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EMPLOYMENT TRIBUNALS

Appellant: Mrs S Inthrajith t/a Ronald Park News

Respondent: Commissioners for Revenue and Customs

Heard at: East London Hearing Centre

On: Friday 22 March, Tuesday, Wednesday, Thursday 7-9 May & Wednesday, Thursday 24-25 July 2019

Before: Employment Judge Prichard

Representation

Appellant: Mr K Haskins and Mr N Atheray (Easan & Co Accountants, South Wimbledon SW19)

Respondent: Ms S Idelbi (counsel, instructed by Ms R Rosenblatt, solicitor, HMRC, London WC2)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that: -

- (1) **The Appellant's appeal is dismissed. The Notice of Underpayment and the penalties set out in the Notice dated 19 September 2018 now stand, as issued then.**
- (2) **The total outstanding National Minimum Wage arrears for the workers is £12,659.28 as stated in the original notice, and not the higher amount of £13,052.61, as recalculated by the respondent during the course of this tribunal hearing.**

REASONS

1 This is an appeal under section 19C(1) & (2) of the National Minimum Wage Act 1998. It is one of the Employment Tribunal's special jurisdictions which is not employment-based, although the National Minimum Wage relates to employment indirectly. Enforcement of the National Minimum Wage is undertaken by a specialist department within HMRC, although it is not their core activity which is the collection of

taxes. That is why the appellant employer in this case is represented by a firm of accountants who have experience with HMRC over clients' tax affairs.

2 The appellant has been represented at this tribunal by Mr Kevin Haskins. He has provided his services *pro bono* free of charge. There is no doubting he has invested a large amount of time and care into his oral and written submissions. He is clearly mortified by the way he says that the Inthrajiths were dealt with by HMRC. Easan & Co do not have specific experience of this kind of investigation under the NMWA. They are tax accountants. They took the case over from the claimant's former accountant Mr Raj Anpalagan of Raj & Co in Harrow whose role was to provide payroll services to the Inthrajiths. Mr Anpalagan felt himself out of his depth and unable to deal with HMRC at all.

3 Whilst the tribunal is grateful the Inthrajiths have been supported in what has obviously been a profoundly shocking experience, including this appeal, sometimes Mr Haskins' commitment and zeal led him to interrupt in circumstances where it appeared that he was coaching Mrs Inthrajith, to say what he wanted her to say to the tribunal. That is never permissible here.

4 He gave a long closing summary at the end of the last day or the hearing in July which prevented the Judge from having one day to compose this reserved judgment. That was unfortunate because that was the parties' understanding of how the final extra 2 days of the hearing had been scheduled.

The legal framework

5 The notice of underpayment in this case, I gather from other first instant cases I have seen, is typical. An aggregate sum of arrears is stated in respect of a number of workers, in this case 6. In addition, there is a total penalty payable to HMRC which is usually twice the amount of the arrears due to the workers. In this case the total penalty was £24,154.22 and the total arrears due to the 6 workers was £12,659.28.

6 Similarly to a traffic fixed-penalty, if the person served with the notice pays the penalty and the arrears within 14 days, they are entitled to reduce the penalty by 50% which in this case would be £12,077.11. (It will be noted that that figure is not exactly half the arrears. It was explained to me that there is a distinction between arrears and amounts outstanding in certain pay reference periods. In any event, the appellants would not query the fact that the penalty was less than twice the arrears assessed to be due to the 6 workers. See further for the explanation of this estimated figure below).

7 I was referred to 2 first instant decisions which were helpful. The first was 2377744/2011, a judgment of the South London Employment Tribunal, refusing one of these appeals. More recently there was 2200954/2017, a Manchester ET judgment dismissing an appeal. Both judgments confirmed to me that the approach urged upon me by Ms Idelbi is substantially correct regarding the jurisdiction, and the burden of proof on the appellant employers. (In the latter Manchester case, the financial penalty was twice the amount of the arrears exactly).

8 Section 28(1) of the NMWA provides:

“Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.”

The Act then refers to section 23(1)(a) of the Employment Rights Act (unlawful deductions from pay) providing that a tribunal hearing any claim for unlawful deductions from pay will make an award based upon no less than the rate of the national minimum wage.

9 In s 28(3) the Act provides:

“Where in any civil proceedings a person seeks to recover on a claim in contract the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.”

And “additional remuneration” in section 17(1) of the NMWA is the difference between the actual payments and the national minimum wage rate.

10 The other important provision is in Regulation 59 of the National Minimum Wage Regulations 2015. The South London case cited above was decided in 2011 under the National Minimum Wage Regulations 1999. I have checked the citation of those Regulations. Regulation 38 of the 1999 regulations is identical in terms to Regulation 59 of the 2015 regulations. It provides:

“59(1) The employer of a worker who qualifies for the national minimum wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage.

