



# EMPLOYMENT TRIBUNALS

**Appellant:** Mr M Hamed t/a Tesco Hand Car Wash

**Respondent:** The Commissioners for HM Revenue & Customs

**HELD AT:** Manchester

**ON:** 18-19 October 2017  
22 November 2017  
7 December 2017  
(in Chambers)

**BEFORE:** Employment Judge Slater  
(sitting alone)

## REPRESENTATION:

**Appellant:** Mr B Henry, counsel

**Respondent:** Mr S Redpath, counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The name of the appellant is changed to Mr M Hamed t/a Tesco Hand Car Wash.
2. The appeal is not allowed and the notice of underpayment stands as issued.

# REASONS

## Claims and Issues

1. This is an appeal against a National Minimum Wage Notice of Underpayment dated 24 March 2017 which required payment of £2,935.80 representing arrears owed to four workers, Alin Davidescu; Rasul Abdul; Bela Gabor and Liviu Claudiu Racovita, together with penalties of £5,871.60.

2. The issue for the Tribunal is whether the sums set out in the Notice of Underpayment in relation to the workers were due to the workers in respect of the pay reference periods specified in that notice and, therefore, also whether the penalty was correct.

### **The Facts**

3. Mr Hamed is a sole trader operating the business of a car wash in a Tesco car park in Burnley. This is a franchise operation. The franchisor is Waves Car Wash Consultancy Limited. Mr Hamed took over the franchise on 14 April 2016.

4. The respondent has powers to enforce payment of the National Minimum Wage.

5. The respondent conducted observations of the appellant's business as part of a targeted enforcement project looking at Waves Car Wash franchisees. The observations gave snapshots of how many people appeared to be working at the car wash at the times of the observations. Observations were made on three separate occasions when the site was open. On two occasions, four workers were seen and on the other occasion, five workers were seen.

6. Following these observations, the respondent conducted an unannounced visit on 9 November 2016. Mr Hamed met with Ms Scarlett, Mr Hilton and Ms Palmer of the respondent. In accordance with standard practice, Mr Hamed was first given a document to read, setting out the purpose of the enquiry and the respondent's powers in respect of National Minimum Wage. Mr Hamed did not tell the respondent's representatives that he did not understand this and it appeared to Mr Hilton that Mr Hamed understood the discussions which followed. We accept Mr Hilton's evidence that, if he had had reason to believe that there was a language difficulty, he would have made use of an interpreting service which the respondent's representatives can access at any time via their Blackberries.

7. Mr Hamed fully cooperated with the representatives of the respondent at the visit in November and at a subsequent meeting in December. Notes were taken of the meeting by Mr Hilton, Ms Scarlett and Ms Palmer. As well as the typed notes prepared by Mr Hilton and Ms Scarlett, we have what appear to be handwritten notes from Ms Scarlett. In his evidence, Mr Hamed disagreed with some of the points recorded e.g. he said he had not said that the workers' hours were nearer 40 hours, but that they were 30 hours. However, the accuracy of these notes was not challenged in cross examination. No reason has been suggested as to why the respondent's representatives would deliberately make an inaccurate record. I consider it unlikely that the respondent's representatives would make an error in recording significant matters such as Mr Hamed saying that the workers' hours were nearer 40 per week. I find, on a balance of probabilities, that the notes are an accurate summary of relevant matters. In relation to some matters, more than one of the representatives was party to a relevant conversation and each has made a note of that conversation. Where the evidence of Mr Hamed and the written notes of the conversations do not agree, I find the written notes more likely to be an accurate record of what was said. Mr Hamed's oral evidence was inconsistent at times, appearing to change to produce an account most likely to serve his interests. Mr Hamed's case now is clearly inconsistent with some of the things he is recorded as

saying to the respondent's representatives so he would have a clear motive for denying the accuracy of the respondent's notes of relevant conversations.

8. The notes record that the business is open 08:30 to 18:00 Monday to Saturday and 10:00 to 16:00 on Sunday. Ms Scarlett's typed and handwritten note record that there are no changes in the summer to the opening hours. Mr Hilton's typed note, records the same trading hours but put in brackets "dependent on season and weather". Ms Scarlett's typed note was the note sent to Mr Hamed after the meeting. Mr Hamed never, prior to issue of the notice of underpayment, sought to challenge that the opening hours were as set out in Ms Scarlett's notes. I find that these were the opening hours of the business throughout the year although, if the weather was poor, there would be fewer workers on site.

9. Mr Hamed told the respondent's representatives that he had been on holiday the previous two weeks. He said he was usually on site most of the time and he currently employed three workers: Rasul Abduli who started 21 April 2016 and worked 24 hours per week; Liviu Claudiu Racovita who started 1 October 2016 and worked 30 hours per week; and Bela Gabor who started 1 October 2016, working 30 hours per week. Mr Hamed showed the respondent copies of their contracts. Pictures were taken of these. Mr Hamed said there were two staff plus him or two staff plus the supervisor there at all times and he would have three staff plus him when the weather was nice. Mr Hamed told them that workers were paid monthly in cash and they did not sign for payment. He said he gave them advances from time to time and did not keep a record of this but just remembered who owed what.

10. Mr Hamed said that timesheets were not completed and that he said he had been told by Mr Blackburn of the franchisor that he needed to keep time records correctly going forward. There were some undated timesheets with three workers' names on them. The names included Baiz and Marcel. Mr Hamed told the respondent that these workers left in October.

