EMPLOYMENT TRIBUNALS

Appellant: Vavavoom Hairdressing Limited

Respondent: The Commissioners for HM Revenue and Customs

HELD AT: Manchester **ON:** 28 April 2017
13 June 2017 (In Chambers)
31 August 2017 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Appellant: Mr P Dawson, Director
Respondent: Mr S Redpath, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The appellant's appeal succeeds in part, under s.19C(6)(b) of the National Minimum Wage Act 1998, and the notice of underpayment issued on 2 December 2016 in the form in which it was served is to be rectified.

2. The tribunal rectifies the notice of underpayment by providing that the pay reference period specified on page 3 of the notice at column (e) in respect of each worker is varied to read "01/08/2016 to 28/08/2016".

3. The tribunal does not make any further rectification at this stage, but proposes also to rectify columns (f), (g) (i) and (j) , in respect of each worker referred to, with consequential rectification of the penalty charge due set out on pages 1 and 3 of the notice.

4. The parties are to consider agreement of the terms of any rectified notice, or other compromise of the appeal, but, in default, shall notify the tribunal in writing by **2 Ooctober 2017** as to whether any further hearing is required. If so, the parties shall state what is to be determined, and whether they wish to have a further oral hearing, call any further evidence,

or wish the tribunal to deal with any further issues by way of written representations.

5. If a further hearing is required, the tribunal shall further determine the terms of the rectified notice of underpayment.

REASONS

1. The respondent is HM Revenue and Customs, which has responsibility for enforcing the National Minimum Wage ("NMW") legislation. It does so, among other ways, by issuing notices of underpayment to employers whom it alleges have contravened the NMW legislation, which have the effect of requiring the employer to pay , where appropriate, arrears of pay to the affected workers, and also to pay financial penalties, calculated by reference to the amount of the alleged deficiency in the amounts paid to the affected workers. Appeal against such notices lies to the employment tribunal. The relevant statutory framework is set out in the Annex to this judgment.

2. The Notice of Underpayment which is the subject of this appeal was issued on 2 December 2016 to the appellant, a company which conducts a hairdressing business at one salon, 11b Water Lane, Wilmslow . The Notice requires a penalty to be paid to HMRC of £1,843.20 This is calculated by reference to alleged underpayments of the NMW to two workers, Christina Colledge, and Elaine Jones in respect of the period from 8 August 2016 to 20 August 2016 of , respectively, £345.60 and £576.00 . That makes a total alleged underpayment of £921.60, and the penalty is calculated at 200% of that figure.

3. Paul Dawson, managing director of the appellant, who has appeared for it in this appeal, submitted a notice of appeal dated 21 December 2016. In box 5 of the appeal from he ticked boxes 1, 2 and 3, indicating that the appellant was contending that:

the decision to serve the Notice was incorrect because no arrears were owed to any worker named in the Notice.

the requirement imposed by the Notice to pay arrears to a specific worker was incorrect because:

the amount specified in the Notice as due to the worker is incorrect

no arrears were owed to the worker in respect of any reference period specified in the Notice

the requirement imposed by the Notice to pay a penalty was incorrect because:

the amount of the penalty has been incorrectly calculated.

4. Paul Dawson attached full grounds of appeal to the notice of appeal, running to some 6 pages, with attachments.

5. Other than to acknowledge the appeal, on 15 February 2017, and provide the tribunal with a copy of the Notice, the respondent did not respond to the appeal . There is no requirement that it should do so.

6. The appeal was heard at Manchester (originally it was to have been Liverpool) on 28 April 2017. Paul Dawson appeared for the appellant, gave evidence himself and adduced a witness statement from Janis Williams, the receptionist and salon manager, but she did not give live evidence. The respondent , represented by Mr Redpath of counsel, called Karen McAllister (nee Orr) , a Compliance Officer , to give evidence. There was a Bundle of documents. Judgment was reserved.

7. During deliberations, however, the Employment Judge sought further information from appellant as to what payments were actually made to the relevant workers in the August 2016 payroll, and in respect of what hours worked.

8. The appellant replied by letter of 11 July 2017, with attachments. Unfortunately the appellant did not confine itself to providing that information, but made quite lengthy further submissions, and attached further documents, which had not been included in the Bundle, and which, the Employment Judge understands, had not been previously disclosed to the respondent. They are:

Attachment 1

This is a summary of payroll for all employees dated 7 September 2016

Attachment 2

Extract from the appellant's bank statements for 9 September 2016

Attachment 3(i)

Payslip for Christina Colledge – 9 September 2016

Attachment 3(ii)

Pay calculation for Christina Colledge : 1 August to 27 August 2016

Attachment 4(i)

Payslip for Elaine Jones – 9 September 2016

Attachment 4(ii)

Pay calculation for Elaine Jones: 1 August to 27 August 2016

Attachments 5(i) and 5(ii) are receipts for online submissions

Attachment 6

This is a summary of payroll for all employees dated 7 October 2016

Attachment 7

Extract from the appellant's bank statements for 7 October 2016

Attachment 8(i)

Payslip for Christina Colledge – 7 October 2016

Attachment 8(ii)

Pay calculation for Christina Colledge : 29 August to 24 September 2016

Attachment 9(i)

Payslip for Elaine Jones – 7 October 2016

Attachment 9(ii)

Pay calculation for Elaine Jones: 29 August to 24 September 2016

9. The respondent was invited to comment upon those, and did so by letter of 20 July 2017, in essence, objecting to the appellant advancing anything further. No specific comment was made upon the attachments, and the information contained therein. The appellant responded further by letter of 21 July 2017, apologising for being inexperienced in these matters, (which is accepted, and the appellant should not be concerned about this), and making the point that all the necessary information for the relevant pay reference periods had been supplied. The Employment Judge accordingly resumed his deliberations. In doing so, he has concluded that whilst there are arguably new matters that the appellant has sought to introduce at a late stage in the appeal, these are not directly relevant to the major issues of principle raised by the appeal, upon which the tribunal can, and will , give its ruling. The effect of that ruling can then be considered, and , if a further hearing is required, appropriate directions can be given.

Preamble.

10. There is very little guidance in the legislation, or anywhere else as how an employment tribunal is to approach appeals of this nature. Unlike other appeals, such as those against Health and Safety Prohibition and Improvement Notices, there are no provisions in the 2013 employment tribunal rules of procedure which are specifically applicable to appeals against Notices of Underpayment, and one falls back on reg. 13 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides that Schedule 1 (which contains the 2013 rules of procedure) applies to "all proceedings before a Tribunal" , except where separate rules of procedure made under the provisions of any enactment apply. No such rules

of procedure have, as far as the tribunal is aware, been made, and hence the tribunal's 2013 rules of procedure in Schedule 1 will apply

11. That immediately throws up some issues, as those rules are primarily of application to claims made by employees or workers against their employers, and hence provide procedures for starting and responding to claims, preparation of documentary and witness evidence, and , ultimately for a final hearing, at which the rules as to the burden , and standard of proof , and all other procedural and legal issues have been long established , or are ascertainable from the primary legislation creating the rights that claimants before the tribunal are seeking to enforce.

12. Those provisions, however, sit somewhat uneasily with an appeal of this nature. They could, the tribunal supposes , have been adapted, and a preliminary hearing held, with some case management attempted , by analogy with the more usual tribunal claim processes, but this has not occurred. Fortunately, the parties have prepared along very similar lines to those utilised in the more usual tribunal claims, and have produced witness statements, and documents for use in this hearing.

