



# EMPLOYMENT TRIBUNALS

## BETWEEN

**Appellant**  
**CRASH BANG WALLOP**  
**ACCIDENT REPAIR LIMITED**

**AND**

**Respondent**  
**THE COMMISSIONERS FOR HER**  
**MAJESTY'S REVENUE AND**  
**CUSTOMS**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT: CARDIFF      ON:      9<sup>TH</sup> APRIL 2018**

**EMPLOYMENT JUDGE MR P CADNEY**  
**(SITTING ALONE)**

**MEMBERS:**

**APPEARANCES:-**

**FOR THE APPELLANT:-      NO APPEARANCE**

**FOR THE RESPONDENT:-      MS M BAYOUMI (COUNSEL)**

## **JUDGMENT**

The judgment of the tribunal is that:-

1. The appeal is dismissed.
2. The appellant is ordered to pay the respondent's costs in the sum of £1320.

## Reasons

1. This is an appeal against the issuing of a National Minimum Wage Notice of Underpayment dated 27<sup>th</sup> September 2017, in respect of two workers Mr Mark Hughes and Mr Jamie Reed. In its notice of appeal the only ground of appeal advanced was that both workers were paid at the correct apprenticeship rate as they were employed as “common law apprentices”.
2. On 7<sup>th</sup> December 2017 EJ Davies gave directions for the hearing. The appellant complied with the direction to provide further information (albeit late) but did not comply with the directions as to disclosure, the preparation of the bundle, nor the exchange of witness statements. However the appeal was not withdrawn, but nor has the appellant attended today. Given that the burden of proof rests on the employer to show that the correct rate has been paid (s28 NMWA1998) its absence and the absence of any evidence presented on its behalf means that the appeal necessarily fails.
3. The respondent has sought its costs on two bases. Firstly it asserts that the appellant has behaved “unreasonably” in failing to comply with the directions and failing to attend to pursue the appeal. In the absence of the appeal being withdrawn the respondent was bound to attend and has incurred the costs of attendance as a consequence of the unreasonable behaviour. This point on its own appears to me unanswerably correct. In addition the appeal was misconceived in that a “common law” contract of apprenticeship does not, for National Minimum Wage purposes, exist or have any bearing on the amounts properly payable under the NMWA 1998. Either a contract complies with the statutory requirements of an apprenticeship agreement (s32 Apprenticeship Skills Children and Learning Act 2009), in which case the employer is entitled to pay the appropriate apprenticeship rate, or it does not, in which case the employer cannot pay at that rate. The existence of such a “common law” contract even if were proved evidentially would not therefore provide any basis for a successful appeal. This point too appears to me to be unanswerable. The costs sought are £1320, which simply represents counsel’s fee for attendance which is wholly reasonable. Accordingly the appellant will be ordered to pay the respondent’s costs of £1320.
4. The respondent has asked me to note that the figures for the underpayment and penalty set out in the Notice are to be amended to £5741.43, and £9311.58 respectively.

**Judgment sent to the parties on**

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**for Secretary of the Tribunals**

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**EMPLOYMENT JUDGE**

**Dated: 11 April 2018**