11. Mr Hamed showed the respondent the workers' payslips. Mr Hilton noted that the payslips showed the same amount of hours and pay every month. Mr Hamed told him that pay was calculated by multiplying the workers' weekly number of hours by 52 then dividing it by 12. Mr Hilton questioned Mr Hamed on the opening hours of the business and staffing levels. He compared the hours the business was open (63 hours per week) against the hours recorded. It is unclear exactly which documents Mr Hilton was referring to but he referred to workers' hours on the records available totalling 84 whereas, with three workers on site at all times, the workers' hours would need to total approximately 180 hours per week. It may be that Mr Hilton was referring to PAYE real time information for each worker since he referred specifically to this source of information at the meeting in December. Mr Hamed is recorded as agreeing that the workers' hours were nearer to 40 hours per week than those recorded. The typed notes refer to the working hours of the workers having been "suppressed". Both the typed sets of notes and the handwritten notes record Mr Hamed as admitting that staff worked closer to 40 hours per week than those recorded. I find, on a balance of probabilities, that he did say this, and not, as he asserted in oral evidence, that staff worked 30 hours per week.

12. With the permission of Mr Hamed, Mr Hilton spoke to two employees working on site that day: Rasul Abduli and Bela Gabor. Mr Hilton recorded from what they told

him that Mr Abduli had started in May 2016 and worked 24 hours a week for £172 per week. He said he signed for his hours but not for cash. He said Sunday was pay day. Bela Gabor was recorded as saying he had started on 1 October 2016. He said he worked 30 hours a week or 130 hours a month and Sunday was pay day.

13. Ms Scarlett told Mr Hamed that she would calculate the actual hours worked by each worker in each month before calculating the arrears and agreed to book an appointment to come back to Mr Hamed and his accountant to explain to them the arrears and how she had calculated them. She said they would have a chance to review the figures and come forward with any amendments.

14. Ms Scarlett wrote to Mr Hamed after the meeting on 21 November enclosing summary notes from the meeting. Mr Hamed did not challenge the notes at the time or until his evidence in these proceedings.

15. The respondent sent letters to three former employees, including Mr Davidescu and Mr Abdulla. Mr Abdulla did not respond to the letter. Mr Davidescu phoned Ms Scarlett of the respondent in response to the letter. Ms Scarlett did not give evidence but I have no reason to believe the note is not an accurate record of the telephone conversation. Mr Davidescu told Ms Scarlett that he had worked at the Tesco hand car wash for approximately a year and left at the end of August 2016. He said Mr Hamed took over the business in April 2016. He said he was put onto a zero hours' contract once Mr Hamed took over. His contract stated he would be paid £7.20 per hour but he suspected he was not paid this amount. He said he worked 08:30 to 18:00 five days a week and was paid £40 per day with a 30 minute lunch break. He said he took a month's leave in July 2016 and when he returned from leave his wage was increased to £45 per day. He said there were always three people at the car wash at any one time.

16. Mr Hamed referred in his oral evidence at this hearing to Mr Davidescu having been dismissed. However, Mr Hamed had not referred to this in his witness statement. I note that Mr Davidescu responded to contact from the respondent rather than initiating any complaint.

17. Mr Hamed had a further meeting with HMRC representatives, including Mr Hilton, on 13 December 2016. Mr Hamed was accompanied at this meeting by a relative, Mr Merawdly, who is incorrectly identified in the notes as Mr Mohammed. Mr Hamed was also accompanied by his accountant, Mr Chilwan. Mr Hilton made notes of the meeting. These were not challenged in cross examination. I find them to be an accurate summary of the meeting.

18. At the meeting, Mr Hilton provided Mr Hamed with a further copy of the National Minimum Wage factsheet and advised him to re-read it to confirm he had fully understood the position. Mr Hamed and Mr Chilwan confirmed that he understood the position. Mr Chilwan showed the respondent's representatives the payroll process the car wash had adopted since the previous visit, which indicated an increase in hours, and was signed by the workers each day. The note of the meeting records that the system indicated National Minimum Wage was being paid on hours worked, as workers were no longer on an annualised payroll. Mr Hamed confirmed the trading hours previously recorded and that three workers were generally on site at all times, the supervisor and two workers, as stipulated by the Waves contract. Mr

Hamed confirmed there were no periods since April when the business had not traded but said he had been away and Rasul Abdul had covered as the supervisor. Mr Hamed advised that the following workers had also been employed during his period of ownership: Mr Abdulla, Mr Natasa and Mr Davidescu.

19. Mr Hilton said that during observations an average of three workers had been seen on site at all times and this would suggest they would expect to see around 180 hours per week recorded on the timesheets. Mr Hilton advised that the hours on the timesheets reported around 84 and he had concerns that the rotas did not reflect the true position. Neither Mr Chilwan nor Mr Hamed provided an explanation for the discrepancy.

20. The respondent's representatives suggested that the rotas and payslips did not support the manpower required to run the car wash given the business was trading for some 60 hours a week and that there appeared to be at least three workers at the site at most times. Mr Hilton suggested it was reasonable to expect to see at least 180 working hours going through the books each week.

