EMPLOYMENT TRIBUNALS

Claimant: The Blue Bicycle (York) Ltd
Respondent: Commissioners for HM Revenue and Customs

HELD AT: Leeds **ON:** 24 May 2017

BEFORE: Employment Judge Keevash

REPRESENTATION:

Claimant: Mr R Lacey, accountant
Respondent: Mr S Redpath, counsel

JUDGMENT having been sent to the parties on 30 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Appellant appealed against two national minimum wage Notices of Underpayment dated 13 December 2016 requiring payment of the sum of £3,479.46 together with penalties of £2,689.42.
2. At a Preliminary Hearing on 24 February 2017 an Employment Judge ordered that the matter be stayed. If the appeal was to be pursued, the Appellant was ordered provide written grounds setting out why it contended that the specific legislative provisions giving rise to the Notices of Underpayment had not been properly implemented in respect of the particular facts of the case, what alternative approach could and should have been undertaken by the Respondent by reference to these legislative provisions and what powers the Tribunal had and should apply to allow the appeal.
3. By a letter dated 15 March 2017 the Appellant sent a Statement of Case to the Tribunal. The matter was ordered to be listed for a Hearing.
4. By a letter dated 5 April the Respondent sent its Response to the Appellant's case to the Tribunal.

Hearing

5. At the Hearing Kirsty Wheeldin, Executive Manager, gave evidence on behalf of the Appellant. Amanda Gaffney, National Minimum Wage Compliance Officer, gave evidence on behalf of the Respondent. The Employment Judge also considered a bundle of documents.

Law

6 The relevant law was set out in sections 1(1), 19, 19A and 19C of the National Minimum Wage Act 1998 ("the 1998 Act"), Regulations 9, 30, 31 and 36 of the National Minimum Wage Act Regulations 1995, and Regulations 8, 9, 10, 12, 14, 15 and 16 of the National Minimum Wage Act Regulations 2015. The Tribunal also considered DTI Guidance issued in 2004 and 2007, BERR Guidance issued in 2008, DBEIS Guidance issued in 2016 and 2017, and the National Minimum Wage Manuals.

Submissions

7 Mr Redpath made oral submissions. He referred to **Revenue and Customs Commissioners v Leisure Employment Services Limited** [2006] ICR 1094 EAT; **Revenue and Customs Commissioners v Leisure Employment Services Limited** [2007] ICR 1056 CA; **Springfield Care Services Limited v HMRC** Case Number 1801578/2010; **Landon Lodge Limited v HMRC** Case Number 2650653/2010 and **Bryan Accountancy Limited v HMRC** Case Number 2401543/2014.

Discussion

8 In its notice of appeal the Appellant did not make clear on what ground the appeal was made. With that no doubt in mind on 24 February 2017 Employment Judge Jones made the Order referred to in paragraph 2 of these Reasons. The Appellant sent its statement of case to the Tribunal. However, it did not refer to any specific legislative provisions.

9 Section 19C of the 1998 Act provided that an employer can appeal to an Employment Tribunal against a notice of underpayment in one or more of three circumstances:- in relation to the decision to serve the notice; in relation to a requirement imposed by a notice to pay a sum to a worker; and in relation to a requirement imposed by a notice to pay a financial penalty. In the case of the first of these, the ground must be that there is no sum due. In the case of the second, the ground must be that there was no sum due or that the amount in the notice is incorrect. In the case of the third, the ground must be that these are circumstances where the Secretary of State has specified that no penalty may be imposed or a penalty which has been imposed has been incorrectly calculated.

10 Parliament specified that the ground of appeal "must" be one or more of those set out in section 19C of the 1998 Act. There could be no doubt that this requirement

was obligatory. A Tribunal only had power to determine an appeal if the ground of appeal was one of those set out in section 19C of the 1998 Act. In the Employment Judge's judgment the Appellant did not demonstrate that this appeal was based on any of the specified grounds. That was a sufficient basis on which to dispose of the appeal. He thereby dismissed it.

11 With all due respect to Mr Lacey, who was an accountant and not an employment lawyer, the Employment Judge went further and stated his understanding that by its notice of appeal the Appellant did not in any way challenge that the accommodation of certain rules apply in this case. It did not dispute the calculation of the amounts of arrears set out in the notices of underpayment and it did not dispute the calculation of financial penalties. As he understood the appeal, the Appellant in effect complained that the Respondent should not have issued the notices because the Appellant was not one of those unscrupulous employers that Parliament intended to regulate as part of its policy to protect workers. Mr Lacey submitted that the Respondent's action in issuing the notices of underpayment produced an unjust outcome - a fair employer had fallen foul of the law through no fault of its own.

12 In reaching his judgment the Employment Judge accepted the evidence of Miss Gaffney. The Respondent applied its legal powers in accordance with the law, the departmental guidance and other policy guidelines. It had a legal right to issue the notices The Employment Judge had no ground on which to ignore that right. There was no evidence that the Respondent had acted outside the scope of the authority which has been conferred on it by Parliament or in any improper way. It was irrelevant that, in the Appellant's opinion, the Respondent's exercise of its powers led to an unjust outcome. It did not matter whether any anomalies had been created as suggested by Mr Lacey - for example that a worker would be paid more than another worker doing exactly the same work simply because she or he lives in accommodation provided by the employer. If that was an undesirable outcome and created any unfairness, that was a matter for Parliament. Parliament had the power to amend legislation to cure any problems which may arise as a result of the implementation of legislation. It was not appropriate for an Employment Judge to usurp Parliament's function in such matters. It did not matter whether the Appellant had or had not exploited its position to its own benefit. It was not for the Employment Judge to examine the motive or the intention of the parties to make any findings of fact on such matters as whether the amount of rent charged was above or below the market rate or whether the decision to offer and accept accommodation was voluntary or not. In the Employment Judge's judgment, this approach was supported by the observations of Lord Justice Buxton in **Leisure Services Limited** (see in particular at paragraph 14 of the Judgment).

Costs

13 After the Judgment was given, Mr Redpath made an application for costs limited to his brief fee for the Hearing. He submitted that the appeal had no reasonable prospect of success. Mr Lacey made no submissions. After pausing to consider the submission, the Employment Judge decided to grant the application. The appeal had no reasonable prospect of success. At the Preliminary Hearing the Employment Judge clearly discussed the requirements of the 1998 Act. The Appellant had an opportunity to withdraw its appeal but instead chose to continue with it. That led to the unnecessary cost of attending this Hearing.

14 The Employment Judge explained that he had a discretion as to whether he should consider the Respondent's ability to pay costs. After hearing Mr Lacey's submission, he ordered the Appellant to pay to the Respondent costs in the sum of £2,782.00 (including £462.00 VAT).

Employment Judge Keevash

Dated: 31 July 2017