(2) The records required to be kept under paragraph (1) are to be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document.”

There is further provision, beneath that Regulation, that the employer must keep such records for a period of 3 years from the relevant pay reference period.

11 Paragraph 9 of the South London judgment stated:

“I am satisfied that the requirement of Regulation 38... means that if the appellant in a case such as this has failed to keep such records, the appeal must fail.”

I am finally persuaded that that is a good statement of the law and, in practice, no exaggeration.

12 I have found another useful passage in the Manchester case describing the *modus operandi* of HMRC cases such as this:

“The notice of underpayment was an exercise of best judgment after drawing inferences. This is a legitimate approach the respondent’s officers can take to judge whether NMW has been paid. This approach is important where there may not be adequate records. Where there is a complete dearth of information as to how the business operated the respondent is entitled to assume, based on the basic criteria, that a business will operate in a certain way. The

respondent acted on information provided by Mr H: his concessions were the best information the respondent could reasonably rely on in issuing the notice.”

13 In this case I have seen the evidence of the drawing of inferences and a conscientious effort by HMRC to gather information by means of interview, given the general lack of reliable and apparently contemporaneous evidence from the appellant employer.

The Facts

14 The Inthrajiths ran 2 local news agents / general convenience stores in the Southend area.

15 At the initial telephone conference with Ms Hoey, the HMRC NMW investigator, the Inthrajiths, and their payroll administrator, Mr Anpalagan, they confirmed that the workers were paid in cash from the till, and were not required to sign for any cash payments. Ms Hoey advised that they should sign for their payments. Mrs Inthrajith also confirmed there was no special key on the till to indicate that a certain amount of wages had been taken out from the shop takings.

16 Mr Anpalagan described that he would have to manually input annual increases in the national minimum wage.

17 Both Inthrajiths confirmed that no accommodation is rented to any current or former worker (this might in principle have been an allowable deduction from the national minimum wage under Regulations 14 & 15 of the 2015 Regulations).

18 Ms Hoey typed up the notes from that initial 3-way telephone conference and sent them to Mr Anpalagan the following day and also to Mrs Inthrajith. The note had 8 names in all:

- 18.1 Mr Michael Georgiou;
- 18.2 Mr Gheorghe Furnigel
- 18.3 Mr Alexandre Miguel Abreu (Berenguer);
- 18.4 Mr Gheorghe Madalin Stanescu;
- 18.5 Mr Denis-Florin Maghiran
- 18.6 Mr Rajendra Bhairo;
- 18.7 Mr Gregorio Vicente Mendes Neves;
- 18.8 Mr Diogo De Sousa.

19 The Inthrajiths themselves both worked in the stores. They have some local family support but this has not been described to us in any great detail, other than the fact that it exists. The extent to which family support worked in the stores (where national minimum wage would be payable) or undertook childcare (where it would not) remained undetermined, unassessed, by either Ms Hoey, or this tribunal.

20 For the purpose of the national minimum wage, everybody who works must be paid the national minimum wage unless they are members of the “same family”, defined as living at the same address. The mere fact that a person is described as “family” is not enough to avoid the effect of the national minimum wage legislation.

21 Mrs Inthrajith is the proprietor of the business. It is customary, I am informed, given that her family put up the money to get the business started, that she, rather than her husband, should be the named proprietor of the business. She is the sole proprietor of the business, and the respondent employer for this appeal. Mr Inthrajith put in long hours and appears to have been paid a fixed weekly wage for fewer hours than he apparently worked (but his hours did not need to be assessed). The takings of the family from any profits of the business as a whole is a different unrelated matter.

22 Both shops were open from 6am (being newsagents), until approximately 11pm with slightly shorter hours at the weekends. That was a lot of hours to cover. They are small shops however and can be run by one single person at a time. Workers might shut the door if they needed to go to the toilet leaving a quick note on the door. There is a bell system that activates when a person walks into the shop. The shops are also fitted with a CCTV principally because of the risk of shoplifting. At one stage in the case Mr Inthrajith told HMRC that the CCTV system stored 15 days worth of footage but after that would overwrite.

23 This HMRC investigation started, (as many do), with an informant telephoning HMRC and tipping them off that he and his colleagues were being underpaid the NMW. The Inthrajiths' belief throughout has been the fact that the informant bore them a grudge because he had been dismissed somehow invalidated his complaint. The respondent's point about that is that they investigate. They do not take what the informant tells them at face value; they treat it as a lead for their own investigation. It is upon their own investigation that their own findings are then based, although the informant was one of several workers formally interviewed by HMRC in their investigation.

24 The investigation was a single-handed task undertaken by Ms Erin Hoey, Compliance Officer with the national minimum wage section of HMRC. She is based in Belfast and, incidentally, has a marked regional northern Irish accent. The relevance of this becomes apparent later.