21. Mr Hilton informed Mr Hamed of a telephone conversation with an ex worker who said he had been paid a day rate of £45 a day. The notes of the meeting record, "Agent advised day rates were in operation". I find that Mr Hilton was referring to Mr Chilwan, the accountant, in this statement. Mr Chilwan, in evidence, said he had not said that workers were paid a daily rate. Mr Hamed denied in his witness statement ever indicating to Mr Hilton that workers were on a day rate of £45. In the letter dated 19 December 2016 which Miss Scarlett sent to Mr Hamed following the meeting on 13 December, she recorded that, at the meeting, Mr Hamed had indicated that workers were on a day rate of £45. Mr Hamed did not seek to correct that statement until these proceedings. Whether it was Mr Chilwan who said this or the appellant, I find, on a balance of probabilities, that Mr Hamed, or someone on his behalf, said that a day rate of £45 was paid.

22. Mr Hilton said that around 24 hours had been accounted for under the PAYE real time information for each worker. Mr Hilton had prepared three alternative calculations based on different scenarios. He presented the alternative scenarios orally. These were:

- (a) All workers undertaking 60 hours per week ( $60 \times 5 = 300$  hours) and pay and hours being uplifted accordingly.
- (b) All workers working 40 hours per week, using the monthly payroll information submitted to the respondent.
- (c) All workers receiving £45 a day for 8 hours a day, working 5 days a week.

23. Mr Hilton gave Mr Hamed time with his accountant to discuss the calculations. It appears from Mr Hilton's oral evidence that the written calculations were not given to Mr Hamed and Mr Chilwan until later in the meeting.

24. On re-entering the room Mr Hamed agreed the calculation should be based on the scenario of workers receiving £45 a day for 8 hours a day, working 5 days a week. However, he wished to discuss a couple of the workers. Mr Hamed raised

points in relation to Mr Abduli and Mr Davidescu but not in relation to Mr Gabor and Mr Racovita. Mr Hilton agreed to re-issue calculations following the meeting.

25. Mr Hamed agreed in evidence that he had agreed to the calculation but later, when he had discussed it with other people and understood it, he said he did not agree. Mr Hamed did not say to the respondent's representatives at the meeting that he did not understand the calculation he was agreeing.

26. Miss Scarlett wrote to Mr Hamed on 19 December, summarising the discussions and enclosing a schedule of arrears for the period 25 April 2016 to 31 October 2016. The summary of discussions included that, on 9 November 2016, Mr Hamed had informed the respondent that the three current workers were contracted to work the following weekly hours: Mr Abduli 24; Mr Gabor and Mr Racovita 30. Miss Scarlett wrote that she and Mr Hilton had questioned him about there not being enough contracted worker hours to cover the opening hours of the business. She wrote that Mr Hamed had admitted on 9 November that each worker actually worked nearer 40 hours per week. She wrote that Mr Hamed had indicated to Mr Hilton on 13 December that workers were on a day rate of £45.

27. Miss Scarlett wrote that she had taken copies of timesheets at the visit on 9 November but, as they were not dated, she had disregarded them. In the absence of timesheets, she had calculated working hours based on each member of staff working 8 hours per day, 5 days per week. She referred to information given by Mr Hamed on 13 December about Mr Abduli not working 5 days a week for the first couple of months of employment and recorded the number of days he was said to have worked in the period 25 April to 31 July 2016 and that, from 1 August to 31 October, he had worked 5 days a week. She referred to information given by Mr Hamed about Mr Davidescu working only 5 days in August 2016 and wrote that her calculation was based on Mr Davidescu working 40 hours in August.

28. Miss Scarlett enclosed a schedule of arrears identified for the pay reference period 25 April 2016 to 31 October 2016, showing an underpayment of £2935.80. She wrote that this was not a formal notice to pay the arrears but an opportunity for Mr Hamed to review the figures used in the calculation. She asked that, if he had any records or information relevant to the investigation, to provide these forthwith. She asked that he contact her by 3 January 2017 to agree the schedule or ask her to consider any amendments.

29. The suggestion has been made in these Tribunal proceedings that the claimant did not understand what was said at the meetings with him or in the letters which followed. The claimant's first language is Kurdish. The claimant gave his evidence at this Tribunal with the assistance of an interpreter. I note that the claimant communicates with his accountant in English and has attended training for his business in English. At the meeting on 13 December, he had his cousin with him who, according to the claimant, has assisted him in these Tribunal proceedings with translation when required. We note that the claimant at no time told the respondent that he did not understand and needed an interpreter. Even if the claimant did not understand fully what was said at the meetings, he had ample time between the meetings to seek translation of the letters which followed and to raise concerns with the respondent if what the respondent recorded in its letters and in Miss Scarlett's notes of the meeting on 9 November was not correct. He did not raise any concern

until a telephone call with Miss Scarlett on 16 January 2017, after she had sent the calculation with her letter of 19 December 2016.

30. On 16 January 2017, Mr Hamed rang Ms Scarlett. He said he had consulted with a business adviser and a solicitor and wished to arrange a further meeting to discuss the calculations. He said he had struggled to understand the calculations and had records from 9 November 2016 for them to look at. Mr Hamed said that an ex worker took all his records. Ms Scarlett asked why he had not told her that on their initial meeting on 9 November. Mr Hamed told her that he had just returned from leave and was confused.

