



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Minster Fisheries Ltd**

v

**Commissioners for Revenue and  
Customs**

**Heard at: Hull**

**On: 12 August 2019**

**Before: Employment Judge Knowles**

**Appearances:**

**For the Claimant: Mr Lawrence, Accountant**

**For the Respondent: Mr Feeny, Counsel**

## RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:

1. The Appellant's appeal is well founded.
2. The notice of underpayment and penalty issued 3 July 2019 is rescinded.

## RESERVED REASONS

### 1. Evidence

1.1 I heard evidence from Miss Ria Chauda, director of the Appellant company. On behalf of the Respondent, Mr Noon (NMW Compliance Officer) attended and gave evidence. The parties produced a bundle of documents, 363 pages.

### 2. Issues

2.1 This is an appeal hearing under Section 19C of the National Minimum Wage Act 1998.

2.2 The Appeal originally related to a notice of underpayment and penalty issued 28 February 2019 relating to an underpayment of £838.71 and a penalty of £1,603.14.

2.3 However, the Appellant has since paid the arrears. As a consequence of this, the penalty notice was withdrawn for the purposes of Section 19F and a replacement notice issued 3 July 2019. The replacement notice shows arrears having been

satisfied and refers to a reduced penalty of £546.90 in the revised notice of underpayment, and the withdrawal notice states that the penalty has been paid and an overpayment is due back to the Appellant. Both parties accept that nothing further is due from the Appellant or any workers or to the Respondent under the present notice of underpayment and penalty, indeed there is a balance due back from the Respondent to the Appellant due to the reduction in penalty in the July 2019 notice.

2.4 The original appeal falls to be considered as having effect as if it were against the replacement notice.

2.5 Employment Judge Smith set out the issues in a case management summary following an attended preliminary hearing for case management on 16 May 2019. The issues are as follows:

- (1) Was Mr Jack Lindon a worker of the [Appellant] within the meaning of Section 54 of the National Minimum Wage Act 1998 (“the Act”).
- (2) If so, [should] all or part of the work that Mr Jack Lindon [undertook] be discounted as work relating to the family household within the meaning of Regulation 57 of the National Minimum Wage Regulations 2015 (“the Regulations”).
- (3) Do any of the grounds of appeal set out in Section 19C of the National Minimum Wage Act 1998 apply?

2.6 Clearly Regulation 58 also falls to be considered given the Appellant’s appeal including references to this being a family business and the Respondent gave evidence and made submissions on both Regulations 57 and 58 although 58 does not appear to have been considered in the previous case management discussion.

### **3. Findings of fact**

3.1 I made the following findings of fact on the balance of probabilities having heard from the witnesses and considered the documents which they submitted and their representations.

3.2 The Appellant is a limited company. The business is a fish and chip shop which operates from 84 Hailgate, Howden.

3.3 The Appellant employs Mr Jack Lindon. The Appellant does not challenge that Mr Lindon is an employee. The Appellant has accepted that Mr Lindon has been employed since 1 May 2013. Pages 285-286 contain his signed contract of employment.

3.4 Miss Chauda is a director of the Appellant. Her parents are each also directors. There is a fourth director, Miss Chauda’s brother. The officers of the company are family members.

3.5 Mr Lindon is Miss Chauda’s fiancé. They have 2 children. They live above the shop and both work in the shop. The flat above the shop is 88 Hailgate, Howden.

3.6 Miss Chauda’s parents purchased the properties and business.

3.7 Mr Lindon is paid £100 per week. His contract states his working week consists of 13 hours per week. He shares running the shop with Miss Chauda, and works whenever is required. It is agreed between the parties that he sometimes works more than his contracted hours.

3.8 The Respondent has calculated the hours Mr Lindon has worked beyond his contracted hours and how the Appellant therefore failed to pay him the National Minimum Wage. The Respondent applied the salaried hours provisions in its latest notice of underpayment. The previous notice of underpayment incorrectly, they state, utilised the unmeasured work provisions. The Appellant accepts the Respondent's calculation under the 3 July 2019 notice of underpayment as being correct.

3.9 This case is unusual or may surprise some bystanders because the Respondent has required the Appellant to pay to Mr Lindon arrears of pay that he objects to receiving. He has been happy with the arrangements between him and his fiancé, Miss Chauda, and the flexibility that their working arrangements afford to them given that one of them can look after the children when the other is working in the shop. In his letter (page 28) he states that as far as he is concerned he has not been underpaid.

3.10 Miss Chauda has given evidence (page 27) and refers to her having, with Mr Lindon, joint income. She refers to the flexibility in their working arrangements. She describes them as viewing the arrears to her fiancé as being a loss to their business.

3.11 Mr Noon, the Respondent's NMW Compliance Officer with responsibility for the Appellant's case, attended the appeal hearing and gave evidence concerning his calculation of arrears and penalty. His calculations were not challenged in evidence. He states at paragraph 26 of his witness statement that he concluded that Regulations 57 and 58 (the exclusions relating to family members – see below) do not apply because although Mr Lindon is a family member of a director of the company, the limited company is the legal entity and a limited company cannot be considered to have a family, to be a member of a family or to own a family home.

3.12 There appears no great factual dispute in this matter between the parties. The Respondent simply believes the NMW has not been paid to Mr Lindon in accordance with the law and should have been paid. The Appellant submits that this is a small family business and Mr Lindon is a director's partner so the rules should not apply.

#### **4. Submissions**

4.1 The Respondent submitted that the grounds of appeal are as set out on page 6 and the only ground ticked is that "the decision to serve the notice was incorrect because no arrears were owed to any worker named in the notice". The Respondent notes that Miss Chauda confirmed in evidence that she had no issues with the Respondent's calculation. The attachment to the grounds of appeal on page 8 appear to state that the Appellant is a small family run business and that Mr Lindon is a directors partner. However, the grounds of appeal are misconceived because a limited company is the employer and cannot have or be a family.

