Case No: 2602181/2017

EMPLOYMENT TRIBUNALS

Appellant: **Mrs R Vardy**

Respondent: **Commissioners for HM Revenue and Customs**

Heard at: **Nottingham** **On:** **Thursday 26 April 2018**

Before: **Employment Judge Milgate (sitting alone)**

Representation

Claimant: **Did Not Attend**
Respondent: **Mr D Maxwell of Counsel**

REASONS

Judgment in this matter was sent to the parties on 19 May 2018 (copy attached). Written reasons were subsequently requested by the Appellant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. Accordingly, the following reasons, which reflect those given orally at the hearing, are now provided.

Background

1. This case concerns an appeal against a Notice of Underpayment of the national minimum wage which the Respondent served on the Applicant by means of first class, recorded delivery post on Thursday 16 November 2017. The notice concerned an alleged failure to pay the national minimum wage to two workers and related to reference periods between 1 October 2016 and 31 May 2017. It stated that the sum of £5,314.20 was due to the workers in question and also imposed a penalty of £10,317.20.

2. Under section 19C of the National Minimum Wage Act 1998 (NMWA 1998) a person on whom such a notice is served may appeal against the notice on a number of grounds. Section 19C(3) NMWA 1998 provides that any such appeal must be made "before the end of the 28 day period". By virtue of section 19(8) NMWA 1998 the phrase '28 day period' means "the period of 28 days beginning with the date of service of the notice of underpayment". There is no express provision in the NMWA 1998 giving an employment tribunal power to extend this 28 day time limit, a matter of particular significance in this case.

3. In the absence of any provision about deemed service in NMWA 1998, the Respondent adopted Rule 6.26 of the Civil Procedure Rules to work out when the time limit ended. This rule, which is arguably quite generous to the Appellant, provides that a document sent by first class post is deemed to be served 'the second day after it was posted… provided that day is a business day; or if not, the next business day after that day.' As a result, the Respondent deemed the notice to have been served on Monday 20 November 2017. The Respondent therefore calculated that the Appellant had until 17 December 2017 to appeal. The Appellant does not argue with that calculation and it is clear that the Notice of Underpayment duly informed her of the deadline.

4. For reasons that are set out later in this judgment, the Applicant failed to appeal by the due date. Instead she completed the relevant form on 18 December 2017. The form was then submitted by post and received by the Tribunal on Wednesday 20 December 2017 - some 3 days late. She accepted, in a covering letter, that her appeal was made out of time but asked that her appeal be allowed to go forward, arguing that there were mitigating circumstances justifying such a course.

5. The Respondent, for its part, presented a response to the appeal on 12 February 2018. This argued that the appeal should be struck out on the ground that the tribunal has no power to extend time beyond the 28 day limit, setting out in some detail the legal basis for that argument. This hearing is therefore to consider whether the Tribunal has the power to extend the time limit (and if so whether it should do so) or whether the appeal should be dismissed because it has been made out of time.

Procedure at the hearing

6. The notice of today's hearing was sent to Mr Kennedy, the Appellant's representative, on 24 March 2018. However, he had earlier indicated in an e-mail to the Tribunal of 20 February 2018 that "the applicant is content for the jurisdiction point concerning the grounds for a late appeal to be dealt with on the correspondence". Accordingly, neither the Appellant nor her representative attended the hearing, which went ahead as planned. Mr Maxwell attended on behalf of the Respondent, providing the Tribunal with a short written skeleton argument which he supplemented with oral submissions. The response had been copied to the Mr Kennedy prior to the hearing and the Appellant can therefore have been in no doubt as to the arguments that the Respondent would be putting before the Tribunal today.

7. No evidence was heard at today's hearing. Apart from a number of cases submitted by Mr Maxwell, there was no documentation before the Tribunal, beyond that on the Tribunal file.

8. In coming to my decision, I considered a number of documents submitted by the Appellant to support her case. The first was the letter submitted by the Appellant with her appeal form. In addition there were two letters sent to the Tribunal on the Appellant's behalf by Mr Kennedy, dated 9 February 2018 and 13 February 2018 respectively. None of these documents engaged with the arguments in the response about the Tribunal's power (or rather its alleged lack of power) to extend the 28 day time limit. Instead they concentrated on the practical difficulties which, according to the Appellant, had prevented her from

appealing in time. So, for example, the letter submitted with her appeal stated that the Respondent had served her with the Notice of Underpayment:-

'during a specific time, knowing that nobody else could open my mail and that I would out of the country and not be able to open and action this before the deadline of 17 December.'