13. Probably the most glaring lacuna in the procedure is the absence of any requirement for the respondent to serve or file any form of response to the appeal. Again, fortunately Mr Redpath had prepared a Position Statement for use in this hearing, which helpfully sets out the respondent's case.

14. The purpose of this preamble is to explain how this tribunal has approached its task, and why. Tribunals are primarily fact – finding bodies. Nothing in the legislation suggests that the tribunal should carry out some form of purely legal review of the Notice in question, and limit itself to a judicial review - like enquiry, where no facts can be challenged. The tribunal will consider precisely what its approach should be in due course, but given the express applicability of the tribunal's own rules of procedure, and its primarily fact – finding role in all proceedings before it, the tribunal considers that finding the relevant facts is its initial and primary role.

Findings of Fact.

15. Having heard the evidence , and considered the documents, and the submissions of both parties, the tribunal finds the following relevant (for many aspects of the evidence are not relevant to the issues in the appeal, such as the complaint that the appellant has made about the role and conduct of the Compliance officer) facts:

15.1 The appellant carries on a hairdressing business in Wilmslow. It employs some 5 people, most of them women. Paul Dawson is the Managing Director, and his partner Elsa Brennon is the Operations Director.

15.2 In April 2016 Karen McAllister, as she now is, then Karen Orr, a National Minimum Wage Compliance Officer, opened a National Minimum Wage Review into the appellant. In the course of that review she interviewed Paul Dawson by

telephone, and obtained copies of various documents and records from the appellant. She entered into e-mail communication as well.

15.3 In the course of the review, Mrs McAllister also sent letters to, and spoke with a number of employees of the appellant. She learned that upon the commencement of employment with the appellant, workers are not paid for the first two weeks, working "two weeks in hand". This would be repaid to them upon termination of their employment.

15.4 The documentation confirmed that this was indeed the policy of the appellant, and documents were produced in relation to current and former workers which demonstrated the application of this policy.

15.5 This issue arose around July 2016, and in correspondence in June and July 2016 Paul Dawson had referred to the practice of workers working "two weeks in hand".

15.6 On 9 August 2016 Christina Colledge, and Elaine Jones started work for the appellant. Elaine Jones' Employment Contract Key data document signed and dated 8 August 2016 is at page 20 of the Bundle. In it there appears the following:

"Pay Frequency : 4 Weekly

Rate of Pay : £8.50 p/hr

Pay Mechanism: 2 Weeks in hand with first two weeks withheld to enable full annual leave allowance from employment commencement date "

15.7 Christina Colledge was employed to work three days per week, 24 hours in total, , at the rate of £7.20 per hour. Elaine Jones was employed to work 5 days per week, 40 hours in total, at the rate of £8.50 per hour.

15.8 Mrs McAllister wrote to Paul Dawson on 27 September 2016 (page 70 of the Bundle) raising this issue, and seeking details of current workers employed by the appellant. She accepted that the records and correspondence produced did establish that payment for the initial two week payment was indeed paid upon termination, in the final pay reference period, but she contended this was an underpayment, as the rate at which the final payment was made was at the lower rate of NMW which applied at the commencement of the employment, and not that which pertained at the date of termination.

15.9 Paul Dawson replied by letter of 13 October 2016 (pages 75 to 76 of the Bundle). In that letter he explained the rationale for the salon's policy of withholding the first two week's pay, which was as follows:

> *"Our salon policy is to withhold the first two weeks pay of all new employees until they leave. This remains an accrual on our balance sheet for future release when an employee leaves. It is purely a mechanism to ensure that when an employee leaves we can retain a fiscal amount in the event that they have taken more holidays pro-rata in a given year than is applicable at the point of leaving. If their holidays are at the correct level they receive the two weeks payment in full withheld at the commencement of their employment. A better description to avoid any confusion would be <u>two weeks worked in hand at commencement of employment.</u>"*

15.10 His letter went on the deal with specific enquiries relating to workers whose cases are not relevant to this appeal. He asserted the appellant did pay the NMW, and departing employees were paid the two weeks pay at the rate of rate applicable at the time that they left. He raised a number of complaints about the respondent contacting members of staff.

15.11 On 20 October 2016 Mrs McAllister rang Paul Dawson , with her colleague Gabriel Murphy. The notes of this conversation are at page 84 of the bundle. Paul Dawson explained further the two weeks in hand practice, and was told that repaying that at the older NMW rate would be a failure to pay the NMW, although there was no problem with paying it in arrears this way. He agreed to provide more information, which he did later that day (page 88 of the Bundle).

15.12 By letter of 24 October 2016 (page 91 of the Bundle) Mrs McAllister requested certain information from Paul Dawson. Her letter was stated to be in order for her to ascertain if there was an issue in relation to the NMW, and she asked him to complete a table setting out in respect of each named worker (including Christina Colledge and Elaine Jones) details of hours worked in respect of a two week period, along with its start and end date.

15.13 Paul Dawson replied on 25 October 2016 (page 92 of the Bundle), completing these details, and in relation to Christina Colledge and Elaine Jones stating that they worked 48 and 80 hours respectively. He gave the start date for each of them as 8 August 2016, and the end date as 20 August 2016.

15.14 By letter of 11 November 2016 (pages 93 to 94 of the Bundle) Mrs McAllister told Paul Dawson that by not paying workers in their initial two week period or in the following pay reference period, this created an issue, and the two workers should be paid at prevailing NMW rates . She set out her calculation of the underpayments to Christina Colledge and Elaine Jones. She calculated that Christina Colledge had been underpaid by £345.60, and Elaine Jones by £576.00. She advised Paul Dawson of the penalty applicable of £1843.20, and warned that she did not hear from him further a Notice of Underpayment would be issued.

15.15 Paul Dawson replied by letter of 17 November 2016 (pages 97 to 98 of the Bundle). He explained how Christina Colledge had left the business, and how he had decided, "without prejudice" to pay Elaine Jones her two weeks pay.

15.16 On 30 November 2016 Mrs McAllister issued a Notice of Underpayment (pages 101 to 103 of the Bundle), seeking payment of arrears to the Christina Colledge and Elaine Jones of £921.60 , and a penalty of £1,843.20 .

15.17 As Paul Dawson had paid the workers the alleged arrears he contacted the respondent to tell Mrs McAllister this.

15.18 Mrs McAllister then withdrew that Notice (page 114 of the Bundle).

15.19 By letter of 2 December 2016, however, she re-issued a Notice of Underpayment in similar terms, save that no arrears were alleged to be due to the workers Christina Colledge and Elaine Jones, but the penalty of £1,843.20 was still sought.

15.20 The Notice of Underpayment dated 2 December 2016 is at pages 1 to 3 of the Bundle (and at pages 117 to 119 as well). In it the details of Christina Colledge and Elaine Jones are given, and the "relevant day" is said to be 21 August 2016. The "Pay Reference Period" in each case is said to start on 8 August 2016 and end on 20 August 2016. The underpayment is alleged in the case of Christina Colledge to be £345.60, and , in the case of, Elaine Jones, £576.00.

15.21 Paul Dawson responded later that day by letter (pages 121 to 122 of the Bundle), saying he would appeal, and issue a formal complaint, which he then proceeded to do.

