



EMPLOYMENT TRIBUNALS

Appellants: Lyndon Subcontractors Ltd
Lyndon Resources Ltd

Respondent: Commissioners for Her Majesty's Revenue and Customs

Heard at: Manchester **On:** 4 May 2018

Before: Employment Judge Sherratt

REPRESENTATION:

Appellants: Mr M Cronshaw, Chartered Accountant
Respondent: Mr N Flanagan, Counsel

JUDGMENT having been sent to the parties on 25 May 2018 and written reasons having been requested on 8 May 2018 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The appellants bring their appeals to an Employment Tribunal against notices of underpayment issued under the National Minimum Wage Act. This preliminary hearing was listed to consider whether or not the appeals were presented within time and whether the Tribunal has jurisdiction to hear them.

The Facts

2. On 22 January 2018 HM Revenue and Customs served a notice of underpayment under section 19 of the National Minimum Wage Act 1998 ("NMWA") in which it set out the amount of the arrears allegedly due, the total penalty to be paid and the final due date for payment. If the company disagreed with the notice:

“You have the right to appeal against this notice. You must make your appeal to an Employment Tribunal by 20 February 2018. Appeals received after this date may not be accepted by the Tribunal. There is more information about this in the enclosed NMW-FS3.”

3. NMW-FS3 is entitled “Guidance notes on the notice of underpayment”. Under the heading “How do I appeal against a notice?” it states:

“You have 28 days from the date of service of the notice to lodge an appeal – the deadline is shown on the notice.

You can appeal against the notice on any of the following grounds:

- Our decision to serve the notice.
- Any requirement imposed by the notice to pay amounts outstanding to a worker.
- Any requirement imposed by the notice to pay a penalty.

You may also appeal where a replacement notice has been issued which relates to a worker not included in the original notice.

General information about making an appeal can be found at www.gov.uk/employment-tribunals/make-a-claim.

However, when appealing against a notice it is better to use the specific NMW appeal form described below:

Where can I find an appeal form?

For employers in England and Wales go to www.judiciary.gov.uk/wp-content/uploads/2014/08/presidential-guidance-making-statutory-appeal-England-Wales.pdf and select the form entitled ‘Notice of appeal against NMW enforcement notice’.

You must lodge an appeal at an Employment Tribunal before the end of 28 days following the date of service of a notice.”

4. The Presidential Guidance 2014 (to which appellants were still being referred by HMRC in January 2018) was issued in accordance with rule 7 of the Employment Tribunals Rules of Procedure 2013 and had effect from 23 June 2014. It states that “Employment Judges and Employment Tribunals are expected to have regard to this guidance but are not bound by it”.

5. After setting out the jurisdiction of Employment Tribunals to hear appeals the Presidential Guidance goes on to deal with the position regarding how an appeal may be submitted. Whilst it is not necessary to use a prescribed form (ET1) there are no other legal provisions which make it necessary to submit the appeal on any particular type of form, but the President had concluded that it would be of assistance if a form were made available for completion by the appellant in respect

of each type of appeal including a notice of appeal against an NMW enforcement notice.

6. The Chartered Accountants instructed by the appellants appealed using the form attached to the 2014 Presidential Guidance.

7. The last page of the form states that:

“Once the form has been signed it should be sent with the relevant fee (£160) or application for a remission (if you are a sole trader) to the appropriate Central Office where claims are first processed.”

8. The relevant address given was that of the Central Office of Employment Tribunals in Leicester.

9. By a letter dated 15 February 2018 the Chartered Accountants representing the appellants sent two forms of appeal to the Employment Tribunal in Manchester by post and they were received on 16 February 2018. The covering letter stated that:

“We enclose forms of appeal in relation to the above matters. In adopting the enclosed forms for use in these matters we have connected to the online link indicated to be applicable by HMRC and downloaded the forms that they indicated were applicable. It appears to us that those forms may need updating because they are incorrect in certain respects but, as they are the only forms available, we have used them.