9. The letters from Mr Kennedy went on to explain that the Appellant had been a participant in a television show being filmed in Australia (according to Mr Maxwell this was the 'I'm a Celebrity' reality show). As a result, she left the country on 12 November 2017, some four days before the notice of underpayment was served, only returning home on 13 December 2017. At that point, according to Mr Kennedy, she was 'jet lagged, had young children and… there was no realistic prospect for her to lodge an appeal before the deadline'. He went on to state that it was 'reasonable to assume that [the relevant HMRC officer] was aware that [the Appellant] was in Australia'. He therefore argued that it would be 'wholly unfair' for the appeal not to be considered simply because it was slightly out of time.

My decision

10. As Mr Maxwell pointed out, it is unusual for an employment law statute to provide for a strict time limit without giving a tribunal express power to extend time in certain circumstances. So, for example, although section 123 of the Equality Act 2010 provides that a claim of sex discrimination must be brought within three months of the date of the act to which the complaint relates, the tribunal is given the power to extend that time limit if it thinks it 'just and equitable' (see section 123(1)(b) Equality Act 2010). Similarly, section 11(4) NMWA 1998, which deals with complaints that an employer has not allowed a worker access to national minimum wage records, allows a Tribunal to extend the normal 3 month time limit if it is satisfied that it was 'not reasonably practical' for a complaint to be presented within that time.

11. However section 19C of the NMWA 1998 (the relevant provision in this case) is different. It provides for a 28 day time limit for bringing an appeal and there is no provision anywhere in the Act giving the tribunal power to extend time. That omission appears to me to be significant. It would have been very easy for Parliament to have replicated the wording found in section 11(4) NMWA 1998 to allow for a similar extension of the time limit in section 19C of the same Act, yet it did not do so. It appears therefore, on the face of it, that Parliament intended that the time limit should be an absolute one and that there should be no power to accept a late appeal.

12. It was therefore necessary for me to consider whether, in the absence of an express power to extend time, there was any other basis on which the Tribunal could extend the time limit in the circumstances of this case. I decided there was no such basis. Firstly, as Mr Maxwell pointed out, the Tribunal's jurisdiction is entirely statutory. There is therefore no question of it having an inherent common law power to extend the statutory time limit found in section 19C.

13. Secondly I do not accept there is anything in the Tribunal Rules of Procedure (to be found in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure Regulations 2013) which gives the Tribunal power to

allow a late appeal. It is true that Rule 5 allows a tribunal to 'extend or shorten' any time limit. However that provision only applies to time limits 'specified in the Rules or in any [case management] decision'. It has no application to statutory time limits, such as the one in this case. Similarly, although Rule 2 provides that a tribunal has to seek to give effect to the overriding objective (namely to deal with cases fairly and justly), that provision can only be invoked when interpreting or exercising any power given to the Tribunal by the Rules of Procedure. Once again it has no relevance to statutory time limits.

14. In concluding that the Tribunal Rules do not assist the Appellant, I have had regard to the decision of the House of Lords in **Mucelli v the Government of Albania [2009] 1 WLR 276**, brought to my attention by Mr Maxwell. That case was concerned with the Extradition Act 2003 and whether certain appeals against extradition orders were out of time. As in this case, the relevant time limits were strict and there was no express statutory power to extend time. The House of Lords held that in those circumstances there was no power to extend the time limits. In particular, Rule 3.1(2)(a) of the Civil Procedure Rules (which, like Rule 5 of the Tribunal Rules, allowed a civil court some flexibility with regard to time limits) was held only to apply to time limits in the rules themselves, in practice directions or in court orders. It could not be invoked to extend a statutory time limit, unless the statute itself so provided. According to Lord Neuberger this was correct not only as a matter of construction of the rules but also as a 'matter of principle'.