#### **5. The Law**

5.1 The Act provides:

- 1 *Workers to be paid at least the national minimum wage.*
- (1) *A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.*

- (2) *A person qualifies for the national minimum wage if he is an individual who—*
  - (a) *is a worker;*
  - (b) *is working, or ordinarily works, in the United Kingdom under his contract; and*
  - (c) *has ceased to be of compulsory school age.*
- (3) *The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.*

5.2 The Act defines a worker or employee as follows:

*54 Meaning of “worker”, “employee” etc.*

- (1) *In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
- (2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
- (3) *In this Act “worker” (except in the phrases “agency worker” and “home worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
  - (a) *a contract of employment; or*
  - (b) *any other contract, whether express or implied and (if it is ) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker’s contract shall be construed accordingly.*
- 4) *In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
- (5) *In this Act “employment”—*
  - (a) *in relation to an employee, means employment under a contract of employment; and*
  - (b) *in relation to a worker, means employment under his contract;*

*and “employed” shall be construed accordingly.*

5.3 The Regulations contain provisions concerning family businesses as follows:

*Work does not include work relating to family household*

*57.—*

- (1) *In these Regulations, “work” does not include any work done by a worker in relation to an employer’s family household if the requirements in paragraphs (2) or (3) are met.*
- (2) *The requirements are all of the following—*
  - (a) *the worker is a member of the employer’s family;*
  - (b) *the worker resides in the family home of the employer;*
  - (c) *the worker shares in the tasks and activities of the family.*
- (3) *The requirements are all of the following—*
  - (a) *the worker resides in the family home of the worker’s employer;*
  - (b) *the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;*
  - (c) *the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;*
  - (d) *if the work had been done by a member of the employer’s family, it would not be treated as work or as performed under a worker’s contract because the requirements in paragraph (2) would be met.*

*Work does not include work relating to family households and businesses*

58. *“Work” does not include any work done by a worker in relation to an employer’s family business if the worker—*
- (a) *is a member of the employer’s family,*
  - (b) *resides in the family home of the employer, and*
  - (c) *participates in the running of the family business.*

5.4 Section 19 of the Act contains provisions concerning arrears and the process around arrears and financial penalties including:

*19C Notices of underpayment: appeals*

- (1) *A person on whom a notice of underpayment is served may in accordance with this section appeal against any 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.*
- (2) *An appeal under this section lies to an employment tribunal.*
- (3) *An appeal under this section must be made before the end of the 28-day period.*
- (4) *An appeal under subsection (1)(a) above must be made 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.*

- (5) *An appeal under subsection (1)(b) above 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.*
- (6) *An appeal under subsection (1)(c) above must be made on either or both of the following grounds—*
  - (a) *that the notice was served in circumstances specified in a direction under section 19A(2) above, or*
  - (b) *that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason).*
- (7) *Where the employment tribunal allows an appeal under subsection (1)(a) above, it must rescind the notice.*
- (8) *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.*

## **6. Conclusions**

6.1 This is clearly an appeal under Section 19C(1)(a) concerning the Respondent's decision to issue a notice of underpayment at all. The Appellant is not challenging the calculations of the arrears due or penalty. Sub-sections (b) and (c) have not been raised by the Appellant.

6.2 Mr Lindon is an employee of the Appellant company. He is employed under a contract of employment (pages 285-286). The Appellant does not resist that he is an employee or employed under a contract of employment. No suggestion has been made that the employment relationship is a sham or pretence. The issue appears to me to be agreed between the parties. I find that on the balance of probabilities, Mr Lindon is a worker for the purposes of the Act and Regulations because he is an employee employed under a contract of employment.

6.3 Unless Mr Lindon is excluded, then the Respondent was entitled to issue the notice of underpayment and penalty.

6.4 There is no small business exemption to the national minimum wage. This part of the Appellant's appeal is not well founded.

6.5 Mr Lindon is not excluded from the national minimum wage by Regulation 57. Both parties are agreed he is a family member of Miss Chauda. The work he does for the Appellant is running a fish and chip shop. This is not work in relation to the family household. It is distinct from his tasks and duties in relation to the family household. Both he and Miss Chauda draw this distinction; they describe the flexibility of their arrangements allowing them to each switch between running the shop and looking after their children in the flat. The Respondent has not included the time that Mr Lindon spends in sharing the tasks and activities of the family household in their calculation of time spent at work. They have only included his time recorded as spent working in the fish and chip shop.

6.6 Mr Lindon is a member of the Miss Chauda's family, resides in the family home, and participates in the running of the family business, the fish and chip shop. But is that sufficient? I consider this to be the main point in contention between the parties. Can the Appellant rely on the family business exclusion or is that impossible because the Appellant is a company and has a legal personality separate from its directors, shareholders and employees? There is no definition of what is an "employer's family business". I apply simple meaning to the words by asking whether or not Minster Fisheries Ltd is a family business. It clearly is; its shareholders and officers are the Chauda family, Miss Chauda, her parents and brother. Given that Mr Lindon is accepted to be a member of the family, resides in the family home with Miss Chauda, and participates in the running of the family business, in my conclusion the arrangements fall within Regulation 58 of the Regulations. I take into account the Respondent's submission that the employer is a limited company, cannot have a family or a family home. However, family businesses take many legal forms and there seems to me to be nothing preventing a limited company being a family business in the ordinary sense of the words. That appears to me to be the substance of the arrangements and to fall within the intent behind the regulations that family businesses should have an exclusion to the national minimum wage provisions.

**Employment Judge Knowles**

**Date: 20 August 2019**

**Note**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.