15.22 In relation to the two workers in question Christina Colledge and Elaine Jones, the hours that they worked and the sums that they were paid were as follows, from the calculations provided by the appellant. In calculating the hours worked, the appellant has taken the standard contracted hours for each employee, and has deducted from those hours, hours not worked when the salon closed early, and hours when the respective employees were receiving hairdressing services, and hence were not working. (The tribunal, it should be clear, does not find as a fact that the employees did not work for the hours that they were receiving hairdressing services, but sets outs the appellant's contentions, not yet in evidence, that this was so.)

Christina Colledge.

Hours worked:
08.08.16 to 27.08.16 72 hours

less :

early closure	6.15 hours	
hairdressing services	3.00 hours	
Total hours worked :		62.85

Actual payment received in respect of period to 27.08.16 on 09.09.16

£172.80

Elaine Jones.

Hours worked:

08.08.16 to 27.08.16	120 hours	
less :		
sick leave	8.00 hours	
early closure	13.06 hours	
hairdressing services	2.00 hours	
Total hours worked :		96.94

Actual payment received in respect of period to 27.08.16 on 09.09.16

£612.00

16. Those, then, are the salient facts. There was no real conflict on the evidence, which is largely well documented, though the tribunal has discovered that some information as to what Christina Colledge and Elaine Jones were actually paid in late August or early September is not actually in the Bundle. It has since been supplied as part of the attachments to the appellant's letter of 11 July 2017.

The submissions.

17. The parties made submissions. Those from the respondent were largely based upon Mr Redpath's Position Statement, and he orally expanded upon them. He contended that the two weeks in hand arrangement did not satisfy reg.12(2)(b) of the regulations, there was no element of repaying a loan, it was simply a means of taking pay off the workers on account of future holiday entitlement. It did not fit within that regulation. He contended that the PRP of two weeks was the correct PRP, as this was severable form the normal four week pay period, and this was a period for which the pay was totally withheld.

18. In relation to issues as to the interplay between the NMW legislation, and the Working Time Regulations , there was none. They were separate pieces of legislation, and must be read that way.

19. For the appellant, Mr Dawson, not being a lawyer, firstly expressed how he had only during the hearing heard the respondent's legal basis for its contentions that the NMW had not been paid in respect of the PRP. The two weeks in hand arrangement was to benefit employees, who could start work with potentially more holiday than they would accrue until they had been working for some time. In relation to reg.12(2)(b), and how it might apply, he explained that the reality was that the employees were being given an advance of their wages, in the sense of the wages

that they would get when being given holidays with pay, when they otherwise would not be entitled to them.

20. He referred to Mr Redpath's Position Statement, and para. 23 where reference is made to holiday pay not being counted towards the NMW, under reg. 35. If this was so, the workers may have been overpaid.

21. His main contention was that the respondent had used the wrong PRP., though he contended that the correct PRP should be a three week period from 8 August 2016 to 27 August 2016. He pointed out that when the appellant was asked for information about all the workers (page 91 of the Bundle) , the request related only to a two week period. No mention was made of dates, or of what the PRP was said to be. He referred to reg.32, and how only hours when the workers were at work were to be counted. He had provided evidence of when the salon had actually been open.

22. It is also right to observe that in the appellant's response to the tribunal dated 11 July 2017, in addition to reiterating and possibly expanding upon arguments that had been ventilated in the hearing, and in the evidence as to the practice of the "two weeks in hand" provision, and the correct PRP, the appellant has added a further additional factor in support of its argument that if any sum is found to be due, the amount by which the workers in question were underpaid the NMW is to be further reduced by the deduction of, not only the time that they received hairdressing services that they received, and were hence not working, but also the value of these services. Neither of these potential factors for reduction of the ultimate calculation of whether the workers had been underpaid the NMW, or , if so, by how much, had been referred to in argument, or, more importantly, the evidence, before the tribunal. The tribunal has determined, however, that it can decide some important issues of principle without making final findings upon this later material, and will proceed to do so.

23. Finally, to the extent that they may not have been mentioned , the tribunal has considered all the written points made by both parties in their documents, and each side's submissions and arguments (plus any that could have been advanced by the unrepresented appellant) have been considered, as will be apparent from the ensuing discussion and findings.

The law.

24. The relevant statutory provisions are contained in the Annexe to this judgment. As indicated in the initial discussion above, there is no real guidance as to the approach that a tribunal should take when determining an appeal against a Notice of Underpayment. Given the wording of the grounds of appeal in ss.19C(4),(5) and (6) it must be the case that the tribunal is entitled, and indeed required, to determine for itself whether any sum was in fact due to a worker, on a particular specified day, or in respect of a particular reference period , or whether the amount of any penalty has been incorrectly calculated.

25. To clarify, whilst s.19C provides the right of appeal against a Notice in three specified circumstances, only two of them apply here. The appellant appeals, firstly, under s.19C(1)(a) against the decision to serve the Notice at all. S.19C(4) therefore applies, which provides that the sole ground for making such an appeal has to be that no such payment was actually due to any worker on a day specified in the Notice.

26. The appellant, however, does not, or rather cannot, appeal under s.19C(1)(b), as this only applies to any requirement in the Notice to pay any sum to a worker. The Notice under appeal in this instance did not impose any such requirement, as the amount stated to be due to worker was nil. The grounds of appeal applicable to an appeal on this basis, which are set out in s.19C(5), therefore, have no application.

27. The provisions of s.19C(1)(c), however, are engaged, as the Notice does impose a requirement to pay a financial penalty. The grounds for such an appeal contained in s.19C(6) therefore apply, but, of those, s.19C(6)(b) is the only relevant ground , as s.19C(6)(a) relates only to an appeal based on service of a Notice in breach of directions made by the Secretary of State, which is not relied upon here.

28. Thus, the enquiry for the tribunal in relation to an appeal under s.19C(1)(a) is whether, on a date specified in the Notice under appeal, any sum was actually due to any worker specified in the Notice, with reference to the relevant pay reference period. The enquiry for the tribunal in relation to an appeal under s.19C(1)(c) is whether the amount of the financial penalty has been incorrectly calculated.

29. Finally , different disposals follow from the different types of appeal. Under s.19C(7), if a tribunal allows an appeal under s.19C(1)(a) , i.e that the Notice should not have been served, it must rescind the Notice. Those are clear mandatory words. If, however a tribunal allows an appeal under s.19C(1)(c) , it must rectify the Notice, which then takes effect in rectified form. In other words, if the tribunal finds that the amount of the financial penalty imposed in the Notice was incorrect, but that some financial penalty was in fact due, it must (again, mandatory language) rectify the Notice , which then takes effect to impose the corrected financial penalty.

30. From all this it is clear that the tribunal must, for the purposes of either type of appeal , i.e s.19C(1)(a) or s.19C(1)(c), determine , in relation to the former, whether any sum was in fact due to any worker on the relevant day, and in relation to the latter, whether the amount of any financial penalty has been correctly calculated. This may often involve determination of the same issues for the purposes of each type of appeal, for the amount of the financial penalty is itself dependent upon what, if any, sum is alleged to have been due to the worker, but this may not always be the case.

Findings.

i)The s.19C(1)(a) appeal.

31. The first issue therefore is was any sum due under section 17 to any worker to whom the notice relates on the day specified under section 19(4)(a) of the Act in

relation to her, in respect of any pay reference period specified under section 19(4)(b) in relation to her. The appellant's case is that no such sum was due, and therefore the Notice should be rescinded.

