



EMPLOYMENT TRIBUNALS

Appellant: Morecare at Home Ltd

Respondent: Commissioners for Her Majesty's Revenue and Customs

Heard at: Birmingham **On:** 6 November 2019

Before: Employment Judge Miller

Representation

Claimant: Miss J Moore - counsel

Respondent: Did not attend

JUDGMENT

The judgment of the tribunal is:

1. The tribunal has no jurisdiction to determine the Appellant's appeal on the basis that the appeal was submitted out of time; and
2. The appeal is dismissed.

REASONS

Introduction

1. This is an appeal against a Notice of Underpayment dated 12 December 2018 issued under section 19 of the National Minimum Wage Act 1998 by the respondent to the appellant.
2. The notice of underpayment identified underpayments of the National Minimum Wage in respect of workers employed by the appellant. The total amount outstanding due to those workers was said in that notice to be £4,776.82 and the associated penalty charge was said to be £4,881.27.
3. By way of an appeal form received by the Employment Tribunal date stamped 7 June 2019 the appellant appealed against the notice of underpayment. None of the boxes referring to the statutory grounds for appeal in part 5 of that form are ticked, but in part 6 in the section headed "please give full details of your grounds of appeal" the appellant had written:

“HMRC have not acted in accordance with their own charter to act in a timely fashion. This enquiry commenced January 2017. No calculations were provided in this matter until February 2018. In the interim 13 months company had become insolvent and had ceased trading (details provided in enclosed correspondence with HMRC). The company has provided correspondence and explanations by return, HMRC do not respond for several months!”

4. On 8 July 2010, employment Judge Findley directed that there be a preliminary hearing to determine whether the application was presented in time and, if not, whether time should be extended or the appeal be dismissed and this was the purpose of today’s hearing.

The Hearing

5. The respondent was represented by Miss Moore of counsel and the appellant did not attend. The respondent had produced a small bundle of documents to which I was referred and written representations.
6. The appeal was submitted on the appellant’s behalf by Roberts & Co, Chartered Certified Accountants and there is correspondence on the tribunal file from that firm. In that correspondence it is asserted that the appellant is in fact insolvent, has no assets and no longer trades. Roberts & Co further say in their letter to the respondent of 13 December 2018 that in fact they will not be paid for any work undertaken for this company because of its status.
7. I note that the notice of hearing was sent to both parties, and Miss Moore said that while there had been communication with the appellant previously, there had been none recently. Having considered this information, I decided to go ahead with the hearing in the absence of the appellant pursuant to rule 47.

The issues

8. The sole issue in this case is whether an appeal was presented in time, and if not whether time should be extended for the bringing of the appeal.

Findings

9. The appellant was served with a Notice of Underpayment of National Minimum Wage under s 19 National Minimum Wage Act 1998 on 12 December 2018. That is not disputed, and, in any event, it is clear from the document.
10. The appellant submitted an appeal on standard form that was received by the employment tribunal on 7 June 2019. That appeal was accompanied by a covering letter which is at pages 49 and 50 of the bundle which says:

“I am writing on behalf of my above-named client formally appeal against the notice of underpayment issued 12 December 2018.

Please find enclosed copies of all correspondence to HMRC on this matter along with the duly completed appeal to an employment tribunal against the notice of underpayment issued under the National Minimum Wage Act form.

I apologise this appeal has been issued to your office late. An appeal was lodged on 13 December to the following address as this is the address quoted on the HMRC website

Midlands (West) employment tribunal
Centre city Tower
13th floor
5-7 Hill St
Birmingham
B5 4UU”

11. It further says,

“In the notice of underpayment letter issued by HMRC on 12 December 2018, no details regarding to (sic) the correct tribunal office were provided, hence the information available via the HMRC website was the only source of information”.

12. The letter referred to of 13 December 2018 is also included in the bundle at page 60. That letter is addressed to the Midlands (West) employment tribunal is set out above. It refers to the appellant and says

“I am writing on behalf of my above-named client formally appeal against the notice of underpayment issued 12 December 2018. Please find enclosed copies of all correspondence to HMRC in this matter.

