EMPLOYMENT TRIBUNALS

Appellant	*Respondents*
Arcadis Consulting (UK) Ltd	**AND** Commissioner for Revenue & Customs

Heard at: London Central **On**: 18 October 2017

Before: Employment Judge Spencer (Sitting alone)

Representation
For the Claimant: Ms A Beale, of Counsel
For the Respondent: Ms K Balmer, of Counsel

REASONS

Introduction

1. This case concerns the Appellant's appeal against the decision of the Respondent in respect of two notices of underpayment of the national minimum wage issued to the Appellant by the Respondent in respect of two separate failures to pay the national minimum wage to two of its employees in 2012 and 2016 respectively. The jurisdiction for the Employment Tribunal to hear that appeal lies under Section 19C of the National Minimum Wage Act 1998.

2. The case was listed before me today for a Preliminary Hearing to hear the Respondent's application to strike out the appeal on the basis that it was out of time. However, it was agreed at the outset of the hearing, after I canvassed the point with both Counsel, that this is not a strike out application as such which engages Rule 37 of the Tribunal Rules of Procedure ("the Rules"). In fact, what I was being asked to do was to

determine a preliminary issue and therefore this was a hearing at which a preliminary issue was determined in accordance with Rule 53 of the Rules. That preliminary issue was whether this Tribunal has jurisdiction to entertain the Appellant's appeal or whether the Tribunal lacks jurisdiction because the appeal is out of time.

Submissions, documents and witness evidence

3. I decided the case having heard submissions from both parties' Counsel, supported by written submissions from both parties' Counsel.

4. I took into account the evidence of Phil Wicksteed, an employee of the Appellant. His evidence is set out in his witness statement dated 17 October 2017.

5. Various case authorities were cited to me. They are **Muchelli v The Government of Albania [2009] 1 WLR 276**, **Yadly Marketing Company Ltd v Secretary of State for the Home Department [2017] 1 WLR 1041**, **Adisena v Nursing and Midwifery Council [2013] 1 WLR 3158**, **Pomiechowski v District Court of Legnisia Poland & Another [2012] 1 WLR 1604**, **Revenue & Customs Commissioners v Lorne Stewart Plc [2015] ICR 708** and **Radakovits v Abbey National plc [2010] IRLR 307**.

6. I also took into account a paginated bundle of documents produced by the Appellant.

Findings of Fact

7. The Appellant is a large organisation employing some 4000 staff, they are certainly large enough to have an HR function. They tender for work in compliance with the Public Contracts Regulations 2015.

8. The Respondent is a state agency which amongst other things has a role in policing enforcement of the national minimum wage legislation. The Respondent's powers include issuing notices to employers who are considered to have underpaid the national minimum wage and requiring such employers to make payment of sums due. The Respondent also has a policy of publicly naming employers who have failed to pay the national minimum wage (subject to a de minimus principle whereby deductions of

less than £100 are not made public). That naming policy is a matter of public knowledge and I have concluded that the company of the Respondent's size and resources ought to have known about that policy.

9. The Appellant is alleged to have failed to pay the national minimum wage to two its employees in 2012 and 2016 respectively.

10. The Appellant was first informed by the Respondent that they were under investigation for failure to pay the national minimum wage in August 2016. A letter dated 15 August 2016 from the Respondent informed the Appellant of this and crucially refers to the Respondent's naming scheme. It is clear to me that the Respondent was aware of the existence of that scheme at least from August 2016.

11. The existence of that naming scheme was also communicated to Samantha Pointer of the Appellant by a representative for the Respondent during an interview on 23 September 2016.

12. The Appellant also received other letters and documents from the Respondent which may not have expressly referred to the naming scheme but certainly referred to various websites and publicly available information which included reference to the naming scheme.

13. It is clear to me that this is a case in which the Respondent knew and certainly ought to have known about the existence of the naming scheme. The conclusion that I have reached is that the Appellant overlooked the significance to its business of being named under that scheme.