32. The starting point has to be the Notice, and what it states. The Notice is at pages 1 to 3 of the Bundle , with the crucial details being set out on page 3. This is in tabular form. It sets out in boxes, lettered (a) to (j), the relevant information required by s.19(4) to be contained in a Notice of Underpayment, though it does not conveniently follow the lettering of that sub-section as there are 10 boxes on the Notice, but only 5 in the subsection. S.19 makes reference to amounts due to a worker under s.17, and to pay reference periods. It is therefore to s.17 that one must look in order to determine whether a worker has or has not been paid the NMW at any given time.

33. The respondent's case is that the Notice correctly asserts that the two workers were not paid the NMW in relation to the relevant pay reference period. That period for both workers is stated in the Notice to be 8 August to 20 August 2016, and in each case the amount of the underpayment is the amount of pay that would have been payable at the NMW hourly rate of £7.20 for each worker, for the hours they worked. As they were actually paid nothing for this period of 13 days , the amount of the underpayment is the whole of the payment they should have received.

34. The appellant's case is that no sums at all were payable to these workers because this was the first two weeks of their employment with the appellant, and the appellant applies a policy in the employment of these workers (as all their other workers) that they are not paid for the first two weeks' work, but rather this pay is "banked" against future holiday entitlement. This enables workers who have only short service, and hence only limited accrual of holiday until their service builds up, to take extra holiday to which they would not be entitled much earlier in their service. This is put forward as some form of advance, falling within reg.12 of the 2015 Regulations, which disregards, for the purposes of determining whether the NMW has been paid, certain deductions made by an employer from payments otherwise due to a worker.

35. The respondent disputes this, and contends that this policy cannot have this effect, and cannot justify such total deductions so as to fall within the "permitted", as it were, deductions under reg.12.

36. In support of this argument it is argued that this is not the type of repayment of an advance that is envisaged by the regulations at all. It is a withholding of monies earned for future release as holiday pay.

37. The appellant has, it is claimed, been advised that this is permissible, and that this policy and the payments made, or rather, withheld, under it do not have the effect of the workers not being paid the NMW.

38. The tribunal cannot agree. The respondent's arguments are correct. A worker cannot contract out of the NMW (see s.49 of the Act). A major principle of the NMW legislation is that a worker who has provided labour should be paid at the rate of the

NMW for it, and should receive that payment at the appropriate time, i.e within the pay reference period, and not at some unspecified date in the future. Regs 11 to 15 set out very strict exceptions to that principle, and prescribe which deductions can, and which cannot , be taken into account for the purposes of determining whether the NMW has been paid. When an employer has made a deduction (in this case a total deduction for two weeks) the burden is upon him to show that the deduction falls within one of those permitted by the regs., so as to be properly taken into account when determining if the NMW has been paid.

39. Whilst appreciating that the appellant may have relied upon advice, and acted at all times with transparency and good faith, for what it believed was the benefit of both its workers and the business, as a matter of law the policy of working two weeks in hand in return for advantageous holiday arrangements cannot fall within reg. 12 , or any other exception. This cannot be characterised as the type of arrangement covered by reg.12(2)(b) as being "deductions or payments on account of an advance under an agreement for a loan or an advance of wages". There has been no "advance of wages", quite the opposite. What there will be, of course, is payment of holiday pay if a worker seeks paid holiday to which they would not be entitled , when they will be paid for that holiday, from funds provided from the withholding of the initial two weeks of employment.

40. That is not an advance of wages by the employer. In fact it is the reverse. The employee is advancing to the employer a portion of her wages, out of which the employer then repays her by paying her for holiday that would otherwise be unpaid. The tribunal cannot see that this is the type of payment that falls under reg.12(2)(b), and if that were the only issue, it would find that the workers in question were not paid the NMW (at the time, for they have since been paid) for the first two weeks of their employments with the appellant.

41. Thus whilst there may be issues as to the correct pay reference period (to be discussed below) the tribunal cannot see how it can be the case that no sum was due to either worker on any of the relevant dates and in respect of the specified pay reference period. An appeal under s.19C(1)(a) can only succeed if there is no sum due, and any error in calculation of any such sum , even if established, does not entitle the appellant to succeed on this ground , unless no sum was actually due to a worker.

42. A further argument has been advanced (albeit, perhaps only in correspondence after the hearing, but the respondent has been afforded the opportunity to comment upon it) that payments made after the relevant pay reference period can and should be taken into account. The basis for this assertion is, however, somewhat dependent upon what the correct pay reference period is, and it is to that issue that the tribunal now turns.

The pay reference period.

43. The process for determining whether the national minimum wage has been paid is set out in NMWR SI 2015/621 reg 7. The aim is to calculate the worker's average hourly rate of pay over a given reference period and then compare that with

the appropriate national minimum wage rate to see if the employer is complying with the legislation. To achieve this it is necessary to divide the total remuneration received in a given pay reference period by the total number of hours worked in that period. The provisions in Part 4 of the 2015 Regulations determine which payments qualify as remuneration and Part 5 deals with how to calculate the hours worked for the purposes of the calculation.

44.The worker's pay has to be calculated by reference to the 'pay reference period'. This concept is central to the calculation and is defined as being a maximum of one month or, in the case of a worker who is paid wages by reference to a period shorter than a month, that period (NMWR SI 2015/621 reg 6). This means that in the case of a worker who is paid weekly the pay reference period is one week. Where a worker is paid every three months the pay reference period will be one month. Special provisions apply in circumstances in which the relevant contract terminates inside the pay reference period (NMWR SI 2015/621 reg 9(1)(d)).

45.The question that arises in this appeal is whether the respondent (or indeed the appellant, for the tribunal is not sure that it too has correctly applied this concept) has utilised the correct pay reference period, and, if not, what the consequences are for the appeal.

46. The term “pay reference period” is a term of art, and derives from reg.6 of the 2015 regulations. It is at the heart of all calculations of whether or not a worker has been paid the NMW. It effectively creates an averaging of the worker’s pay over the relevant pay reference period for the purposes of assessing whether the worker’s pay over the whole of the period fell below the NMW. Clearly, the shorter the period in question, the less scope there is higher “overpayments” compensating for any alleged underpayments so as to bring the average of the payments made to the worker over the NMW threshold for the relevant period. Thus what is the correct pay reference period is a crucial issue. In this case, for instance, where the workers were not paid at all for the first two weeks, any pay reference period of two weeks or less is going to produce a failure to pay the NMW. If, however, hypothetically, those workers were then paid at double the NMW for the next two weeks, if they had a four week pay reference period, their pay, averaged out over those four weeks would not fall below the NMW.

47. The issue here is that the pay reference period specified in the Notice, in respect of both workers, is 8 August 2016 to 20 August 2016. That is a period of 13 days. This brings into question precisely what reg.6 of the 2015 regulations means. It is a short and simply worded provision:

6 Pay reference period

A “pay reference period” is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

Clearly, the default position is a month, but the real issue is what do the words “*is paid by reference to a period shorter that a month*” mean ? The conventional wisdom is that this relates the pay reference period to the frequency with which the employee

is actually paid, with a maximum of a month, so that weekly paid workers will have pagy reference periods of one week, fortnightly paid , of two weeks, four weekly, of four weeks, which is, of course, less than one month, and monthly paid workers the maximum of a month.

