judge recorded that there was a notice provision on both sides: Reasons paragraph 19. The notice provision appears in every version of the contract: Trial Bundle, pages 133; 137; and 149. The Employment Judge does not refer to the effect of this. He contradicts **Wallace** at

paragraphs 12-15. Second, the contract contains a power to dismiss for gross misconduct on no notice and that is inconsistent with a contract of apprenticeship. At paragraph 70 of his Reasons, the Employment Judge simply disregards that fact. That is contrary to **Wallace**, paragraphs 12-15. I do not accept Mr Budworth's submission that in this case gross misconduct must be construed as repudiatory conduct by the employee. It would only do so if it had the effect of fundamentally undermining the ability to teach the apprentice. Third, Mr Serr submits that there was no fixed period of apprenticeship: Reasons paragraph 70. The Employment Judge's explanation, contained in paragraph 73 of his Reasons, that each worker varied in the time needed to progress towards qualifications and thus a fixed period would not have been appropriate, would have substance if, objectively viewed, the contract made provision for undertaking of a prescribed course of qualification (thereby enabling the end date to be ascertained in some other way). However, it did not do so: see Reasons paragraphs 70, 14 and 18. Mr Budworth submits that the Employment Judge was correct in paragraph 70 in his conclusion, which was that there was a de facto end date when the exam was taken and passed or, in the alternative, when the worker had passed the stage 3 examination: see Reasons paragraphs 41-42. I agree with Mr Serr. As a matter of fact, there was no fixed contractual term. The individual worker decided which examination she would take and when subject to discussion with Eleanor Jones. There was nothing to stop them taking the examination if Mrs Jones did not feel they were ready for that particular examination. The sanction was that the Respondent would not pay the fee. In my judgment, the findings of fact by the Employment Judge and the absence of reasoning do not entitle him to draw the conclusion that these terms were consistent with a contract of apprenticeship.

11. Mr Serr's second submission relates to what was the primary purpose. He refers me to the first principle of law set out above, which is that the essential purpose of a contract of

apprenticeship is training, with the execution of work for the employer being secondary. I will not repeat the references. He submits that the factors set out in paragraphs 9.1-9.9 of the Appellant's Grounds of Appeal and these facts demonstrate that the central part of the contract was work and not training. Mr Budworth submits that training does not have to be the primary purpose of the contract and there is no reason why an employer cannot benefit from a contract of apprenticeship from work done by the apprentice. He refers me to **Wallace** at paragraph 5 and **Edmonds** at paragraphs 32 and 34. In my judgment the Employment Judge did not carry out the analysis that he was required to do and did not analyse the factors properly. If he had done so, he would clearly have taken the view that these contracts were very much for the benefit of the employer and that the training aspect was incidental and subsidiary to that contract.

12. In particular I note that the young women employed by the Respondent were essential to the business. There were no persons categorised by them as employees at all.

13. Mr Serr's final submission relates to the intention of the parties. He submits that it was not the intention of either the workers nor the Respondent to create a contract of apprenticeship. He refers me to paragraphs 30; 38; 41; 43-44 of the Reasons. As a matter of law, the parties cannot by agreement fix the status of their relationship, which is an objective matter to be determined by the court on the evidence. However, it is legitimate for the court to have regard to the way in which the parties have chosen to categorise their relationship. In cases where the position is uncertain, it can be decisive: **Stringfellow Restaurants Ltd v Quashie** [2013] IRLR 99 at paragraph 52. Mr Budworth submits that despite this there is nothing to prevent the Employment Judge being correct in determining that these were contracts of apprenticeship.

14. However, in my judgment the Employment Judge simply ignored the evidence given by the witnesses as to how they saw their legal relationship at the time the contracts were entered into and gave it no weight whatsoever. He simply did not address this factor in his conclusions.

Conclusion

15. For these reasons the Employment Judge was in error of law and the appeal must be allowed.

16. I have carefully considered disposal. No further evidence is needed. The Employment Judge made careful findings of fact. Neither party has sought to argue that further findings of fact are necessary. In the light of the clear findings of fact and the errors of law made by the Employment Judge I am satisfied, on the material before me, that the relevant workers were employed under contracts of employment and not contracts of apprenticeship. There is, therefore, no necessity for me to refer this matter back to the same Employment Judge or order a fresh re-hearing before another Employment Judge. That would be disproportionate and not in accordance with the overriding objective. I will therefore declare that the workers were employed under contracts of employment and not apprenticeship and invite the parties to determine the question of the appropriate quantum. Failing agreement between them, then they must make application to the same Employment Judge.