31. On 26 January 2017, Mr Davidescu phoned Ms Scarlett. He said he had been contacted by text by Mr Hamed on 10 January who told him that he owed him money for his holiday pay. Mr Davidescu told Ms Scarlett that Mr Hamed had told him he was due about £800. Mr Davidescu has not given evidence in these proceedings but copies of messages, which Mr Hilton has told us were on Mr Davidescu's phone, have been produced in the bundle. Mr Hamed asserted in his witness statement that the messages were fabricated and a misrepresentation. However, in oral evidence he said he did not remember whether he had sent any texts to Mr Davidescu. He said his solicitor had written the statement, which was written in English. Mr Hamed's evidence was inconsistent as to whether he had contacted Mr Davidescu and told him that money was due to him. At first, Mr Hamed agreed that he had done this but said he had not yet sent the money to Mr Davidescu. He later said he did not remember contacting Mr Davidescu, then said he did not know. I find, on a balance of probabilities, that Mr Hamed did contact Mr Davidescu to offer him a payment.

32. The appellant authorised a solicitor, Mr Alam, to act on his behalf. After some difficulties in arranging a convenient date, a meeting was arranged for 16 February 2017. Mr Hilton and Mr Taylor of the respondent attended the meeting on that date with Mr Hamed and Mr Alam. Mr Hilton provided an overview of the review so far and advised that Mr Hamed had agreed the calculations in a previous meeting and some minor adjustments at the end of the meeting, and that the respondent held information which indicated Mr Hamed had attempted to pay arrears to an ex worker. When asked what had changed, Mr Alam advised that new information had come to light. When asked what information, Mr Alam advised that the information had come from the accountant but he was not ready to release the details yet as he had only just received them. Mr Taylor asked how the solicitor knew they were new information rather than some old payroll details which had already been considered. The notes of the meeting indicate that Mr Alam could not provide an answer to the question but advised that the information supported that the workers had not worked the hours stated on the informal National Minimum Wage calculations. Mr Hilton agreed to hold off issuing the formal notice of underpayment for a further seven days.

33. Mr Chilwan's evidence to this Tribunal is that he did not provide anything new to the solicitor. The solicitor subsequently sent to the respondent the documents which appear from pages 116 to 122, which are sheets completed by Mr Chilwan on the basis of information provided by Mr Hamed purporting to show total hours worked for each employee by month. The pay on the sheets is calculated on the basis of £7.20 per hour. The sheets give no indication of hours worked by each employee each day. There are sheets for Mr Abdulla, Mr Abduli, Mr Gabor and Mr Racovita. The

sheets for Mr Abdulla show the same total hours worked (120) for each of the months August to October 2016. The sheet for Mr Abduli shows 16 hours worked in April 2016 then 96 hours worked for each month May to October 2016 inclusive. For the months ending 30 November 2016 onwards, there is some variation in total hours for each month, ranging from 24 up to 103 (in November). By the time pay records were compiled for November 2016, the respondent had visited the appellant and provided advice on the records to be kept from that point on. The sheets for Mr Gabor show hours from October 2016 until December 2016. The hours for October were 130 and the hours in subsequent months varied. The sheet for Mr Racovita showed hours from October 2016 until February 2017. The hours for October were 130 and the hours in subsequent months varied.

34. I have been shown a similar sheet for Mr Davidescu, but it appears from the bundle index that this was not amongst the documents sent to the respondent by Mr Hamed's solicitor. This purportedly shows hours worked from April to August 2016. This shows 110 hours for April, 120 hours in each of May to July inclusive and 30 hours in August. I note that Mr Davidescu told Miss Scarlett in a telephone call on 8 December 2016 that he took a month's leave in July 2016 and Miss Scarlett did not include July 2016 in the calculation of arrears.

35. The formal notice of underpayment was issued on 24 March 2017. The workers named in the notice are: Rasul Abduli, Bela Gabor, Liviu-Claudiu Racovita and Alin Davidescu.

36. In respect of Rasul Abduli, the notice of underpayment sets out arrears said to be due in respect of a series of consecutive pay periods, the first being 24 April 2016 to 31 May 2016 and the last being 1 October 2016 to 31 October 2016. The amount outstanding is stated to be £1,562.40.

37. In respect of Bela Gabor, the notice of underpayment sets out arrears said to be due in respect of the pay period 1 October 2016 to 31 October 2016. The amount outstanding is stated to be £264.60.

38. In respect of Mr Racovita, the notice of underpayment sets out arrears said to be due in respect of the pay period 1 October 2016 to 31 October 2016. The amount outstanding is stated to be £264.60.

39. In respect of Mr Davidescu, the notice of underpayment sets out arrears said to be due in respect of a series of pay periods, the first being 1 April 2016 to 30 April 2016 and the last being 1 August 2016 to 31 August 2016. There is no pay period for July 2016 included in the notice; Mr Davidescu told the respondent he was away in July 2016. The amount outstanding is stated to be £844.20.

40. The total arrears in the notice is stated to be £2,935.80. The penalty charge due is stated to be £5,871.60 i.e. 200% of the amount of arrears.

41. The claimant appealed to this Tribunal against the notice by notice of appeal dated 12 April 2017 and received by the Tribunal Service on 21 April 2017. The ground of appeal was that the decision to serve the notice was incorrect because no arrears were owed to any worker named in the notice. The details of the grounds of appeal provided were as follows [sic]:



“The respondent has disregarded the documents served by the solicitors. Therefore, decision of underpayment was made on the basis incorrect documents.

Respondent also failed to provide any evidences from employees in connection with this notice. On the other hand, appellant will rely on the employees who are alleged to under underpayment.”