15. I can see no reason why the same principle referred to by his Lordship should not also apply to section 19C(3) NMWA 1998, particularly as **Mucelli** can be regarded as a particularly strong case, dealing as it does with issues of extradition and personal liberty. If there was no discretion to extend time in **Mucelli**, then in my view there is no basis on which a different rule should apply to section 19C(3) NMWA 1998. I am fortified in that view by the Court of Appeal's decision in **Massan v Secretary of State for the Home Department [2011] EWCA Civ** 686, to which I was also referred by Mr Maxwell. In that case the Court of Appeal applied the reasoning in **Mucelli** to an appeal against a penalty notice under the Immigration, Asylum and Nationality Act 2006. As in the instant case, the 2006 Act provided that any appeal had to be brought within 28 days and there was no provision allowing a court to extend time. Lord Justice Moore-Bick, giving the judgment of the Court, concluded as follows:-

> 'In my view the reasoning of their Lordships in **Mucelli** applies equally in this case. ..There is no provision in the statute for the court to extend time and the court does not have the power under the Civil Procedure Rules to extend statutory limits. … The terms of [the relevant provision in the 2006 Act] are quite clear. In any event, a period for bringing an appeal of 28 days is entirely reasonable, even though that period is not open to extension. So in my view it is not arguable that the court has power to extend time in this case… I think it is clear therefore that no effective appeal can be pursued once the 28 days prescribed by [the statute] have elapsed and it follows that any appeal to this court in the present case would be bound to fail.'

16. My decision is therefore that the appeal must be dismissed as being out of time. (It may be that this decision is academic. Mr Maxwell informed me that HMRC are considering withdrawing the current notice of underpayment and issuing a new notice in a greater sum. It is his understanding that this may give

the applicant a further opportunity to appeal. If that is indeed the case, the appellant should now be very clear that the 28 day time limit is indeed a strict one.)

17. Finally, for completeness, I would add that even if (contrary to my decision) there had been discretion to extend the time limit, the Appellant's case had little merit. According to the written submissions submitted on her behalf, HMRC wrote to the Appellant as early as 23 August 2017 informing her that they were making a check of her records in relation to the National Minimum Wage. She subsequently spoke to an HMRC officer about the matter on 7 September 2017 before leaving the country on 12 November 2017 for Australia. It is therefore clear - on her own case - that the Appellant knew that an investigation was underway some considerable time before leaving the country. She would also have been aware, given the nature of the reality show in question, that she might well be out of the country for some weeks. However, she gives no explanation for failing to put in place some arrangements for dealing with her affairs whilst she was abroad, (or, if arrangements were in fact made, to explain why they were so ineffectual).

18. Nor was I impressed by Mr Kennedy's criticism of the timing of the Notice of Underpayment, which was served a few days after the Appellant left for Australia. According to Mr Kennedy it was 'public knowledge she was overseas' and the suggestion is therefore that the process adopted by HMRC was unfair. However, this appears to overlook the fact that an allegation that there has been a failure to pay the national minimum wage is a serious matter, not least because of the impact on the workers in question if indeed there has been a failure to pay. In those circumstances it is important that any possible breach of the law is investigated and dealt with in timely fashion. I therefore do not accept the suggestion that HMRC should alter or delay its procedures to suit the convenience of those who are alleged to have breached their statutory obligations, in particular to allow them to participate in what was no doubt a lucrative commercial engagement overseas.

19. Moreover, I note that the Appellant returned home on 13 December 2017, four days before the deadline expired. Mr Kennedy's written submissions state that attempts were made (unsuccessfully) to contact HMRC on her behalf on 14 and 15 December 2017 and that Mr Ward her 'personal security specialist' finally managed to speak to an official from HMRC on 18 December 2017. Given this state of affairs it is unclear why she could not have given instructions for an appeal to be submitted on her behalf within the relevant time limit. The form is neither long nor complicated and if she had given this matter the attention it deserved, there seems no compelling reason why she (or a representative acting on her behalf) could not have dealt with the matter and presented her appeal within the 28 day period. Mr Kennedy suggests that she chose to prioritise her young family. Be that as it may, she made a conscious choice about her priorities and that choice has consequences. I therefore see no grounds on which it would have been possible to exercise discretion in her favour in any event. On any basis her appeal therefore fails.

Employment Judge Milgate

Date 20.7.18

REASONS SENT TO THE PARTIES ON

30 July 2018

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FOR THE TRIBUNAL OFFICE