48. But is it right to so link PRPs to frequency of payment of wages? If it is, it would seem that a worker (provided his paydays do not change) will have one PRP for the whole of his employment. The applicable PRP will not change, regardless of when his employment starts in relation to a payday. The workers in this case had four weekly pay periods (see page 20 of the Bundle). On that basis it may be thought that the relevant PRP for each of them would be a 4 week period. A worker starting employment part way through his or her PRP causes no problems, as they will not have worked any hours in the part that pre-dates the commencement of their employment, so the averaging that then takes place over the balance of the period of the PRP when they are employed will be perfectly possible, and likely to produce a calculation that the NMW has been paid for that period. That such a conclusion is correct, and that a worker will have the same PRP regardless of when he starts employment is rather reinforced by the specific provisions in reg.9(1)(d) which deal with the position where a worker ceases employment part – way through a PRP. If, in those circumstances his PRP would simply change to reflect the curtailment of any relevant PRP, such a provision would not be necessary. The tribunal's conclusion therefore is that the relevant PRP for any worker at any given time is to be ascertained by reference to the frequency of his or her paydays (subject to the maximum of a month), and when, at any point within any potentially relevant PRP a worker actually commences employment has no bearing on the relevant PRP.

49. The respondent, however, in this Notice has taken a 13 day PRP. It has done so it seems, on the basis that the appellant did not pay any wages at all for the first two weeks (or rather 13 days), and it is this period which has been taken as the PRP. The actual payroll date given by the appellant is 27 August 2016, and hence the relevant PRP it contends is 1 August 2016 to 27 August 2016. It is unclear why the start of that period is said to be 1 August, unless the July payroll date was 31 July, which was a Sunday. Be that as it may, the principle here is whether, in taking the 13 day period from 8 to 20 August 2016 as the relevant PRP the respondent was correct.

50. The tribunal's view is that the respondent was not correct in doing so. In focussing upon the period for which the workers were <u>not</u> paid the respondent lost sight of the fact that the relevant PRP ended on the payroll date of 27 August 2016, and the whole of the period from 1 (or 8) August 2016 to 27 August 2016 should have been taken into account. Reg. 6 cannot be read as entitling the respondent to take this shorter, rather arbitrary, period as the PRP. When the appellant ran its payroll on 27 August 2016 and paid the two workers accordingly, it was paying them wages "by reference to" the period preceding that payroll date, i.e the preceding 4 weeks, for 19 days of which the workers had been employed, and had carried out work, but for the first 13 days of which they were not paid, because of the appellant's holiday pay arrangement.

51. There is no logic to the respondent's position. Once employed for two months, doubtless it would be acknowledged that the relevant PRP for each worker would be the four week period which was the frequency with which the workers were paid. The approach of taking an initial 13 day period begs the question of what would be the next PRP ? The one selected by the respondent ends on 20 August 2016. There is no basis for it doing so. Would the next PRP then be 21 August or 27 August 2016, and then, there would be a four week PRP until the next payday in September? Further, given the provisions in reg 9 , to be considered below, that payments in the PRP immediately following one PRP can be taken into account, if paid "as respect" a previous PRP, this only applies to a second PRP that immediately follows the first. If the respondent is correct, in this instance, there could be two, short, and different PRPs before the next one, with the possibility that this sequence could be broken by an intervening, but shorter period. That cannot be right, and the PRP set out in the Notice is wrong.

52. The requirements of a notice of underpayment, of course, are set out in s.19 of the Act. They are, it would seem, mandatory, as s.19(4) states what such a notice must specify. At s.19(4)(b) that includes:

"the pay reference period or periods in respect of which the employer is required to pay a sum to the worker as specified in subsection (2) above:"

Of course, the actual sum that the appellant was required to pay either worker was in fact nil, and only the penalty was sought. The tribunal, however, does not consider that this affects the validity of the Notice, or the issue of what consequences should flow from the inclusion of an incorrect PRP.

53. On one view, it may be argued that the failure to specify a correct PRP renders the Notice a nullity, and of no effect, as if the respondent had put no dates at all in the relevant boxes on the third page of the Notice. The counter view, however, would be that the tribunal should not consider the defects fatal to the validity of the Notice, but should consider whether the Notice can stand, but with rectification.

54. That this latter view is the correct one is rather supported by the provisions of s.59C itself, which are the only provisions which govern appeals of this nature. The only ground for rescission of a notice is under s.19C(1)(a), on the sole ground that no sum at all was actually due to the worker at the relevant time. S.19C(1)(c), however, along with s.19C(1)(b), which is not applicable, but which contains analogous provisions, can be advanced on the grounds that the amount specified in the notice as either the sum to be paid to the worker, or by way of penalty, is incorrect. Further, s.19C(1)(c) appeals can be brought on the grounds that the amount of the financial penalty has been incorrectly calculated:

"(whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason)".

The words "or for some other reason" are important, and reinforce the tribunal's view that a defect in choice or specification of the relevant PRP cannot be fatal to the validity of a Notice of Underpayment. In such circumstances, the tribunal cannot

rescind the notice, but must rectify it. Those express provisions persuade the tribunal that even if there has been a failure to comply with the mandatory provisions of s.19 in the information that must be specified in the notice ,the tribunal cannot treat the notice as a nullity, but must rectify it.

55. The tribunal considers therefore that the effect of the error in relation to the identification of the PRP is such that the tribunal cannot, for that reason alone, and should not, rescind the Notice. If, however, in fact no sum was due to the employees in question in relation to the pay reference period, the tribunal can, and indeed, must rescind the Notice. That therefore requires an analysis of whether any sum was in fact due to the employees in relation to the (correct) PRP. If it was, but it is a different sum to that upon which the penalty has been calculated, the tribunal may then consider whether on this basis the appeal succeeds on the basis of s.19C(1)(c).

56. In making this assessment, the tribunal has utilised information produced in the appellant's letter of 11 July 2017 and its attachments. It has done so *pace* the respondent's objections, but has done so on the basis that this information can be used as a hypothesis to see , were it to be admitted into evidence, on the appellant's best case, as it were, if there would be any prospect of the appellant showing that no sum was due to any employees at all in respect of the PRP as contended for by the appellant, or found by then tribunal. From that information, the following calculations of whether there was any shortfall in the NMW can be made.

a)Christina Colledge.

Taking the information from attachments 3(i) and 3(ii) to the 11 July letter, and other evidence before the tribunal (for these documents do not take into account early closing) the following would be the appellant's best case on a PRP of 1 to 27 August 2016:

Hours worked: 08.08.16 to 27.08.16		72 hours
less :		
early closure	6.15 hours	
hairdressing services	3.00 hours	
Total hours worked :		62.85
NMW entitlement for 62.85 hours @ £7.20 p/hour		£452.52
Actual payment received in respect of period to 27.08.16 on 09.09.16		£172.80
Shortfall :		£279.72
Further reduction for cost of hairdressing services		£165.00
Minimum shortfall in payment of NMW		£114.72

b)Elaine Jones.