42. Two of the workers named in the notice, Mr Racovita and Mr Abduli appeared as witnesses for the appellant. Their witness statements were in identical form, down to the spelling mistakes, save for their dates of employment with the appellant. Both statements were, unusually, in the form of statutory declarations, made before solicitors: Mr Racovita’s before a solicitor in Burnley, and Mr Abduli’s before a solicitor in Kingston upon Thames. It was obvious that the statements must have been written by the same person for both witnesses. Mr Abduli, however, gave evidence that his statement had been written by the solicitor in Kingston upon Thames, whom Mr Abduli had found online, on the basis of what Mr Abduli told the solicitor, with the assistance of a friend interpreting for him. Even when shown Mr Racovita’s statement with the same words and mistakes in it, Mr Abduli persisted in his evidence that the statement had not been prepared for him before he went to see the solicitor in Kingston upon Thames and that the words in the statement were his own words. The evidence of Mr Abduli was completely without credibility in this respect.

43. The appellant put forward a witness statement for Mr Gabor, apparently signed and made as a statutory declaration before a solicitor on 3 April 2017. Mr Gabor did not attend to give evidence. I was told that he was no longer working for the appellant and could not be traced. The statement was in exactly the same form as that for Mr Abduli and Mr Racovita, down to the same spelling mistake, save for the dates of employment. It was apparently declared on the same day and before the same solicitors as the statement of Mr Racovita.

44. I find that I cannot rely on the evidence given in the witness statements for Mr Racovita, Mr Abduli and Mr Gabor, since it is apparent that the statements were written for them. In any event, the statements consist of nothing but dates of employment and a statement that: “I was paid my full wages for the hours I worked at the National Living Wage rate.”

45. Since Mr Gabor did not attend to give evidence, and the statement cannot be relied on, I disregard his statement.

46. Mr Racovita and Mr Abduli both answered questions at this hearing, giving oral evidence. It appeared, from their evidence, that both have cause to be grateful to Mr Hamed. Mr Hamed gave Mr Racovita his first job in this country. Mr Hamed gave Mr Abduli his first job after he came back to this country from Iraq. Although neither were still working for Mr Hamed by the time of this hearing, it is possible that their gratitude to Mr Hamed could have led them to give evidence favourable to him. I treat the evidence of both witnesses with caution for this reason. In addition, the lack of credibility in Mr Abduli’s evidence about the process of creation of his witness statement causes me to consider I cannot rely on his evidence unless supported by other evidence.

47. Mr Racovita gave evidence that he was paid per hour, not per day and was paid £7.20 per hour. He said he worked 4, 5 or 6 hours per day. He said he had kept a record of the hours he worked in his diary but no one had asked him to produce this. I was not shown this document. He said he worked 30 hours per week in October then worked more hours. He said there was no fixed schedule. He said that most weeks he received advances on his pay and received the rest at the end of the month.

48. Mr Abduli said he received payment in cash on a monthly basis but received advances on pay in some months. Mr Abduli said that, at the beginning, hours were recorded in a book by Mr Hamed and they signed the book but the book disappeared. Mr Abduli said he kept his own record of hours worked on his mobile phone but erased this each month.

49. I also heard evidence for the appellant from one other former employee, Mr Abdullah. He is not a worker named in the notice of underpayment. He only worked for Mr Hamed for a short time, he says August to October 2016. The respondent wrote to Mr Abdullah on 24 November 2016 seeking his assistance but he did not reply to their letter. Mr Abdullah is a family friend of Mr Hamed. Mr Abdullah said he worked 120 hours per month. However, he said he did not work fixed hours; his hours depended on how busy the car wash was; in good weather he would work more hours. Mr Abdullah said that Mr Hamed wrote down the hours they worked and they signed for it but he did not know where the book had gone. Mr Abdullah said he always got paid for 120 hours each month. This accords with the wages sheet referred to in paragraph 33.

50. The respondent did not call Mr Davidescu as a witness.

51. I will return to the assessment of the witness evidence and other evidence in my conclusions.

52. From payslips produced in evidence, it appears that Mr Nastasa was employed in April to August 2016 inclusive. The hours recorded on payslips for him were as follows: April 72, May 100, June 110, July 120, August 120.

53. From payslips, it appears there was also another employee, not mentioned by Mr Hamed to the respondent: Mr Vasile. According to the payslips, Mr Vasile worked in April and May working 100 hours in April and 90 in May.

54. There is no documentary evidence of any employees other than those named in the notice of underpayment (Mr Abduli, Mr Gabor, Mr Racovita and Mr Davidescu), and Mr Abdullah, Mr Nastasa and Mr Vasile.

55. I heard evidence from Mr Kaka, a friend of Mr Hamed's, who said he had helped cover the car wash when Mr Hamed went to meetings. He estimated that he had attended the car wash for this purpose 3-4 times in the period 1 April to 31 October 2016.

56. I also heard evidence from Mr Hamed's cousin, Mr Merawdly. Mr Merawdly gave evidence that he had covered for Mr Hamed for a few days when Mr Hamed had been away.

57. Although Mr Hamed, in his witness statement, argued that the respondent did not take into consideration the hours he worked and the hours that his friends and family helped him, there was no specific evidence of friends and family helping out as unpaid workers other than the few days covered by Mr Kaka and Mr Merawdly.