I’m hopeful on this occasion a speedy reply will be received!”

13. The final sentence of that letter is a reference to the not insubstantial delays apparent from the bundle in the respondent replying to correspondence from the appellant throughout the Notice of Underpayment process.

14. I find, on the balance of probabilities, that that letter was sent by Roberts & Co on behalf of the appellant to the Midlands (West) Employment Tribunal Office on 13 December 2018. It was not suggested by the respondent that this letter was fabricated and there is no reason not to believe that it was sent. It follows, therefore, that I also find that the Notice of Underpayment was received by the appellant, at the latest, on 13 December 2018.

15. The form does not, however, appear to have been accepted by the Employment Tribunal as there is no copy on the Tribunal file.

The Law

16. The relevant legal provisions are as follows

National Minimum Wage Act 1998

17. Section 19C (Notices of underpayment: appeals) provides

(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.

18. The relevant part of this section is subsection (3) which provides that an appeal must be made before the end of the 28-day period. "The 28-day period" is defined in section 19 (8) of the National Minimum wage Act 1998 as follows: "In this section and sections 19A to 19C below "the 28-day period" means the period of 28 days beginning with the date of service of the notice of underpayment".

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

19. Regulation 11 (Practice directions) provides

(1) The President may make, vary or revoke practice directions about the procedure of the Tribunals in the area for which the President is responsible, including—

(a) practice directions about the exercise by Tribunals of powers under these Regulations (including the Schedules); and

(b) practice directions about the provision by Employment Judges of mediation, in relation to disputed matters in a case that is the subject of proceedings, and may permit an Employment Judge to act as mediator in a case even though they have been selected to decide matters in that case.

(2) Practice directions may make different provision for different cases, different areas, or different types of proceedings.

(3) Any practice direction made, varied or revoked shall be published by the President in an appropriate manner to bring it to the attention of the persons to whom it is addressed.

20. Regulation 12 (Power to prescribe) says

(1) The Secretary of State may prescribe—

(a) one or more versions of a form which shall be used by claimants to start proceedings in a Tribunal;

(b) one or more versions of a form which shall be used by respondents to respond to a claim before a Tribunal; and

(c) that the provision of certain information on the prescribed forms is mandatory.

- (2) It is not necessary to use a form prescribed under paragraph (1) if the proceedings are—
- (a) referred to a Tribunal by a court;
 - (b) proceedings in which a Tribunal will be exercising its appellate jurisdiction; or
 - (c) proceedings brought by an employer under section 11 of the Employment Rights Act 1996.
- (3) The Secretary of State shall publish the prescribed forms in an appropriate manner to bring them to the attention of prospective claimants, respondents and their advisers.
21. The Employment Tribunal Rules of Procedure 2013 are set out in Schedule 1 to the regulations. Rule 1(1) (Interpretation) says, as far as is relevant
- (1) In these Rules—
- “ACAS” means the Advisory, Conciliation and Arbitration Service referred to in [section 247](#) of the Trade Union and Labour Relations (Consolidation) Act 1992;
 - “claim” means any proceedings before an Employment Tribunal making a complaint;
 - “claimant” means the person bringing the claim;
 - ...
 - “complaint” means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;

22. Rule 7 (Presidential guidance) says:

The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

23. Rule 8 (Presenting the claim) says:

- (1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.
- (2) A claim may be presented in England and Wales if—
- (a) the respondent, or one of the respondents, resides or carries on business in England and Wales;

- (b) one or more of the acts or omissions complained of took place in England and Wales;
- (c) the claim relates to a contract under which the work is or has been performed partly in England and Wales; or
- (d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.

(3) A claim may be presented in Scotland if—

- (a) the respondent, or one of the respondents, resides or carries on business in Scotland;
- (b) one or more of the acts or omissions complained of took place in Scotland;
- (c) the claim relates to a contract under which the work is or has been performed partly in Scotland; or
- (d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with Scotland.