Taking the information from attachments 4(i) and 4(ii) to the 11 July letter, and other evidence before the tribunal (for these documents do not take into account early closing) the following would be the appellant's best case on a PRP of 1 to 27 August 2016:

Hours worked: 08.08.16 to 27.08.16		120 hours
less :		
sick leave	8.00 hours	
early closure	13.06 hours	
hairdressing services	2.00 hours	
Total hours worked :	96.94	
NMW entitlement for 96.94 hours		£697.97
Actual payment received in respect of period to 27.08.16 on 09.09.16		£612.00
Shortfall :		£85.97
Further reduction for cost of hairdressing services		£140.00
Minimum shortfall (no underpayment)		[£54.03]

58. The upshot of these calculations , therefore, is that even if the appellant is entitled to findings that:

a) the correct PRP is 1 to 27 August 2016;and
b) only the hours actually worked , after deduction for early closing, and time spent receiving hairdressing services is also discounted; and
c) credit can be claimed for the cost of hairdressing services re-charged to the employees

there would still be a minimum shortfall in payment of the NMW over this PRP in respect of Christina Colledge of £114.72. Hence, s.19C(4) cannot be satisfied, and the appellant cannot successfully appeal the decision to serve the Notice under s.19C(1)(a) because if a sum was due to "any worker to whom the notice relates" the notice cannot be rescinded under s.19C(7). In other words, even if there was no such sum due to one of the two workers to whom the Notice relates, as there may not have been in the case of Elaine Jones, as there clearly was, on any view in relation to the PRP a sum due to Christina Colledge, no appeal under s.19C(1)(a) can succeed, and the tribunal cannot rescind the Notice.

59. The tribunal would add that it is of no consequence whether the correct PRP starts on 1 or 8 August 2016. As the calculation of the NMW is the result of an averaging process, and no work was done until 8 August 2016, the difference in start date has no effect on the calculations. The end date is far more important, and the tribunal is statisfied that this should be 28 August 2016.

60. Finally, and for completeness, again although this has been raised in the further submission of the appellant, given that it is unrepresented , and has put in issue in general terms the extent to which payments can and cannot be taken into account in any given PRP, the tribunal will address the contention made by the appellant that a payment made in the next PRP to Christina Colledge in respect of holiday that she took in the next PRP can be attributed to the previous PRP . The documents produced , as Attachments 8(i) and (ii) do suggest (though it is appreciated that the respondent has not had an opportunity to comment or cross – examine upon them) that Christina Colledge was paid in the next PRP for 96 hours of work at £7.20 per hour , of which 24 hours was holiday pay, making the hours actually worked 72.

61. The appellant, relies upon reg.9(1)(b) , which provides:

"(1) The following payments and amounts, except as provided in regulation 10, are to be treated as payments by the employer to the worker as respects the pay reference period—

(a) payments paid by the employer to the worker in the pay reference period (other than payments required to be included in an earlier pay reference period in accordance with sub-paragraphs (b) or (c));

(b) payments paid by the employer to the worker in the following pay reference period as respects the pay reference period (whether as respects work or not);"

62. The appellant's argument is that because Christina Colledge took and was paid for three days holiday (72 hours) in the following PRP, the payment she received in relation to this leave, to which she would not have been entitled, but for the special arrangement made whereby she "banked" her first two weeks' pay against her future holiday entitlement, is to be treated, under this regulation , as being paid "as respects to" (the curious and non – grammatical wording of the provisions) the previous PRP when she worked, but was not paid for the first two weeks of her employment.

63. This is an interesting argument, but one which the tribunal considers is wrong. Clearly, reg. 9 provides that in some circumstances payments made in the ensuing PRP can be treated as having been made in respect of work done in the previous PRP. The examples commonly cited are bonuses or other payments earned in the first PRP, but not paid until the next one. That is not the case here. The payments made to Christina Colledge in the second PRP were of holiday pay. She took, and the appellant agreed to pay for, paid holiday. That is was , as it were "funded" by the withholding of the first two weeks' pay, does not, in the tribunal's view make the payment made in the second PRP a payment in respect of the first. It is a payment of

holiday pay, the holiday being taken in the second PRP. It is not payment for work done , or in any other way referable to the previous PRP , save for the "funding" element. To apply a different construction would be to circumvent the provisions of reg.12, the tribunal having ruled that the withholding of two weeks pay "on account of" future holiday entitlement is not permissible under that regulation. Finally, whilst not necessary to determine the point, which fails for the reasons just set out, in any event, the tribunal does not accept the appellant's argument that the whole of the payment made in the second PRP is to be regarded as being referable to the first PRP , because the employee would not have had any entitlement to accrued holiday, and hence was getting something she would not otherwise be entitled to. Christina Colledge started work for the appellant on 9 August 2016, and worked a three days week, of 8 hours per day. Consequently, as the appellant says in para (12) of Paul Dawson's witness statement, her annual pro rata leave entitlement would be 16.8 days. That would therefore accrue at the rate of 1.4 days per month. Hence , by the end of the second PRP, Christina Colledge would have accrued at least 1.4 days of leave entitlement in any event. She was paid for three days, 24 hours. 1.4 days equates to 11.2 hours, which at £7.20 per hour would be £80.64. The amount paid for 24 hours was £172.80, so even if the appellant was right, the maximum amount of the holiday pay paid in the second PRP which was solely attributable to the "two weeks in hand arrangement" would be £92.16. As the minimum shortfall in payment of the NMW , applying every reduction, deduction and other factor relied upon by the appellant (save the alleged lawfulness of the scheme itself) is £114.00, reducing that by £92.16 still leaves a shortfall of £21.94, so there would still be an underpayment to one of the employees to whom the Notice relates, and hence no grounds upon which the tribunal could rescind the Notice under. S.19C(1)(a)

ii)The s.19C(1)(c) appeal.

64. This is a different ground of appeal , which does not require a finding that no sum was due to a worker, and thus opens up the possibility that if the financial penalty has been incorrectly calculated, the tribunal should rectify the Notice to correct that error. The tribunal has identified above how the respondent has, in its view, wrongly specified the PRP as being 8 to 20 August 2016. The correct PRP is 1 (or 8) August to 27 August 2016.

65. There is an additional aspect to this ground, however, in that the appellant contends that the respondent has also erred in its calculation because the hours actually worked by the workers were less than have been taken into account by the respondent. Paul Dawson has given evidence to this effect, and para. 14 of his witness statement sets out the correct calculation of hours actually worked by the workers. Whilst the respondent did not accept this, and no other evidence has been led abut it, the tribunal has no reason to doubt the honesty of Paul Dawson, or the accuracy of his information, and will accept it. It also accepts that in the case of Elaine Jones her hourly rate was £8.50, as is confirmed by her Employment Contract Key data document (page 20 of the Bundle).

66. The appellant seeks also, belatedly , to reduce the amount by which the workers in question were underpaid the NMW by the deduction of not only the hours

that they received hairdressing services that they received, and were hence not working, but also the value of these services. Neither of these potential factors for reduction of the ultimate calculation had been referred to in argument, or, more importantly, the evidence, before the tribunal. The respondent objects to this, and the tribunal agrees that it is not permissible to allow the appellant to seek to rely upon this further argument, and evidence, which was not before the tribunal in the original hearing, and only emerged when the tribunal was seeking further specific information as to payments made to the employees in question. Allowing for the fact that the appellant is unrepresented, and inexperienced in these matters, this appeal was instigated in February 2017, and these matters have not been raised by the appellant until its letter of 11 July 2017. Full grounds of appeal, and witness statements were prepared for the hearing, and oral evidence was given. No mention whatsoever was made of the receipt by these employees of hairdressing services as a "perk" of their employment, either in the context of calculation of the hours they actually worked, or of "set off" as it may be termed, against their entitlement to be paid the NMW. In short, this would be an amendment to the appellant's case, raised very late in the day, after the conclusion of the evidence and the submissions, with no explanation (other than the presumed likely explanation of oversight due to lack of legal knowledge or experience) for its lateness. There has been no opportunity for the respondent to cross – examine Mr Dawson upon these matters, nor for them to be put to Mrs McAllister. If the tribunal were to permit these matters to be taken into consideration, at the very least the hearing would have to be re-convened for them to dealt with properly, with potential costs consequences which may well outweigh any benefit that these further issues may achieve in reducing the penalty that may be due. As is apparent from the previous findings, the tribunal has given the appellant the benefit of taking these arguments , and this evidence , into account in determining whether there was any basis for rescinding the Notice, and has concluded that there is not.