### Submissions

58. Mr Redpath produced a written opening note and made oral closing submissions. Mr Redpath submitted that, having regard to the trading hours and the observations of at least 3 workers on the premises, it was reasonable for the respondent to draw an inference that the business required at least 180 hours going through the payroll. Mr Hamed had agreed that workers were working more hours than stated. Prima facie, there was a potential underpayment in relation to the NMW. Mr Hamed and Mr Chilwan were unable to give any explanation for the discrepancy between hours recorded and those that would be expected. Regulation 59 requires an employer to keep adequate records. The information provided to the respondent was that workers' hours had been suppressed and, from an ex worker, confirmed by Mr Chilwan, a daily rate of £45 was in operation. The basis for a calculation was discussed. Mr Hamed agreed the calculation, discussing some workers in detail. The documents produced after the February meeting did not take the position further forward; they were records produced by Mr Chilwan on the basis of information provided by Mr Hamed. Mr Hamed had no other information to support the payroll record.

59. The notice of underpayment was an exercise of best judgment after drawing inferences; this is a legitimate approach the respondent's officers can take to judge whether the NMW has been paid. This approach is important where they may not be adequate records. Where there is a complete dearth of information as to how the business operated, the respondent is entitled to assume, based on basic criteria, that a business will operate in a certain way. The respondent acted on information provided by Mr Hamed; his concessions were the best information the respondent could reasonably rely on in issuing the notice.

60. Mr Redpath made submissions relevant to the credibility of witnesses for the appellant.

61. Mr Henry made oral closing submissions. Mr Henry said there was no issue taken in relation to the notice of underpayment fulfilling the conditions in section 19(4) of the Act. There was a question of fact for the tribunal: what were the workers paid and was this less than the NMW? Mr Henry submitted that the correct approach was to compare the evidence before the tribunal and give the correct weight due to it.

62. Mr Henry referred to the evidence given by Mr Abduli to Mr Hilton during the unannounced visit on 9 November, that he worked 24 hours per week, not 40, and that this accorded with his payslip. In the absence of timesheets, this was the best evidence of hours worked by Mr Abduli.

63. Mr Henry noted that 2 further employees were mentioned at the meeting on 9 November: Baiz (Mr Abdullah) and Marcel who it was said left in October. He submitted that calculations using 3 workers were undermined by the respondent's

own notes of who were workers. They were also undermined by the respondent's observation reports which showed four or five workers. This would mean that, to cover opening hours, individual workers would not have to do 60 hours but could be doing less.

64. Mr Henry submitted that the context in which Mr Hamed's admissions were made (including English not being Mr Hamed's first language) cast doubt on them and the admissions should carry less weight than the actual evidence before the tribunal. The documents showed hourly rates, not a daily rate. Mr Chilwan denied saying there was a daily rate.

65. Mr Henry submitted that Mr Racovita's evidence was unshakeable. He was adamant he worked 130 hours in October (the only month relevant for him) and was paid by the hour.

66. Mr Henry submitted that it would have been in the interests of Mr Racovita and Mr Abduli to say that they worked from dawn till dusk and were not paid, but they did not, because they were honest witnesses.

67. Mr Gabor was interviewed by Mr Hilton on 9 November. He was clear that he worked 30 hours per week or 130 per month. This contemporaneous evidence was the best evidence.

68. Mr Henry submitted that we only had hearsay evidence from Mr Davidescu. The claimant had given evidence that Mr Davidescu had been dismissed. Less weight could be put on his hearsay evidence than the evidence of Mr Racovita. There was no logical basis upon which Mr Davidescu and Mr Racovita could have had different pay bases.

69. Mr Henry submitted that Mr Hamed filled in gaps in hours recorded; he was the variable factor when workers worked the same hours each month. He also noted that payslips showed Mr Nastasa and Mr Vasili working during the relevant period.

70. Mr Henry submitted that the best evidence, in the absence of documents which had gone missing or not been there in the first place, came from the workers. If their evidence is accepted, they were paid £7.20 per hour and there is no underpayment. If there was no underpayment, the notice must be rescinded. If there was an underpayment for any of the workers but the underpayment is not correctly stated, the notice must be rectified.

### **The Law**

71. The respondent is authorised to enforce National Minimum Wage (NMW) legislation in respect of workers, acting under powers conferred by the National Minimum Wage Act 1998 (the Act) and the National Minimum Wage Regulations 2015 (the Regulations).

72. Section 19 of the Act allows officers of the respondent to issue a notice of underpayment to an employer, where they are of the opinion that a worker is due arrears of pay because they have been paid less than the NMW. Section 19 sets out what must be specified in the notice of underpayment. This includes, for each worker

named, the amount due and the pay reference period to which the underpayment relates.

73. No issue is taken in this case about the form of the notice.

74. Section 19A of the Act provides that the notice of underpayment must, subject to the provisions of that section, require the employer to pay a financial penalty specified in the notice to the Secretary of State within a 28 day period. At the time the notice of underpayment was issued in this case, the penalty was set at 200% of the underpayment due to the worker, subject to a minimum of £100 and a maximum of £20,000.

75. Subsection 19(10) provides that the employer will be regarded as having paid the financial penalty if he pays the specified arrears of wages and at least half the financial penalty within the period of 14 days beginning with the day on which the notice of underpayment was served.

76. Section 19C(1) of the Act allows a person served with a notice of underpayment a right of appeal against 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.