25 The majority of underpayments of national minimum wage do not result from something as simple as paying too low an hourly rate of pay. They usually result from understatement of the hours worked. That is the paradigm case. That is this case.

26 This is a typical case of "time work" i.e. these men were paid an hourly rate for the hours they worked as per Regulation 30 of the NMW regulations 2015. This is the most common of NMW payment.

27 Ms Hoey first made contact with Mrs Inthrajith by letter of 29 December 2017. She made a date to have a telephone conference with Mrs Inthrajith on 23 January 2018, she stated she expected the call to last about an hour and she gave a standard list of documents that she would like to be shown eventually.

28 As often HMRC wanted to keep the details of the informant confidential, understandably. The Inthrajiths knew perfectly well who it was, and stated that they knew who it was. They told the tribunal that they knew it was Mr Michael Georgiou. They said he had been dismissed for calling premium rate numbers from the shop. One had visions of these being adult chat lines or similar, but when we were shown the numbers called, at this hearing, all the tribunal saw was Menzies' telephone numbers.

Menzies is the newspaper wholesaler, who chooses to use a premium rate number for communication with retailers. It was nothing like what I was first led to believe. It was stated by Mr Inthrajith that Mr Georgiou had run up a bill for £450 in respect of these calls. I find it very hard to see how £450 could have been incurred on the basis of the calls that I have seen on the excerpt of a bill. The calls were all relatively short. However, that is beside the point. But it did not help commend the Inthrajiths as reliable witnesses.

29 Following the letter of introduction, Mr Anpalagan made contact with Ms Hoey and they agreed to change the time of the telephone conference to a date mutually convenient to himself and Mrs Inthrajith. They would eventually attend from different telephones at their separate premises (Mr Anpalagan from Harrow). Ms Hoey wanted to see employee records for all workers employed by them from 1 January 2017 and said that she would need time records and payslips. She also stated that if they were not currently keeping time records they should start to do so immediately, as a copy of those most recent time records would be requested by her.

30 Mr Anpalagan was an advantage for Mrs Inthrajith because he is Tamil like her. This has been a theme, particularly at this hearing rather than during the investigation that the claimant was disadvantaged because English was not her first language. However, it is a fact that during the investigation Mrs Inthrajith never chose to avail herself of HMRC's own translation/interpreter service which Ms Hoey offered (they offer this in every investigation).

31 In preparation for the call which was to be on 1 February, Ms Hoey telephoned and spoke to the informant Mr Georgiou who informed her that he worked a 37-hour week. He said no time records were kept, he also mentioned the CCTV which he says would have recorded the times he was there. He said he was paid the round sum of £40 per day and £20 on Saturdays. He stated he had never had a payslip. (If he ever had one, I certainly was not shown it during this tribunal hearing).

32 Workers were paid out of the till, as they often are in retail businesses like this. It saves having to bank the cash takings. All the payslips that I have been shown seem to postdate this investigation starting. Mr Georgiou said that he had been told, presumably by Mr or Mrs Inthrajith, that his rate of pay was £5 per hour and that he was not happy to be told this.

33 Ms Inthrajith pieced together a list of workers who had been employed since January 2017. They included Mr Inthrajith, Mr Georgiou, Mr Neves, Mr Berenguer and Mr Furnigel.

34 Prior to interview going ahead, Mr Anpalagan had provided Ms Hoey with an employee list for 2016-2017 and 2017-2018. From this it appears that Michael Georgiou started on 6 March 2017. From the 2017-2018 list, it is clear that he had left on 30 November 2017. The 2017-18 list includes Mr Inthrajith, Mr Georgiou, Gregorio Neves, Alexandre Berenguer and Furnigel Gheorge. These names were confusing, and were constantly cited wrongly with surnames cited as first names (e.g. George Michael).

35 At the first interview which took place between 4-5pm on 1 February 2018, Mrs Inthrajith informed the Erin Hoey that the opening hours of the shops were Monday to Saturday 6-11 and Sunday 7-10. The longest opening hours were Monday to Saturday 7 to 11 and Sunday 8 to 10. She told Ms Hoey that her and her husband worked full-time and they split school runs and business requirements as appropriate between themselves.

36 It was also established that Mr Inthrajith did live in the same household as Mrs Inthrajith but there had been a problem with his residence previously because his residence was still registered to a flat above one of the shops. Ms Hoey insisted that he got that changed in order to get exemption from the national minimum wage.

37 Mrs Inthrajith stated that workers were expected to arrive 10 minutes before the start of the shift but that the time was not formally recorded. She stated that if workers work additional hours then they would have to take time off in lieu because they would not be paid any more than their fixed weekly amounts. There were no cleaners and there were no written contracts of employment.

