



# EMPLOYMENT TRIBUNALS

**Appellant:**

Mr K Bajracharaya t/a  
Newari Handicraft

v

**Respondent:**

The Commissioner for HM  
Revenue and Customs

## PRELIMINARY HEARING

**Heard at:**

Reading

**On:** 13 September 2017

**Before:**

Employment Judge S Jenkins

**Appearances**

**For the Appellant:** Mr J Rogers (friend)

**For the Respondent:** Mr J Tunley (Counsel)

## JUDGMENT

1. The Appellant's appeal against three Notices of Underpayment under section 19 of the National Minimum Wage Act 1998 shall be struck out pursuant to rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has no reasonable prospect of success

## REASONS

### Background

1. The hearing was scheduled, pursuant to a Notice of Appeal Hearing dated 28 June 2017, to identify issues and make case management orders in relation to the Appellant's appeal against three Notices of Underpayment under section 19 of the National Minimum Wage Act 1998 ("Act"). However, in advance of the hearing, Mr Tunley, on behalf of the Respondent, submitted a skeleton argument contending that the Appellant's appeal had not been submitted within the appropriate time and therefore that there was no jurisdiction on the part of the Tribunal to consider it.
2. On considering the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("Rules"), it did not seem to me that such a contention could be dealt with under Rules 26 or 27 which relate to the rejection of a claim form following its initial receipt. It seemed to me therefore that if I was to consider the matters raised by Mr Tunley on behalf of the Respondent that I would need to do so under Rule 37 and consider whether it would be appropriate to strike out the appeal on the basis that it had no reasonable prospect of success.

3. I was conscious of the provisions of Rule 37(2) which require that “a *claim or response* [and for these purposes I considered it appropriate to substitute “appeal” for “claim”] *may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing*”. I explored with Mr Rogers on behalf of the Appellant whether, notwithstanding that the hearing had not been scheduled to deal with this issue, I could nevertheless deal with it at this hearing on the basis that the Appellant had indeed been given a reasonable opportunity to make representations.
4. Mr Rogers confirmed that the Appellant had had sight of a letter from the Respondent to the tribunal dated 19 July 2017 in which the argument that the appeal had been submitted out of time, and that there was no power within the Act to extend time, had been aired. Mr Rodgers then confirmed that he was content to proceed to deal with this issue at this hearing.

### Submissions

5. I then heard from Mr Tunley on behalf of the Respondent who amplified some of the comments made in his skeleton argument. In essence, the Respondent’s case was that the notices of underpayment were dated 12 May 2017 and issued on that day, and that section 19C(3) of the Act requires that an appeal must be lodged “*before the end of the 28-day period*”. Applying that, the last day for submitting an appeal in relation to the notices was 12 June 2017. Mr Tunley observed that that date was included on the underpayment notices themselves which stated “*You have the right to appeal against this notice. You must make your appeal to an Employment Tribunal by 12 June 2017. Appeals received after this date may not be accepted by the tribunal*”.
6. Mr Tunley observed that the appeal was received by the Employment Tribunal Central Office in Leicester on 21 June 2017 as noted by the date stamp on the form. As a consequence, the appeal was submitted outside the 28-day period and he contended that there was no power to extend time under the legislation.
7. At this point, I aired my thoughts with Mr Tunley that potentially Rule 5 allowed time to be extended but, during that discussion, I concluded myself that Rule 5 only deals with any time limit specified “*in these Rules*” whereas the particular time limit under consideration was contained within the Act. Mr Tunley referred me to the House of Lords decision in Mucelli v Government of Albania [2009] 1 WLR, which, although dealing with the time for filing a statutory appeal under the Extradition Act 2003, noted that there was no ability, in that case, to apply parts of the Civil Procedure Rules, which allow time to be extended in certain circumstances, to extend a statutory time limit. Any extension must have a statutory basis, and in the absence of such a statutory basis it was not open for time to be extended.
8. Mr Tunley submitted that there was no material distinction between the Extradition Act 2003 and the National Minimum Wage Act 1998 for the purposes of construing the tribunal’s power to extend a statutory time limit. Finally, he noted the distinction within the Act between the lack of any ability to

extend time under Section 19C and the fact that a specific ability to extend time is included within the Act under Section 11(4) in relation to a complaint that an employer has failed to allow an employee access to records. He observed that the absence of any similar power in relation to appeals against enforcement notices was telling. He ultimately contended that, as Parliament did not give the tribunal power to extend time for bringing an appeal, it cannot have intended that a tribunal should entertain an appeal out of time and therefore to do so would ignore the statutory requirement.