Before completing the forms we sought the advice of the Employment Appeal Tribunal in London and they confirmed, that contrary to the information contained in the form and Presidential Guidance appended to it, fees are no longer payable on making these appeals and they also confirmed that the appeal was to be sent to the local Employment Appeal Tribunal, not the one in Leicester, as indicated on the form. You are the most local Employment Appeal Tribunal to us and we accordingly send the appeals to you.”

10. The accountants have premises in Lytham St Anne’s as do the appellants and so the Manchester Office of the Employment Tribunals is the appropriate local office to hear the appeals.

11. By a letter dated 20 February 2018 the Employment Tribunal returned the appeal forms to the Chartered Accountants stating:

“Your two appeal forms are being returned.

Contrary to any advice received, there are only three prescribed methods of presenting a claim or appeal to an Employment Tribunal. These are detailed below:

1. Online by using the online submissions service provided by HMCTS accessible at www.gov.uk/employment-tribunals/make-a-claim.
2. By post to the Employment Tribunal Central Office – England and Wales at PO Box 10218, Leicester, LE1 8EG.

3. By hand to a designated Employment Tribunal office within business hours (Monday to Friday excluding public holidays – see overleaf for designated offices).

The abolition of fees has not changed the Presidential Guidance in presenting this type of appeal. The attached two appeal forms have not been presented using one of the prescribed methods; they therefore cannot be accepted and are returned to you accordingly.

The Employment Appeal Tribunal does not deal with the presentation or claims or appeals to an Employment Tribunal. They are not an advisory body and I am sorry if you were given any incorrect advice. I have enclosed form T420 (making a claim to an Employment Tribunal) and the Presidential Practice Direction – Presentation of Claims dated 2 November 2017.”

12. As well as returning the documents through the post there was an email sent at 10:35 on 20 February from the Employment Tribunal to a generic address at the Chartered Accountants with the subject being “(URGENT PLEASE) – RETURNED two Appeal claim forms for Lyndon Resources and Lyndon Subcontractors”. The email stated that:

“As per our telephone conversation this morning, please find a letter confirming the two appeal forms for Lyndon Resources Limited and Lyndon Subcontractors Limited have been returned today by first class post. Also sent by first class post is booklet T420 (making a claim to an Employment Tribunal) and Practice Presidential Direction – Presentation of Claims dated 2 November 2017.”

13. This was followed by a further email sent at 10:52 on 20 February with the subject this time being “Further info regarding appeal forms” and the body of the email saying, “Hello Mr Cronshaw, further to our discussion – please find attached further guidance”, and this was a link to the Presidential Guidance on Statutory Appeals.

14. On 22 February 2018 Mr Cronshaw sent a letter by first class post to the Central Office in Leicester stating:

“We think these appeals may be a day or two over the formal deadline for appeals. The reason for this is that we were not sure if the form should go to your office or to our local office, being the Manchester Employment Tribunal. So we rang Manchester. They called us to call the Employment Appeal Tribunal in London and they gave us the telephone number. We rang that number. We were told by a gentleman there that we should send the forms to the Manchester Employment Tribunal. So that is what we did. The forms were subsequently returned with a covering letter which explains that the forms are to be sent to your office. We were also told by the gent in London that no fee was payable on these appeals, which is also contrary to the guidance that HMRC referred us to. Please let us know if that is not so. Please let us know if you require anything further.”

15. That letter is stamped as having been received on 23 February 2018 and on the same date the Central Office transmitted the form to the Manchester Office electronically.

16. Looking through the bundle both notices of underpayment appear to be directed to Lyndon Resources Limited with no reference being made to Lyndon Subcontractors Limited. The first notice is dated 12 January 2018 and the second is dated 22 January 2018 with the amounts of the arrears and penalty being the same in each case.

17. The timeline therefore is as follows:

22 January 2018	Notice of underpayment
16 February 2018	Appeals received in Manchester by post
20 February 2018	Forms returned by email at 10:35
20 February 2018	Subsequent discussion with representative of appellant at 10:52
20 February 2018	Date by which appeal should be made
23 February 2018	Appeal forms received at Central Office

The Relevant Law

18. Section 19 of the National Minimum Wage 1998 gives power to HMRC to issue an enforcement notice if it is of the opinion that a worker has not been remunerated at or above the relevant rate for the purposes of the National Minimum Wage.