38 Ms Inthrajith also stated: "there are no primary time records in the business". Ms Hoey reminded her that she had already said that if no time records were in place, that they should have been implemented ahead of this meeting. Mr Anpalagan confirmed that it had not been done because they needed to ask Ms Hoey about what details to record (which struck me as a curious thing to ask about a time record). Ms Hoey told them that records could be on paper or electronic. She would expect sample time records from the date of this conference call onwards.

39 Mr Anpalagan said that the pay day is the 5th of every month and it covers the period from the 6th of the month before.

40 Mrs Inthrajith confirmed that the workers are paid in cash, and that they did not ask the workers to sign for receipt of payments. Ms Hoey recommended that they do so, so that there would be an audit trail. Mrs Inthrajith also stated there was no till record either electronic, or paper, of wage payments being taken out of takings from the tills. They said there was no overtime or premium rate for workers. Nor were workers paid for additional hours and therefore if they did work extra hours they would have to take those hours as time off in lieu at another time, in order to keep their monthly pay / hours the same from month to month. It sounded like an honesty system as she described it.

41 Although the pay slips that I have seen are stated to be monthly, it seems that workers were paid weekly. That is not inherently wrong. It is probably a cheaper service for Mr Anpalagan to run a monthly payroll rather than a weekly one, even though the workers would be paid in weekly instalments. (But it was another factor leading me to consider it was very hard to keep the run of these payments).

42 Ms Inthrajith confirmed that no accommodation was rented to any current or former worker which might otherwise have been an allowable reduction under Regulations 14 and 15 of the 2015 regulations.

43 Following this one-hour interview, Ms Hoey sent her typed up notes of the interview to Mr Anpalagan and separately to Mrs Inthrajith. In Mrs Inthrajith's letter she had a list of questions which she said arose from that interview (more or less along the lines I have already alluded to above in citing the interview). Ms Hoey asked for the names of extra workers and their telephone numbers.

44 She also stated that Mr Inthrajith was registered as not living above the Ronald's Park shop any longer. She asked how it was possible for the Inthrajiths to close both stores at 11pm if they closed at the same time - an understandable question, as she was given to understand that none of the workers shut up the shops. Mrs Inthrajith was clear that none of the workers ever held keys to the stores.

45 Ms Hoey did not get the time record she was expecting to get on 18 February. Ms Hoey followed-up with an email on 19 February, to which Mrs Inthrajith replied they were coming. Mrs Inthrajith sent the timesheets in the post. They were handwritten and included the dates from 1 to 18 February. The four names recorded there were Furnigel, Denis Maghiran and Mr and Mrs Inthrajith. Exact times were given, on the hour. There was no reflection of starting shift 10 minutes early. Ms Hoey was pressing for another interview with Mrs Inthrajith and Mr Anpalagan.

46 In the meantime, Ms Hoey carried out interviews with 2 of the workers; Furnigel and Denis Maghiran, as she had their mobile numbers. Mr Furnigel said he was interviewed for the job by Mr Inthrajith and had a trial period of a week and was not paid. He said he started in December 2017 and worked 6 days a week, off on Friday. He said his rate of pay was £7.50 and he worked roughly 46 hours a week. He said that the boss opened the shop and that he sometimes locked it. He said he was paid in cash as he did not have a bank account, he said he had only ever had one payslip.

47 He said he was provided with accommodation with his brother and friends and paid about £60 a week, but not for utilities. It was in a flat above one of the shops. He gave money but not from his wages. He had lived there for one year. To explain that, I have seen a copy of the tenancy agreement and it turns out that the flat is let to Mr Furnigel's brother Nikolai (who has never been one of these workers). He stated that Mrs Inthrajith did not work in that store, only Mr Inthrajith.

48 He then referred to a "declaration". There were 3 such declarations which I was shown. They are in identical terms. At some stage the Inthrajiths had asked the workers to sign these prepared declarations. The declaration stated, in his case:

"I Furnigel Gheorghe confirm that I work 24 hours per week for Mrs S Inthrajith at her Ronald Park shop. I am currently being paid £7.50 per hour for the pay period ending 5 February 2018 I receive cash payment £768 after deduction of £12 for national insurance contribution."

49 Commenting on that, he stated to Ms Hoey:

"Did sign doc... but did not read does not understand what the document is.... male boss told him to sign it."

It would appear therefore that the document mis-states the facts, and it is certainly inconsistent with the information which he gave to Ms Hoey.