77. The right of appeal lies to an employment tribunal.

78. Subsection 19C(4) provides that an appeal under subsection 1(a) (the decision to serve the notice):

“must be 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.”

79. Subsection 19C(7) provides that, where the employment tribunal allows an appeal under subsection 1(a), it must rescind the notice of underpayment.

80. Subsection 19C(5) provides that an appeal under subsection 1(b) (any requirement imposed by the notice to pay a sum to a worker) 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.”

81. Subsection 19C(6) sets out the grounds on which an appeal against a requirement to pay a financial penalty must be made. The relevant ground for this case is that the amount of the financial penalty specified was incorrectly calculated, whether because the notice was incorrect in some of the particulars which affect the calculation or for some other reason.

82. Subsection 19C(8) provides:

“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.”

83. Regulation 59(1) of the 2015 Regulations provides that employers must keep records in respect of workers who qualify for the NMW sufficient to establish that such workers have been paid at a rate at least equivalent to the NMW.

84. Where an employer appeals against a notice of underpayment issued by HMRC, the burden of proof is on the employer to demonstrate that it had, in fact, paid the NMW to the workers concerned.

### **Conclusions**

85. On the appeal form, the claimant had ticked only the reason for appeal corresponding to subsection 19C(1)(a) of the Act. However, the appellant’s list of issues states this to be an appeal is brought under sections 19C(1)(a), (b) and (c) of the Act and the respondent has not disputed the appellant’s entitlement to pursue the appeal on alternative grounds.

86. If I find that no arrears were due to any worker in the notice (the subsection 19C(1)(a) argument), I must rescind the notice. Alternatively, if I find that the notice was correct in respect of arrears owed to some of the named workers, but not others, I must rectify the notice in respect of the arrears and the financial penalty.

87. I have to consider whether the workers named in the notice of underpayment were paid less than the NMW in respect of the relevant pay period(s). The workers are: Rasul Abdul, Bela Gabor, Liviu-Claudiu Racovita and Alin Davidescu.

88. There are no records which show the hours worked by employees on a daily or weekly basis. Mr Hamed says that he had recorded the hours in a book but this went astray when he was away on holiday. I have rejected this evidence. If this had been the case, I would have expected Mr Hamed to have raised this with the respondent earlier than 16 January 2017, when he told Miss Scarlett in a telephone call that an ex worker had taken his records.

89. The only pay records available are pay sheets produced by Mr Chilwan on the basis of information provided by Mr Hamed which show hours purportedly worked by month for each employee and payslips showing the same. I do not consider that I can rely on these records as being accurate. They show a remarkable consistency in

hours worked each month, even though the evidence of witnesses was that they worked varying hours each day with no fixed rota, their hours on any particular day depending, in part, on the weather. It seems highly unlikely that each employee could end up with such a consistent number of hours at the end of the month given such a working pattern. The suggestion that Mr Hamed, Mr Nastasa and Mr Vasile were the variable factors making up any difference in hours between those worked by the other employees and the hours needed to run the business does not make sense when the hours required to run the business and the hours recorded are considered. I will return to this later.

90. The record of 120 hours supposedly worked by Mr Davidescu in July 2016 does not accord with the information Mr Davidescu gave to the respondent that he was not at work in July.

91. Another reason why the monthly pay records do not appear to provide an accurate picture of the hours worked in practice is because this does not accord with what Mr Hamed told Mr Hilton on 9 November 2016. Mr Hamed said that pay was calculated by multiplying the workers' weekly number of hours by 52 then dividing it by 12.

92. The fact that, after advice from the respondent in November 2016, the pay records from November 2016 onwards shows more variation in hours worked each month also suggests unreliability in the records up to and including October 2016.

93. There is some inconsistency in the evidence as to when employees were paid. Mr Abduli and Mr Gabor told Mr Hilton on 9 November 2016 that Sunday was pay day, suggesting that they were paid weekly, rather than monthly.

94. The system of payment described by Mr Hamed and his witnesses would have meant it was difficult to keep track of amounts due to workers without meticulous records. Workers were paid in cash, with no requirement for them to sign to confirm receipt of a payment. Workers' hours varied from day to day. Cash advances were common. Mr Hamed's evidence was that he made no record of cash advances but remembered what he had advanced to each worker.

95. Mr Abduli and Mr Racovita gave evidence that they were paid the NMW for all hours worked. I have considerable reservations about the reliability of their evidence for the reasons I set out in my findings of fact. Mr Abduli gave evidence which lacked all credibility about the creation of his witness statement. Both have reason to be grateful to Mr Hamed for giving them work when they first came to this country or returned to this country. Mr Henry suggests that it was against their financial interest to give evidence for Mr Hamed. I am unable to tell, on the evidence available to me, whether that is the case. I have found that Mr Hamed did make an approach to Mr Davidescu about making a payment to him, although he did not actually make the payment. Mr Abduli and Mr Racovita were not asked whether Mr Hamed has made any payment to them since they left his employment. Even if Mr Abduli and Mr Racovita have given their evidence in good faith, given the system of payment and lack of records, it is hard to see how they could know that they have received the correct payments.

96. Set against the witness evidence of Mr Hamed, Mr Abduli and Mr Racovita are the admissions made by Mr Hamed, or on his behalf, in the meetings of 9 November and 13 December that workers worked nearer 40 hours per week than the hours recorded and that they were paid a daily rate of £45. I have found that Mr Hamed made these admissions.