67. The question now is whether the tribunal can, and should take this further evidence and argument into account into account when determining how to rectify the Notice. The tribunal is satisfied that the appellant has made out the second limb of its appeal under s.19(1)(c), that the amount of the financial penalty has been incorrectly calculated, on the basis of the evidence and arguments already before it, because the amounts by which the workers were underpaid the NMW, upon which the penalty is based, were incorrectly calculated.

68. That finding requires the tribunal, however, not to rescind the Notice, but to rectify it. That involves the tribunal carrying out its own calculation of the amounts by which, in accordance with the correct PRP, for the hours actually worked, and at the appropriate rate, each worker was underpaid the NMW. As will be apparent , there are a number of ways in which this could be approached. At one extreme , working on the basis of what it considers the correct PRP to be, the tribunal could calculate the shortfall, and hence the appropriate penalty , based on the evidence before it, and discount the additional evidence. That would, in essence , have the result of not permitting the appellant to have taken into account both the time and the cost of the hairdressing treatments received by each employee. At the other, these could be taken into account, and would further reduce the shortfall, probably to a very small amount.

69. Those calculations have been carried out in para. 50 above, which represent the best case scenario for the appellant. On that basis, the shortfall would be £114.00, and the appropriate penalty therefore £228.00.

70. Alternatively, if the time and the cost of the hairdressing services are not taken into account, the shortfall increases, in each case, as follows:

Christina Colledge.

Hours worked 08.08.16 to 27.08.16	72 hours		
less :			
early closure	6.15 hours		
Total hours worked :		65.85	
NMW entitlement for 65.85 hours			£474.12
Actual payment received in respect of period to 27.08.16 on 09.09.16			£172.80
Shortfall :			£301.32

Elaine Jones.

Hours worked: 08.08.16 to 27.08.16	120 hours		
less :			
sick leave	8.00 hours		
early closure	13.06 hours		
Total hours worked :		98.94	
NMW entitlement for 98.94 hours			£712.36
Actual payment received in respect of period to 27.08.16 on 09.09.16			£612.00
Shortfall :			£100.36

The total shortfall on that basis would be **£401.68**

The appropriate penalty would accordingly be 200% of £401.68, £803.36

Summary of findings.

71. To assist the parties, the tribunal has considered the following issues, and made the following determinations upon them:

Issue 1:

Are reductions in the pay paid to the appellant's workers, in the form of non - payment of the first two weeks' pay , in accordance with the appellant's practice of withholding two weeks' pay at the commencement of their workers' employment on account of future annual leave entitlement, to be treated as reductions made in accordance with reg.12 (2)(b) of the National Minimum Wage Regulations 2015, so as not to be taken into account in determining whether a worker has been paid the national minimum wage in any relevant pay reference period?

Finding: No.

Issue 2:

Is the pay reference period specified in the Notice of Underpayment dated 2 December 2016 in respect of each worker referred to therein, of 8 August 2016 to 20 August 2016 the correct pay reference period in accordance with the definition in reg.6 of the National Minimum Wage Regulations 2015?

Finding: No.

Issue 3:

Is the effect of the previous finding that the Notice of Underpayment must be rescinded, or rectified?

Finding: The Notice cannot be rescinded on this ground, but must be rectified.

Issue 4:

Was no sum due under section 17 of the National Minimum Wage Act 1998 to any worker to whom the notice relates on the day specified under section 19(4)(a) of the Act in relation to her in respect of any pay reference period specified under section 19(4)(b) of the Act in relation to her, so as to entitle or require the tribunal to rescind the Notice under s.19C(7) of the Act ?

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Finding: Whether the pay reference period as specified in the Notice as served, or as rectified by the tribunal is applicable, there was at the material time a sum due to a worker to whom the Notice relates.

Issue 5:

Is the appellant entitled to rely upon payments made in respect of holiday pay paid, and in respect of holiday taken, in the pay reference period immediately following

that to which the Notice relates (or as rectified, relates) as being payments made "as respects" (sic) the preceding pay reference period , within the meaning of reg.9(1)(b) of the National Minimum Wage Regulations 2015, so as to have those payments counted towards the calculation of a worker's wages for the purposes of determining whether she had been paid the national minimum wage in the preceding pay reference period?

Finding: No.

72. The following issues have been raised by the appellant, but were not raised in the hearing, nor was evidence formally adduced in relation to them. The tribunal accordingly has made no findings upon them, but they are potentially relevant to the terms of any ultimate rectification of the notice of underpayment and determination of the appropriate financial penalty.

Issue 6:

Is the appellant entitled to seek to have taken into account in the calculation of whether the workers in question were paid the NMW during the PRP, as rectified, periods of time when, though present at work, they were not working, but were receiving hairdressing treatments?

Issue 7:

Is the appellant entitled to have taken into account in the assessment of whether the workers have been paid the NMW during the PRP, as rectified, sums deducted by the appellant from the wages due to the workers in respect of charges for the provision of hairdressing services , pursuant to reg.12(2)(e) of the National Minimum Wage Regulations 2015?

Disposal.

73. As indicated, the tribunal allows the appeal, but to the extent that the notice of underpayment is to be rectified. It is to be so in two respects. The first is the PRP, which the tribunal has found is incorrect, and must be amended to 1 August 2016 to 28 August 2016. As the current PRP and the financial penalty calculated upon it are based on total non – payment for 13 days, the amount of that penalty is also likely to be incorrect, and to require rectification. To what figure, however, is unclear, and may require a further hearing.

70. If issues 6 and 7 are resolved in the appellant's favour, the amount of the shortfall will be £114.00, and the penalty therefore £228.00. If neither are, the calculation set out above applies, and £803.36 would be the appropriate penalty. There are permutations in between, theoretically at least, if one issue was upheld but the other was not.

71. As these issues, and the evidence giving rise to them, have not been adduced before the tribunal previously, the respondent is entitled to consider how to deal with them. Another hearing may be required, especially is there are any factual disputes.

If, however, the evidence is admitted by consent, or not challenged, it may be possible to deal with any further issues by way of written representations. Alternatively, the parties may, having had the major issues of principle determined, consider that this appeal can be compromised sensibly without the need for a further hearing. They are to inform the tribunal in accordance with the directions above.

Employment Judge Holmes

Dated: 1 September 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

8 September 2017

FOR THE SECRETARY OF THE TRIBUNALS

ANNEXE

The relevant statutory provisions

The National Minimum Wage Act 1998

1 Workers to be paid at least the 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.

17 Non-compliance: worker entitled to additional remuneration

(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall [at any time ("the time of determination")] be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, [whichever is the higher of—

(a) the amount described in subsection (2) below, and
(b) the amount described in subsection (4) below].

(2) The amount referred to in subsection (1)(a) above] is the difference between—

(a) the relevant remuneration received by the worker for the pay reference period; and
(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.
(3) In subsection (2) above, "relevant remuneration" means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

[(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—

(A/R1 x R2)

where—

A is the amount described in subsection (2) above,

R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and

R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.