50 Denis Maghiran was interviewed on the same day by telephone. He stated that Diogo (de Sousa) opened the shop and that he himself closed the shop, but rarely opened it, and that he always worked in Ronalds Park. He said he had a trial period and he was paid approximately £200 for the trial which was 20 to 30 hours. He stated at that stage, 22 February, that his employment had ended. He stated he was paid £7.50, his normal hours work were 50 hours per week. He stated that Diogo took over that day, and would open and close the shop. He stated he had to be there at 5:50 if the shop opened at 6 and that he would have to stay from 11pm to 11:10pm to tidy up the shop. He stated that there was a rota but there was no timesheet. He had no breaks because he could not leave the shop. He said he was paid weekly on a Sunday, cash £313 a week. The owner paid his wages. He said he had no payslips and he had no accommodation provided. He gave a breakdown of his working hours - from which it appeared he had a regular working pattern of 59 hours per week.

51 Following these interviews, Ms Hoey had another 3-way conference call with Mrs Inthrajith and Mr Anpalagan. Her first question was about Diogo whom Denis Maghiran had said opened the shop. Mrs Inthrajith said that he had now left, did not continue his trial, and he had disappeared so that she could not pay him. Ms Hoey asked for his name, national insurance number and contact details.

52 She then asked about accommodation. She stated that Mr Furnigel paid them £150 per month and that the tenants in that flat all paid separately. Ms Hoey asked why the workers' rotas provided did not provide for starting 10 minutes early. Ms Hoey asked why Denis Maghiran's slip was for 52 hours.

53 She then asked about the declarations. It was given 3 of them to sign respectively by Gregorio Neves, Denis Maghiran and Gheorghe Furnigel. Ms Hoey said that when she asked workers about these declarations they stated they were not correct and that they in fact worked many more hours than the declaration stated. Mrs Inthrajith then said that the workers did not have good English. Ms Hoey advised that all of them were able to converse freely with her and that it is likely they would have had to have understanding of conversational English to be able to work in a shop.

54 She also asked why Denis Maghiran did not appear on the PAYE records. Mr Anpalagan said submissions has not yet been completed. She also said that those interviewed stated variously that they had not been paid or been underpaid national minimum wage for trial periods. She also stated that the workers said that they did close the premises contrary to what Mrs Inthrajith had said on her first interview. Mrs Inthrajith again said that they did not hold keys. Ms Hoey also challenged the rota sent to her which implied that the Inthrajiths both worked round the clock and she could not understand how they could deal with childcare, if that was indeed true.

55 She also pressed about the CCTV and she stated again she would need a copy of the CCTV for the past 15 days and that they should reset settings on the CCTV so that all footage could be retained until her review was over. Finally, she advised Mrs Inthrajith not to approach her workers to discuss interviews they had held with HMRC as she already believed that they had signed documents which they thought had inaccurate information in. She also stated she would not repeat the worker interviews with a translation service, the workers interviewed, because she did not perceive that the questions she asked were not understood.

56 The same day she enclosed the notes of that interview by email to Mr Anpalagan and by postal communication with Mrs Inthrajith dated 27 February. As before, the letter to Mrs Inthrajith contained a list of searching questions that arose from discrepancies between what the workers were telling her and what she, Mrs Inthrajith, was telling Ms Hoey. She repeated her request for CCTV for the last 15 days and to reset the timing so that it held more than 15 days footage until the investigation was over.

57 Following that, she sent an email to Mr Anpalagan reminding him the information requested should be with her in full by 9 March. Mr Anpalagan responded to say:

"I tried to speak with Mrs Inthrajith today and without success. But her husband answered the phone it appears to me from the conversation I had with her husband she has not been well and she had to visit her doctor on Monday the 5th March. She has now been referred to a counsellor by her GP."

58 Ms Hoey was persistent in her requests. Apart from wishing Mrs Inthrajith well, she asked who would be taking over her responsibilities in the shop. Mr Anpalagan responded that Mrs Inthrajith was not comfortable with telephone interviews and requested a face to face meeting with an officer to discuss matters further and they would prefer such a meeting to take place at Ronalds Park Newsagents. Ms Hoey responded and noted the preference for a face to face meeting. She stated:

"... The next steps may well involve visits to the premises if necessary and will certainly involve continued phone calls over the course of my enquiry which could take several months."

And:

"If I can make our future telephone calls more comfortable please let me know. I will continue to set up appointment times that suit your client and I can also offer a translation service so that you do not have to translate at times for Mrs Inthrajith. However, they will remain a mandatory requirement as part of my review."

59 Mr Anpalagan replied an employee list from 2012/13 and stated:

"Her husband is working on the CCTV as he never took a copy before. Mrs Inthrajith does not want a telephone conversation, she would like to meet an officer and will assist with all other outstanding issues. She will show the CCTV also in that meeting. Sorry for the delay as I said I may not be able to respond to your email until I come back on 17th March [he was going away to attend a family funeral]."

So, the investigation halted for a while.