9. Mr Rogers' submission on behalf of the Appellant focused on the practicalities of the submission of the appeal. The Appellant accepted that 12 June 2017 was the date by which the appeal needed to have been submitted but contended that he had complied with that by taking the appeal form to the Commissioners for HM Revenue and Customs office in Bush House South in London on that date. Mr Rogers contended that the appeal form itself directed that the form should be sent to that address. However, I observed to him that that is not what the form actually says.
10. The Bush House South address is only the address that an Appellant is directed to include for the Respondent to a claim, in distinction to any claim relating to employers based in Scotland which should be sent to an Edinburgh address. I observed that the address to which the appeal should be sent was on the last page of the appeal form and was the Employment Tribunal Central Office in Leicester. Mr Bajracharya observed at this point that the last page of the appeal form had not been there, but he also commented that the form had been downloaded from the internet and therefore I did not consider that that would have been the case.
11. Mr Rogers submitted that the appeal form was stamped by way of receipt by the Commissioners for HM Revenue and Customs and Mr Tunley accepted that that was the case. Mr Bajracharya also contended that he had been told by the relevant person at the Commissioners for HM Revenue and Customs' office that the appeal was in order and I saw no reason to doubt that contention. However, HM Revenue and Customs sent a letter to the Appellant, or more accurately his solicitor whose details were included on the appeal form, on 14 June 2017 noting that the appeal should have been submitted to an employment tribunal and therefore that it was considered that the appeal had not been properly served. That letter was then brought to the Appellant's attention and he indicated that he submitted the appeal to the Employment Tribunal in Leicester as quickly as he could which then led to the claim form being received on the date stamped on the appeal form, i.e. 21 June 2017.

## **Conclusions**

12. I considered closely the provisions of section 19C of the Act and also the provisions of the Rules and the House of Lords Judgment in the Mucelli case, in particular the parts of the Judgment of Lord Neuberger at paragraphs 73 to 80. In the circumstances, and certainly without lacking any sympathy for the Appellant in relation to the situation in which he now found himself, I considered that I had to be bound by the House of Lords decision in Mucelli and I agreed with Mr Tunley that there was no reason for me to take a different approach to time limits within the National Minimum Wage Act 1998 to the

approach taken by the House of Lords in the Mucelli case in relation to the Extradition Act 2003. Section 19C of the Act notes, at subsection (2), that an appeal lies to an employment tribunal and, under subsection (3), that an appeal must be made before the end of the 28-day period. I also noted that the Notice of Underpayment makes clear where an appeal should be submitted and the date by which it should be done, and also that the appeal form makes the address for submission of the form clear. As a matter of fact, those requirements were not complied with and the appeal was not submitted in the appropriate manner within the required time. There was no ability to extend time under the Act, and ultimately therefore I felt that I had no discretion to do anything other than strike out the claim under rule 37(1)(a) on the basis that it had no reasonable prospect of success.

13. After delivering my Judgment orally, Mr Bajracharaya made a further plea noting that he had taken the form to the HM Revenue and Customs' office and asked them if they accepted the form and had been told that they did. He observed that if that information had not been given, he could have taken steps to submit the appeal to the Employment Tribunal at that stage. However, I indicated to Mr Bajracharaya that I did not see that I could entertain such an assertion as the matter for me was to assess whether an appropriately constituted appeal had been made within the relevant time limit and that had not happened in this case. I repeated my earlier observation that I was not without sympathy for the Appellant but that it seemed to me that any plea for the exercise of discretion in relation to his circumstances would have to be made to the Respondent itself.

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Employment Judge S Jenkins

Date: 11/10/2017.....

Sent to the parties on: .....