24. It is clear from Rule 1(1) that a claim includes an appeal under s19C National Minimum Wage Act 1998.

25. The relevant practice direction made under regulation 11 is 'Presidential Practice Direction – Presentation of claims' made on 28 November 2018. Paragraphs 4 – 7 of that direction say:

4. This Presidential Practice Direction sets out the methods by which (i) a completed prescribed claim form and (ii) a statutory appeal not on a prescribed form may be presented. It has effect on and from 28th November 2018.

Methods of presenting a completed (prescribed) claim form

5. A completed (prescribed) claim form may be presented to an Employment Tribunal in England & Wales:

- 1. Online by using the online form submission service provided by Her Majesty's Courts and Tribunals Service, accessible at www.employmenttribunals.service.gov.uk;
- 2. By post to Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG.
- 3. By hand to an Employment Tribunal Office listed in the schedule to this Practice Direction.

Methods of presenting a statutory appeal.

6. In the case of a statutory appeal, where there is no requirement to use a prescribed form, presentation may be effected by any of

the methods specified at paragraph 5 above (albeit use of the online form submission service will necessitate the use of a prescribed claim form). In addition, an appeal may be presented by email to a regional office in the schedule to this Practice Direction.

7. Attention is drawn to the related Presidential Guidance entitled “Making a Statutory Appeal falling within the jurisdiction of the Employment Tribunal” which has appended to it forms which can be used to submit a notice of appeal in connection with various appeal rights.

26. The schedule to that practice directions sets out the addresses of Regional Employment Tribunal Offices, including Midlands West at 13th Floor, Centre City Tower, 7 Hill Street, Birmingham B5 4UU.

27. Relevant guidance issued under rule 7 is ‘Making a statutory appeal falling within the jurisdiction of the employment tribunal’ made on 11 September 2017. It is not necessary to set out the guidance in full. In summary, it says that while it is not mandatory to use a prescribed form to make an appeal against a Notice of Underpayment it would enable the tribunal to deal with an appeal expeditiously and fairly if one is provided. A standard form is then annexed to the guidance. It is relevant to note that on the last page of that form it says

“Once the form has been signed it should be sent to the appropriate Central Office where claims are first processed. The addresses of the Central Offices are:

Employment Tribunals Central Office (England and Wales)
PO Box 10218
Leicester
LE1 8EG”

28. It does not provide for any other method of presenting the appeal form.

29. Finally, I have considered the following cases. Firstly, the recent decision of the Employment Appeal Tribunal in *Bajracharaya T/A Newari Handicraft v Commissioners for HM Revenue and Customs* UKEATPA/0796/17/BA. That case concerned circumstances in which the appellant had delivered his appeal nine days out of time. The Honourable Mr Justice Swift said at paragraphs 11 and 12:

“11. The provisions of section 19 C of the National Minimum Wage Act 1998 are clear and prescriptive. They permit of no exception to the requirement that an appeal must be made before the end of the 28-day period. Although the point was not specifically argued performed today, I consider the ET was correct to conclude that it was not open to it to apply the power under Rule 5 of the ET rules to permit of the possibility of extending time to make the appeal. That power is of no relevance given the clear provisions of section 19 C of the National Minimum Wage Act. The legislative provisions in respect of where and how an appeal against the notice of

underpayment may be made are those contained in the Act. That being so, it would have been wrong for the Tribunal to rely on the general case management power existing within the ET Rules as a premise for modification of the prescribed period set out in section 19 C(3).

12. The points made on behalf of Mr Bajracharya this morning are both matters that would be relevant only if there were discretion to extend time to make an appeal. Since it is clear to me that there is no such discretion, no power to extend time, there is nothing in the matters that Mr Bajracharya advances this morning which can affect the conclusion that his appeal to the ET was made out of time and for that reason was not an appeal that could be properly entertained by the ET”

30. The effect of this case is that the tribunal has no discretion to extend the time for bringing an appeal under s 19C and the Employment Tribunal cannot properly hear the claim.