60 In the meantime, Ms Hoey interviewed Alexander Berenguer on his mobile. He said he was told he would receive an employment contract but he did not get one. He was told he would work 5 days per week but he was put on the rota for 6 days. He stated his dates of employment were October 2017 to December 2017 and that he left as he had been told he would then have to work 7 days, and he was not happy. He said that he had been paid £6 an hour. He closed the shop every day and he dropped the key off at the owner's door. His stated hours amounted to 48 hours per week but that he went on Tuesday to the other shop; he was mainly in Ronald's Park.

61 He mentioned 2 others who had no contracts - Gregorio Neves and Diogo. He mentioned Michael who is Romanian, (Michael Georgiou). As far as his finish time was concerned, he said he sometimes finished at 11:30pm after tidying up. He said that Mr Inthrajith paid him every Tuesday, usually £310 per week. He did not receive payslips but he would have to make up till shortages out of his pay. He said that he was happy to speak to Ms Hoey again. He said that he had not been paid for his last week of work.

62 In Mr Anpalagan's absence at the family funeral Mrs Inthrajith emailed Ms Hoey as follows, (verbatim quotes):

"Dear Erin Hoey

I would like to inform the following. The telephone interviews is put under a lot of stress.

I found it was more of a threading way, no consideration is given for my stress.

Therefore I am not happy to any more telephone interview.

I like to see an officer face to face and want to give the answers and records to that officer. I would like a different officer to deal my case."

63 Following that, Ms Hoey wrote on 12 March stating that the investigation still had to go ahead. She added:

"As you are unwell and you advised me that your husband will be assisting you to gather the information we require, I have spoken to my senior officer and agreed we will on this occasion only provide you with an additional week to gather all the documents.

You must send me all of the information and all documentation I have requested no later than Tuesday 20th March 2018.

She then stated that they might have a face to face meeting but that Mrs Inthrajith should not count on that on every occasion.

64 Ms Hoey kept up the pressure by letter of 26 March in response to the copy of the Nikolai Furnigel tenancy agreement which suggested that the total monthly rent was £450 would breakdown at £150 each for the 3 tenants.

65 Following the 20 March deadline Ms Hoey had to chase it up because nothing had been forthcoming. The next event was 9 April when HMRC received a bundle of documents - 12 pages in length, including payslips for March 2018 for:-

- 65.1 Mr Inthrajith;
- 65.2 Gregorio Neves;
- 65.3 Furnigel;
- 65.4 Gheorghe Madalin Stanescu (a new name);
- 65.5 Diogo De Sousa and
- 65.6 Rajendra Bhairo.

66 There were also February 2018 payslips for:-

- 66.1 Mr Inthrajith;
- 66.2 Gregorio Neves;
- 66.3 Furnigel and
- 66.4 Denis Maghiran.

Mrs Inthrajith typed up a sheet giving various details of Diogo who was someone new to Ms Hoey. She attached rota sheets. She stated there that she had stopped staff coming in 10 minutes earlier. She stated that 24 hours per week is equivalent to 104 hours per month (which is mathematically correct). She said that Denis Maghiran had come to work smelling of alcohol, had to be sent home, and later resigned by SMS text. There were various handwritten rotas for each separate worker, including Mr Bhairo and Diogo De Sousa.

67 Ms Hoey acknowledged the information that had been received the same day and said she would review it. She later stated by email of 23 April:

“I have noted you stated you are not well enough to take part in an interview. Therefore, this too would encompass a face to face interview”.

Mrs Inthrajith had also said she was happy to correspond by email.

68 Ms Hoey tried to get in touch with Mr Gregorio Neves, without success. She did succeed in getting in touch with Diogo De Sousa and held an interview with him on 2 May on his mobile telephone. He told her he was not self-employed. He started work 27 February. He worked 4 hours per day for 4 days, he got paid about £112 a week so he was paid £7.50 an hour. His normal hours of work were about 15. He had a disability and he only works 4 hours Monday, Wednesday, Thursday and Friday. If he worked an extra hour he took it as time in lieu the next day and he said his working hours were written down on a piece of paper, and he had no specific breaks. (No such piece of paper was provided to Ms Hoey, or here at the tribunal).

69 At this stage, sensing that she was unlikely to get any more reliable records from the Inthrajiths. Ms Hoey decided that her best next move, possibly to wake the Inthrajiths up to the reality of their situation, was to send a provisional arrears calculation.

70 At that stage, she assessed the arrears at £12,077.11 (see the penalty figure above). This was by letter of 18 June, in which she stated:

“This is not a formal demand for payment at this stage. You are now requested to review the enclosed calculations. If you wish to submit any additional evidence which may alter the calculations you may do so.”

The calculations were in respect of:-

- 70.1 Michael Georgiou;
- 70.2 Gheorghe Furnigel;
- 70.3 Alexandre Berenguer;
- 70.4 Gheorghe Madalin Stanescu;
- 70.5 Denis Maghiran,
- 70.6 Rajendra Bhairo

Those are the 6 workers in respect of whom the final Notice was issued.