(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.

(6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to apply in relation to him, the amounts described in subsections (2) and (4) above shall be egarded as reduced by the amount of that remuneration.

19 Notices of underpayment: arrears

(1) Subsection (2) below applies where an officer acting for the purposes of this Act is of the opinion that, on any day ("the relevant day"), a sum was due under section 17 above for any one or more pay reference periods ending before the relevant day to a worker who at any time qualified for the national minimum wage.

(2) Where this subsection applies, the officer may, subject to this section, serve a notice requiring the employer to pay to the worker, within the 28-day period, the sum due to the worker under section 17 above for any one or more of the pay reference periods referred to in subsection (1) above.

(3) In this Act, "notice of underpayment" means a notice under this section.

(4) A notice of underpayment must specify, for each worker to whom it relates—

(a) the relevant day in relation to that worker;

(b) the pay reference period or periods in respect of which the employer is required to pay a sum to the worker as specified in subsection (2) above;

(c) the amount described in section 17(2) above in relation to the worker in respect of each such period;

(d) the amount described in section 17(4) above in relation to the worker in respect of each of such period;

(e) the sum due under section 17 above to the worker for each such period.

(5) Where a notice of underpayment relates to more than one worker, the notice may identify the workers by name or by description.

(6) The reference in subsection (1) above to a pay reference period includes (subject to subsection (7) below) a pay reference period ending before the coming into force of this section.

(7) A notice of underpayment may not relate to a pay reference period ending more than six years before the date of service of the notice.

(8) In this section and sections 19A to 19C below "the 28-day period" means the period of 28 days beginning with the date of service of the notice of underpayment.]

19A Notices of underpayment: financial penalty

(1) A notice of underpayment must, subject to this section, require the employer to pay a financial penalty specified in the notice to the Secretary of State within the 28-day period.

(2) The Secretary of State may by directions specify circumstances in which a notice of underpayment is not to impose a requirement to pay a financial penalty.

(3) Directions under subsection (2) may be amended or revoked by further such directions.

(4) The amount of any financial penalty is, subject as follows, to be [the total of the amounts for all workers to whom the notice relates calculated in accordance with subsections (5) to (5B).

(5) The amount for each worker to whom the notice relates is the relevant percentage of the amount specified under section 19(4)(c) in respect of each pay reference period specified under section 19(4)(b).

(5A) In subsection (5), "the relevant percentage", in relation to any pay reference period, means 200%.

(5B) If the amount as calculated under subsection (5) for any worker would be more than £20,000, the amount for the worker taken into account in calculating the financial penalty is to be £20,000.

(6) If a financial penalty as calculated under subsection (4) above would be less than £100, the financial penalty specified in the notice shall be that amount.

(7) …

(8) The Secretary of State may by regulations—

(a) amend subsection [(5A)] above so as to substitute a different percentage for the percentage at any time specified there;

(b) amend subsection [(5B) or (6)] above so as to substitute a different amount for the amount at any time specified there.

(9) A notice of underpayment must, in addition to specifying the amount of any financial penalty, state how that amount was calculated.

(10) In a case where a notice of underpayment imposes a requirement to pay a financial penalty, if the employer on whom the notice is served, within the period of 14 days beginning with the day on which the notice was served—

(a) pays the amount required under section 19(2) above, and

(b) pays at least half the financial penalty,

he shall be regarded as having paid the financial penalty.

(11) A financial penalty paid to the Secretary of State pursuant to this section shall be paid by the Secretary of State into the Consolidated Fund.

19C Notices of underpayment: appeals

(1) 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) any 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 either or both of the following grounds—

(a) that the notice was served in circumstances specified in a direction under section 19A(2) above, or

(b) 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.

55 IntePRPetation

(1) In this Act, unless the context otherwise requires,—

"civil proceedings" means proceedings before an employment tribunal or civil proceedings before any other court;

"enforcement notice" shall be construed in accordance with section 19 above;

"government department" includes a Northern Ireland department, except in section 52(a) above;

"industrial tribunal" means a tribunal established under Article 3 of the Industrial Tribunals (Northern Ireland) Order 1996;

"notice" means notice in writing;

"pay reference period" shall be construed in accordance with section 1(4) above;
"penalty notice" shall be construed in accordance with section 21 above;

"person who qualifies for the national minimum wage" shall be construed in accordance with section 1(2) above; and related expressions shall be construed accordingly;

"prescribe" means prescribe by regulations;

"regulations" means regulations made by the Secretary of State, except in the case of regulations under section 47(2) or (4) above made by the Secretary of State and the Minister of Agriculture, Fisheries and Food acting jointly or by the Department of Agriculture for Northern Ireland.

(2) Any reference in this Act to a person being remunerated for a pay reference period is a reference to the person being remunerated by his employer in respect of his work in that pay reference period.

(3) Any reference in this Act to doing work includes a reference to performing services; and "work" and other related expressions shall be construed accordingly.

(4) For the purposes of this Act, a person ceases to be of compulsory school age in Scotland when he ceases to be of school age in accordance with sections 31 and 33 of the Education (Scotland) Act 1980.

(5) Any reference in this Act to a person ceasing to be of compulsory school age shall, in relation to Northern Ireland, be construed in accordance with Article 46 of the Education and Libraries (Northern Ireland) Order 1986.

(6) Any reference in this Act to an employment tribunal shall, in relation to Northern Ireland, be construed as a reference to an industrial tribunal.

National Minimum Wage Regulations 2015

6 Pay reference period

A "pay reference period" is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

9 Payments as respects the pay reference period

(1) The following payments and amounts, except as provided in regulation 10, are to be treated as payments by the employer to the worker as respects the pay reference period—

(a) payments paid by the employer to the worker in the pay reference period (other than payments required to be included in an earlier pay reference period in accordance with sub-paragraphs (b) or (c));

(b) payments paid by the employer to the worker in the following pay reference period as respects the pay reference period (whether as respects work or not);

(c) payments paid by the employer to the worker later than the following pay reference period where the requirements in paragraph (2) are met;

(d) where a worker's contract terminates then as respects the worker's final pay reference period, payments paid by the employer to the worker in the period of a month beginning with the day after that on which the contract was terminated;
(e) amounts determined in accordance with regulation 16 (amount for provision of living accommodation) where—

(i) the employer has provided the worker with living accommodation during the pay reference period, and
(ii) as respects that provision of living accommodation, the employer is not entitled to make a deduction from the worker's wages or to receive a payment from the worker.

(2) The requirements are that as respects the work in the pay reference period—

(a) the worker is under an obligation to complete a record of the amount of work done,

(b) the worker is not entitled to payment until the completed record has been given to the employer,

(c) the worker has failed to give the record to the employer before the fourth working day before the end of that following pay reference period, and

(d) the payment is paid in either the pay reference period in which the record is given to the employer or the pay reference period after that.

12 Deductions or payments for the employer's own use and benefit

(1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).

(2) The following deductions and payments are not treated as reductions—

(a) deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;

(b) deductions, or payments, on account of an advance under an agreement for a loan or an advance of wages;

(c) deductions, or payments, as respects an accidental overpayment of wages made by the employer to the worker;

(d) deductions, or payments, as respects the purchase by the worker of shares, other securities or share options, or of a share in a partnership;

(e) payments as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment.

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