31. Secondly, in *Radakovits v Abbey National Plc* [2009] EWCA Civ 134, the Court of Appeal confirmed that the issue as to whether a complaint is presented in time is jurisdictional rather than procedural. At paragraph 16, Lord Justice Elias said:

*“The first issue, therefore, is whether the tribunal was entitled to re-open the question of jurisdiction. I have come to the clear conclusion that they were. There is plenty of authority which confirms that time limits in the context of unfair dismissal claims go to jurisdiction, and that jurisdiction cannot be conferred on a tribunal by agreement or waiver: see *Rogers v Bodfari Transport* [1973] ICR 325, [1973] IRLR 172, 14 KIR 532 (NIRC), approved by the Court of Appeal in *Dedman v British Building & Engineering Appliances* [1974] 1 All ER 520, [1973] IRLR 379, [1974] 1 WLR 171. *Rogers* is a particularly powerful case because the point on jurisdiction was not heard until after the tribunal had considered the merits of the case. In *Dedman*, Lord Denning pointed out that even if an employer actively wishes to have the case heard by a tribunal, the tribunal still cannot hear it if it does not have jurisdiction. The reason is that the language of s 111(2) of the Employment Rights Act (as with its statutory predecessors provides in terms that a tribunal “shall not consider” a claim of unfair dismissal unless it is lodged in time. That is what makes these issues jurisdictional rather than mere limitation issues”.*

32. Although the words used in s 19C are “must be made” rather than “shall not consider”, the meaning is, in my judgment, the same. The judgment of the Honourable Mr Justice Swift that a claim brought after the end of the 28-day period cannot be properly entertained can only mean that the Tribunal is unable to hear the appeal, and this must therefore be for want of jurisdiction. If, therefore, the appeal was presented out of time, I am unable to exercise the Tribunal’s jurisdiction to consider it.

Analysis and conclusion

33. The combined effect of these provisions is that in order for the Tribunal to have jurisdiction to hear the appeal against the Notice of Underpayment, an appeal must be sent to the Employment Tribunal before the end of the 28-day period. The 28-day period ended on 9 January 2019, service being effected on 13 December 2018.
34. The letter of 13 December 2018 that was sent to the Midlands (West) Employment Tribunal office did not amount to the proper presentation of an appeal. Although it was not necessary to complete a form (see regulation 12 of the 2013 Regulations), the effect of the Presidential Practice Direction – Presentation of Claims is that sending an appeal through the post to a regional office is not effective service. Delivery to a regional office of a hard copy is only effective if delivered by hand or, in the case of a statutory appeal, by email. Regulation 11 and Rule 8 of the Employment Tribunal Rules of Procedure 2013 are clear that the practice direction is prescriptive - it must be followed. This is in contrast to the guidance issued under rule 7 which Tribunals are required to have regard to but are not mandated to follow.
35. The respondent submitted that there must be a good reason for the difference in acceptable methods of delivery to different venues which are likely to be based on administrative arrangements at each venue. I agree. The clear distinctions between the methods of service allowed to various venues are explicit and must have been made for a reason. The appellant did not comply with the requirements of the practice direction in the manner in which the claim was submitted until 9 June 2019 when the appeal form was posted to the Central Employment Tribunal Office.
36. This was almost 5 months after the end of the 28-day period and consequently the appeal was out of time. I have no discretion to extend time and therefore the Tribunal has no jurisdiction to hear the appeal and it must be struck out.
37. The appellant stated in its submissions that the respondent's correspondence and information was misleading in respect of how to submit an appeal. It could, I agree, be clearer but it does refer appellants to the suggested form (as set out in the Presidential Guidance) which includes a clear instruction to send the appeal to the Central Tribunal Office. It provides an internet address for that form. There was, therefore, sufficient information provided to the appellant to enable it to access the suggested form and send the appeal to the correct place in the correct manner.
38. In any event, however, as I have no discretion to extend time and the appellant's appeal is out of time these are not matters that could affect my decision.
39. Finally, the respondent made representations to the effect that, in any event, the appeal form discloses none of the statutory grounds of appeal

and is not therefore a valid appeal. While I accept that the relevant boxes are not ticked, I do not agree. The content of an appeal form is likely to be relevant to any application by the respondent to have an appeal dismissed on the grounds that it has no reasonable prospects of success but that is not a jurisdictional point and not a matter that is before me today.

40. For the foregoing reasons, the appeal is dismissed

Employment Judge **Miller**

13 November 2019