71 She stated in her 18 June letter:

“If you do not submit any additional evidence or I do not hear from you I will assume you have accepted my calculations as correct. I will subsequently issue a notice of underpayment to you on or after 9 July. You will have 28 days from the date of the notice to pay both the workers and the penalty in full.”

She also explained about the 14-day penalty discount.

72 Apparently, the difficulty the Inthrajiths were going to face was finding all these workers in order to pay them. It was a condition of the Notice that within 14 days the workers should be paid, and that the Inthrajiths would have to submit evidence that they had been paid (or given the means of being paid). The letter set out in detail the rationale for the calculations and some of the outstanding points that she discovered in her interviews with workers.

73 The letter included the damning evidence about the 3 standard-form 24-hour declarations signed by the workers. These were obviously a substantial underestimate. Ms Hoey explained in her letter the breakdown of all the separately itemised workers with the exception of Mr Bhairo. Only £78.30 was stated as arrears for him. The majority of the arrears was owed to Michael Georgiou at £6,264; the next was Mr Furnigel at £1,819.98. She had finally been unable to contact Gregorio Neves, hence no arrears.

74 When she spoke to Mr De Sousa she did not have much faith in his evidence. In her statement for this tribunal she stated:

“I could not be sure that Mr De Sousa had not been prompted ahead of his interview with myself. I felt that this could be the case. It appeared to me that Mr De Sousa seemed relatively prepared for my call and my questions whereas the other workers gave the impression that they were not expecting my call and were naturally more wary of receiving a call from someone who claimed they were calling from HMRC ... I decided I was not in a position to calculate arrears for this worker as the information regarding his employment was consistent from both Mr De Sousa and the employer and I had no evidence to base calculations on.”

That was why no arrears were calculated for either for Mr De Sousa.

75 Nor from Mr Neves whom she never contacted, despite trying. She texted him and asked him to call her or to suggest a better time for them to speak. Even that did not work.

76 The letter of 18 June gave Mrs Inthrajith until 6 July to submit any evidence or submissions. Ms Hoey later chased up her letter reminding the Inthrajiths that a response was due by 6 July. Mrs Inthrajith was very unhappy. Mr Anpalagan seems to have dropped out at this stage and she reminded them again on 3 July that if they were going to post any documents, the documents would have to arrive with her by 6 July. Mrs Inthrajith responded that she wanted to have a face to face interview, that she was unable to accept the findings and calculation, that she was still getting counselling. However, Ms Hoey kept the pressure up that she had to respond substantively by 6 July otherwise the provisional figures would become final. She also refused Mrs Inthrajith's request for her to be present at worker interviews; that was no

part of the HMRC process. Mrs Inthrajith followed-up with a repeated request for another officer. Finally, on 4 July Ms Hoey stated:

“The calculations are based on the best evidence available to me. You did not keep adequate records to show you have paid NMW ... The calculations have been based on (1) the records you did provide me with (2) the information you provided me with and (3) interviews held with current and former workers which will not be carried out again, at this time.”

77 Following this on 5 July, the day before the final deadline, Mrs Inthrajith confirmed that she had now appointed another agent to deal with her case - Easan & Co Accountants, who represent her here at the tribunal. She summarised her objections:

“As to my dissatisfaction to your findings I can inform you again that you have live evidence from 3 people who are sacked. They (1) abused the telephone by making premium rated calls [Michael Georgiou] (2) stole money and police were involved [Berenguer] (3) came to work under the influence of alcohol [Denis Maghiran]. I said all these in my previous email but you still used them as your witness. When I said I wanted a different officer to deal with my case I was expecting that officer to deal with me and not to review your file. Finally, the amount of money you are demanding will put me out of business.”

78 Mr Atheray came on to the record. He emailed Ms Hoey, on 5 July saying he was happy to deal with HMRC by email so he asked for extra time and said he would be happy to give a full response by Friday 20 July. Ms Hoey confirmed that she had received a signed Form 64-8. (This is the HMRC agent authorisation form). Ms Hoey was not happy with the extension requested; she wanted to know why it was needed.

79 Subsequently, Mr Atheray wrote to Ms Hoey a letter thanking Ms Hoey for forwarding copies of the records that she had received stating that they were going to carry out a full review of the case. His intention was to provide a full reply by 13 August 2018. He advised that Mrs Inthrajith continued to be unwell and was prone to bouts of tears and shaking. He reiterated how difficult the conference calls had been for her as they were calls between 3 people in different locations and, further, that Ms Hoey's Northern Irish accent had not helped Ms Inthrajith's comprehension.