19. Section 19C is headed “Notices of Underpayment: Appeals” and provides that a person on whom a notice of underpayment is served may appeal. By subsection (2), “An appeal under this section lies to an Employment Tribunal”. By subsection (3), “An appeal under this section must be made before the end of the 28 day period” which is defined at section 19(8) as “the period of 28 days beginning with the date of service of the notice of underpayment”.

20. Rule 8 of the Employment Tribunals Rules of Procedure 2013 provides that:

“A claim shall be started by presenting a completed claim form in accordance with any practice direction made under regulation 11 which supplements this rule.”

21. Rule 1 describes a complaint as:

“Anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal.”

22. Rule 5 deals with extending or shortening time and provides that:

“The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.”

23. The Presidential Practice Direction, made in accordance with the provisions of regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, deals with the presentation of claims and provides that a completed claim form may be presented in one of three ways which are online, by post to Leicester or to an Employment Tribunal Office in person.

Submissions

24. Mr Cronshaw for the appellants submitted that section 19C(3) of the NMWA dealt with the point. It provided for an appeal to be lodged before the end of the 28 day period and this was what he had done. If the primacy of this legislation was good for providing the time limit it must also be good for the appeal which was delivered within time.

25. In his submission there appeared to be some latitude within the Employment Tribunal Rules to extend the time limits.

26. In terms of primacy of legislation, the rules of the Employment Tribunal must bow to the will of Parliament as set out in the NMWA.

27. For the respondent to the appeal Mr Flanagan submitted that the presentation of claims to the Employment Tribunal should be in accordance with the Presidential Practice Direction which came from the statutory instrument.

28. The 2013 Regulations had been the subject of an affirmative regulation in Parliament. When the rules were made in 2013 the National Minimum Wage jurisdiction of the Employment Tribunals was known and appreciated therefore it must follow that the manner prescribed for presenting claims must be followed and if not followed then the appeals were not properly presented.

29. The appellants' representative had received information from the Employment Tribunal on 20 February 2018 and there had been time on that day either for the forms to be submitted online or for someone to have travelled from Lytham to Manchester to present the forms in person at the Employment Tribunal Office.

30. The NMWA and the Rules of Procedure 2013 did not allow for any divergence from the time limit of 28 days.

31. The Employment Rights Act and the Equality Act both provided for claims to be made to the Employment Tribunal under rule 8. In most of those jurisdictions provision was made for time to be extended in certain circumstances. There was no such provision in the NMWA.

Conclusions

32. Sections 19(8) and 19C of the NMWA read together provide that an appeal against a notice of underpayment lies to an Employment Tribunal and must be made

before the end of the 28 day period beginning with the date of service of the notice of underpayment.

33. In this case the period of 28 days beginning with the date of service of the notice of underpayment expired on 20 February 2018. Mr Cronshaw did not submit that this was not the last date for making the appeals.

34. The NMWA does not allow for any extension to the time limit such as can be found in other legislation which provides for claims being made to the Employment Tribunals. Rule 5 does not apply to allow an extension of the time limit specified in the NMWA because it is not a time limit specified in the Rules.

35. The Employment Tribunals Rules of Procedure 2013 and the Presidential Practice Direction were made after the NMWA 1998 in the full knowledge of the 28 day time limit specified in the NWMA.

36. Although the appeal forms were received in the Manchester Office of the Employment Tribunal on 16 February they were not presented in accordance with the Practice Direction made under rule 11 and were, in my judgment, rightly rejected.

37. Notwithstanding the opportunity available to the appellants' representative on 20 February 2018 to present the completed forms either online or in person, they were not presented in accordance with the Rules and Practice Direction until 23 February 2018 and thus were not presented within the statutory time limit.

38. In these circumstances the appeal was not made before the end of the 28 day period and so cannot be allowed to proceed. It is dismissed for want of jurisdiction.

Employment Judge Sherratt

31 May 2018

REASONS SENT TO THE PARTIES ON

1 June 2018

FOR THE TRIBUNAL OFFICE