14. After the Respondent had concluded its investigation it issued two notices of underpayment to the Appellant, they were both served on and dated 10 May 2017. Those notices clearly confirmed to the Appellant, firstly that they had the right to appeal against the Respondent's decision and that there was a time limit within which to do so; that time limit being 28 days. I accept that those notices contained no direct reference to the naming scheme although, once again they did refer to the Respondent's website, which contains those details.

15. The Appellant took the view that they would simply pay the sums due under the notices rather than challenge the Respondent's decision by appealing against the decisions. It is clear to me that the Appellant consciously decided not to appeal. That appears to have been a pragmatic decision to simply pay up rather than fight the cases. The Appellant overlooked the fact that this course of action might still lead to them being publicly named under the Respondent's naming scheme in those circumstances.

16. The Appellant accepts that they received a letter from the Respondent dated 8 June 2017. That letter was issued at the end of the appeal period. It is not a letter that was contained in the hearing bundle and not one I have seen but the Appellant accepts that the letter made them aware of the naming scheme and that they became aware at that point that they were going to be named in this particular case.

17. The Appellant thereafter instructed solicitors although it is unclear from the evidence before me when that instruction took place. That resulted however in this appeal being lodged with the Employment Tribunal, the date of receipt being 11 July 2017. That was more than one month outside the relevant time limit.

18. The Appellant says that the naming decision has the potential to adversely affect its business as it is required under the Public Contracts Regulations 2015 to divulge such breaches of legislation when tendering for contracts.

19. The Appellant's grounds of appeal confirm that the case concerns two deductions from the pay of its staff. I understand to be deductions for relate to recovery of training costs. The Appellant asserts that those deductions were allowable deductions under Regulation 12 for the National Minimum Wage Regulations 2015 and that there has been no infringement of the National Minimum Wage Legislation. They also assert with regard to the second employee that as the amount of the underpayment is less than £100 it does not fall within the naming regime in any event.

20. It is not open to me to determine the substantial merits of the appeal at today's hearing. The Respondent's grounds for objecting to the appeal are primarily that the appeal is out of time. That led to this hearing being convened today, at the Respondent's

request, to consider the preliminary issue regarding the timing of the application. As I have said, it is agreed that the issue is to be determined as a preliminary issue and not as a strike out application.

The Relevant Law

21. The relevant legislation is the National Minimum Wage Act 1998 ("the Act"), the relevant section being Sections 19 and 19(c) of the Act. It is Section 19(c)(1) that gives the Appellant the right to appeal. That right of appeal lies to an Employment Tribunal.

22. It is Section 19(c)(3) of the Act that confirms that the deadline for submitting such an appeal is within 28 days before the end of what is described as the 28 day period. The 28 day period is defined in Section 19(8) of the Act as being the 28 day period starting from service of the notice of underpayment. Crucially, the time limit of 28 days under the Act is absolute. There is no provision in the Act for the Employment Tribunal to have discretion to extend time or to entertain a late claim. That is unlike the majority of statues this Tribunal deals with including, for example, the Employment Rights Act 1996 and the Equality Act 2010.

23. The Appellant's submission is that Article 6 of the European Convention of Human Rights is engaged in this case and the case law establishes a principle that a court, and by extension a Tribunal, must have the power to extend an absolute time limit to ensure compliance with Article 6. The most recent example of that run of case law is the **Yadly Marketing Co Limited** case from 2017. The Appellant also cites other examples. **Adisina v Nursing and Midwifery Council** is an example of the same principle being applied. The Appellant does however accept that the principle established in those cases is a narrow one as confirmed in paragraph 37 of the Court of Appeal's decision in **Yadly**. In that paragraph reference is made to Lord Mance JSC's judgment in **Pomiechowski** as follows:

"*He stated that the court must have the power in any individual case –*

(a) to determine whether the operation of the time limits would have this effect [referring to the effect of preventing an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6.1] *and, if and to the extent it would do so;*

(b) to hear an appeal out of time when "a litigant personally has done all he can to bring and notify timelessly"."