97. The witness evidence for the appellant must also be set against inferences that may be drawn from the hours needed to operate the car wash, the number of workers and the hours which were recorded as being worked by the workers.

98. The pay reference periods cover periods from 25 April 2016 until 31 October 2016.

99. Since the reference periods do not cover the whole of April, and Mr Hamed only took over the franchise with effect from 16 April 2016, I will consider the complete months of May to October 2016.

100. The trading hours of the business were 8.30 to 6 p.m. 6 days a week and 10 a.m. to 4 p.m. Sunday. This is a total of 63 hours but, for the purposes of this exercise, like the respondent, I will use a total of 60 trading hours per week.

101. Based on the observations and what Mr Hamed said in the meetings, there were at least 3 people working at any time, which could include Mr Hamed. On this basis, one would expect to see at least 180 hours recorded by workers each week, less any hours worked by Mr Hamed. If there were more than 3 people on site at all times, the expected recorded hours would be higher. If we assume that Mr Hamed was on site at all times, working 60 hours per week, then at least 120 hours per week need to be recorded for employees, or a monthly equivalent of 520 hours (120 x 52/12). This is a conservative estimate since there were times when, on the basis of observations and Mr Hamed's admissions, there were more than two employees on site in addition to Mr Hamed. There were also times when Mr Hamed was not on site and a paid employee supervised in his place e.g. he told the respondent's representatives that he had been on holiday for two weeks before the meeting on 9 November so, for at least some of October, he was not working 60 hours per week.

102. The information I have about the months of May to October is as follows.

103. In May, the pay sheets and payslips indicate that the following employees were employed and worked the following hours.

Mr Abduli	96 hours
Mr Davidescu	120 hours
Mr Nastasa	100 hours
Mr Vasile	90 hours
Total hours recorded for employees	406 hours

104. In June, the pay sheets and payslips indicate that the following employees were employed and worked the following hours.



Mr Abduli	96 hours
Mr Davidescu	120 hours
Mr Nastasa	110 hours
Total hours recorded for employees	326 hours

105. In July, the pay sheets and payslips indicate that the following employees were employed and worked the following hours. Although Mr Davidescu informed the respondent he was not at work in July so the respondent did not include July in the pay reference periods for which underpayments had been made, Mr Hamed's wage sheets show 120 hours worked by Mr Davidescu in July, so I include that figure below. If these hours were not included, the shortfall in expected recorded hours would be even greater.

Mr Abduli	96 hours
Mr Nastasa	120 hours
Mr Davidescu	120 hours
Total hours recorded for employees	336 hours

106. In August, the pay sheets and payslips indicate that the following employees were employed and worked the following hours.

Mr Davidescu	30 hours
Mr Abduli	96 hours
Mr Abdullah	120 hours
Mr Nastasa	120 hours
Total hours recorded for employees	366 hours

107. In September, the pay sheets and payslips indicate that the following employees were employed and worked the following hours.

Mr Abduli	96 hours
Mr Abdullah	120 hours
Total hours recorded for employees	216 hours

108. In October, the pay sheets and payslips indicate that the following employees were employed and worked the following hours.

Mr Abduli	96 hours
Mr Gabor	130 hours

Mr Racovita	130 hours
Mr Abdullah	120 hours
Total hours recorded for employees	476

109. In each month there is a shortfall from the expected minimum hours recorded for employees of 520 hours. The shortfall for each month is as follows:

May	114 hours
June	194 hours
July	184 hours
August	154 hours
September	304 hours
October	44 hours

110. The lowest shortfall is for October, being 44 hours and the highest, for September, 304 hours. An inference can be drawn from the shortfall each month that the employees have, in fact, been working more hours than recorded and for which they have been paid. This inference is consistent with the admissions I found were made by Mr Hamed in the meetings on 9 November and 13 December that hours were under recorded and the employees were, in practice, working closer to 40 hours per week.

111. The shortfall cannot be accounted for by hours that would be worked by Mr Hamed, Mr Nastasa and Mr Vasile. 60 hours per week for Mr Hamed, all the hours the car wash is open, have already been factored in. The hours worked by Mr Nastasa and Mr Vasile, according to the payslips have also been included for the months when they were employed.

112. Given the lack of records of hours worked each day, it is impossible to know with any certainty the extent of under payment of workers. However, the respondent did a calculation on the basis of the workers working 40 hours per week (8 hours a day for 5 days a week) and having received £45 per day, based on information from Mr Hamed. This calculation was agreed, with some adjustment to the figures for Mr Abduli and Mr Davidescu based on information provided by Mr Hamed. The evidence I have referred to causes me to conclude that this was as accurate a calculation of the underpayments as was possible in the circumstances. The fact that no accurate records are available of hours worked and amounts paid, which would allow an exact calculation to be done, cannot preclude the respondent from issuing a notice of underpayment and from that notice of underpayment being allowed to stand on appeal, where the calculation is the best that can be done in the circumstances. An employer cannot be allowed to overturn a notice of underpayment because it cannot be exact, where the inability to do an exact calculation is due to the employer's own default in failing to keep records it is required to keep in accordance with regulation 59 of the 2015 Regulations.

113. The appellant has not persuaded me that the notice of underpayment was incorrect in any respect. I do not allow the appeal.

Employment Judge Slater

Date: 8 December 2017

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
14 December 2017

FOR THE TRIBUNAL OFFICE