24. Paragraph 38 of the **Yadly** judgment goes on to state that "*it is clear from the decision of this court in Adisina v Nursing and Midwifery Council [2013] 1 WLR 3156 that the scope for departure from a 28 day time limit such as that in Section 17 of the 2006 Act is "extremely narrow"*. It goes on to say the example given in **Adisina** by Maurice Kay LJ is "*a situation in which by reason of illness a person is in blameless ignorance of the fact that time was running for the whole of the 28 day period*".

The Parties' Respective Positions

25. The Appellant submits that the Act would, were it not for an extension of time, operate to prevent an appeal thereby conflicting with the right under Article 6 and also submits that this is a case where the Appellant has, in the words I have quoted, personally done all he can to bring and notify the appeal timelessly. The Appellant therefore submits that I should allow the appeal to proceed to a substantive hearing on its merits.

26. The Respondent's submission is straightforward. They submit that the statue contains no power to extend time. They submit that this was a conscious decision on the part of Parliament. They submit that Article 6 rights are not engaged in these circumstances given that it is neither a civil penalty or a criminal or quasi criminal matter and that the Tribunal therefore has no power to extend time. In the alternative, the

Respondent submits that if such power exists it is not a power that should be exercised in the Appellant's favour in this case as the operation of the time limit in this case does not have the effect of infringing any Article 6 rights and even if it did, this is not an Appellant, who on the facts can be said to have personally done all he can to bring the appeal timelessly.

Conclusions

27. There is no dispute that the time limit under the Act is absolute. There is also no dispute that the Act contains no discretion to extend that time limit. There is also no dispute that the appeal in this case was submitted more than a month out of time.

28. I accept the Appellant's submission that its Article 6 rights are potentially engaged in these circumstances. That submission is supported by case law that suggests that where a time limit is absolute, and the relevant statue contains no discretion to extend time, the courts, and therefore the Tribunal too, must interpret legislation so as not to conflict with Article 6 rights. I accept that this is a case where the Appellant's Article 6 rights are potentially engaged. It is not a criminal or quasi criminal case but it is analogous to the employer's penalty notice that was issued in the **Yadly** case and, in my view, there is a close enough analogy for the principle to apply on the facts of this case.

29. However, it is clear from the case law that the scope for departure from the time limits in these circumstances is, as the case law puts it, "extremely narrow". I am not satisfied that the time limit in this case has operated to prevent the Appellant from exercising their right of appeal. The Appellant accepts that they received the notices of underpayment. The Appellant accepts that they knew of the right appeal. This is a case where the Appellant consciously chose not to exercise that right. They could have done so. They consciously decided not to, apparently overlooking the implications for their business of the naming scheme which they were aware or ought reasonably to have

been aware of. This is a case where the Respondent overlooked the significance of the penalty when deciding not to appeal. It is not a case where the time limit or the circumstances prevented them from exercising their right to appeal. Even if I am wrong on that point, I am not satisfied on the evidence that this is an Appellant who, in the words of the case law, has personally done all he can to bring and notify the appeal timelessly. On the evidence, I find there is no good reason for failing to bring the appeal in time. It was a conscious decision on the part of the Appellant who overlooked the consequences for their business of the potential penalties of not appealing. They were aware of those consequences or ought reasonably to have known about those consequences. Equally, this is not an Appellant who acted promptly even after the consequences were pointed out to them when they received the letter dated 8 June 2017. it took a full month or more after receipt of that letter for the Appellant to lodge its appeal. That cannot be described as timeous.

30. For those reasons I determine the preliminary issue against the Appellant. The appeal is out of time and this Tribunal has no jurisdiction to entertain a late appeal in the circumstances. For those reasons the appeal is dismissed.

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Employment Judge Spencer
15 November 2015