80 Ms Hoey responded as promptly as ever on 17 July and she reiterated she needed a clear understanding of why a further extension was required until 13 August:

“..There was no intention to cause any harassment to Mrs Inthrajith. I will also note that my enquiries which had been limited to 17 July, 23 July and 30 July have been directed to Easan & Co and not Mrs Inthrajith. However, she will remain copied into all of my correspondence as our employers can expect to be kept fully informed regarding their case progression, without exception.”

81 Mr Atheray's next move was to register a formal complaint on 13 August. It was a long and detailed letter about the way the investigation had been conducted and the problems with it, reiterating again the unreliability of these witnesses that Ms Hoey had spoken to, upon whose evidence her calculations were based.

82 Ms Hoey responded on 14 August at great length. She explained the continuing telephone conference calls as follows:

“Mrs Inthrajith was advised in writing on 12 March 2018 that a face to face interview would only

be considered once the documents we needed to carry out the review was sent. A meeting held before receipt of documents would not have been productive for Mrs Inthrajith as we could not have offered any advice or discuss information that had not actually been produced.”

83 Mr Atheray wrote again on 15 August. This letter is the first communication to suggest the shops might be closed at variable hours during the working day. He also suggested that “husband and wife mop up the extra hours” over and above the 787 hours recorded on payslips.

84 Mr Atheray asked for an independent review. However, Ms Hoey responded to him on 22 August that the NMW section of HMRC had no independent internal review procedure. That was obviously something that Mr Atheray knew about from HMRC tax investigations. Her letter of 22 August further explained her approach in the investigation. She stressed the evidence-based approach she adopted:

“An HMRC NMW case officer conducts their review impartially. This is why our legislation allows us to interview the employer, workers, and any other relevant person, and they are subsequently reviewed. As part of that review the notes from my interviews with Mrs Inthrajith would not be provided to a worker nor would the notes from interviews with the workers be shared with Mrs Inthrajith.”

She comments on one of Mr Atheray’s contentions:

“You advised that the March rota records 787 hours as agreed also advised “husband and wife mop up the extra hours” this was not indicated in the records kept for Mr Inthrajith which were supplied to me. Also advised earlier in your letter and from March 2018 the hours “did slow down following Mrs Inthrajith’s mental state”.”

85 This touches on what has been Mr Haskins’ central submission to the tribunal on this appeal. March, he says, cannot be taken as a guideline month because that month Mrs Inthrajith was ill due to the stress caused by the investigation and was not putting in so many hours in the shop. Once again Ms Hoey refers to the incompleteness of the records:

“I have noted your copy of the July 2018 records but I have not received April 2018, May 2018 or June 2018 records despite my requests and despite my advice that these records must be kept by the employer in line with the legislation. Therefore, I have no other basis to use for my calculations.”

She then stated:

“I will now begin to prepare the notice of underpayment. Once issued, Mrs Inthrajith will have 28 days.”

86 In the meantime, the correspondence in the run-up to the issuing of Notice of Underpayment was going around in circles. Mr Atheray went back to saying that he would like to make a complaint. Ms Hoey referred him to the complaints department - an address in Newcastle. However, Mr Atheray never did complain. At this time, Mr Atheray was saying that Mrs Inthrajith’s health had rallied, although it was still fragile.

87 I was referred to some telephone contact between Ms Hoey and Kevin Haskins of Easan & Co. There had been a particularly heated telephone call. Mr Haskins insisted on speaking immediately to her superior. Ms Hoey said that she would get her

manager, Justina, to contact him. She was not just going to put him on the line to her. She recorded in a minute of the conversation:

“I assured him I would pass all that on. I was trying to ask for his number so that Justina could actually call him, but because he keeps speaking over the top of me I cannot do that. He advises me again I am harassing him. I ask if he believes I am harassing him because I am asking a question about the review? He shouted at me to put my superior on the line and I said I was unable to continue this conversation as he was continuously shouting at me and not allowing me to help him. We are both professionals attempting to do our jobs. I advised him that shouting at me was not a good use of either of our time.”

88 There was another call after the Notice of Underpayment had been sent on 19 September. This was on 24 September where Mr Haskins stated that Gheorge Furnigel had refused the cheque and asked what were they to do. He stated:

“These people are transients I don’t mean to be racist but they are. They move around. They don’t have telephone numbers. This is how they are. ...They are open to fraud.”

Her note ends:

“He told me I was the least helpful person he has ever come across. I thanked him for his feedback and his call, and ended the call.”

89 I have recited the exchanges of correspondence and conversation at some length. In order to demonstrate what I have come to consider is the vacuum at the heart of this appeal, namely the lack of records. The arguments as to the characters of the individuals really availed little. I saw the interview records with the individuals as we all did at this hearing and they do not strike one as inherently unreliable. The individuals gave coherent and reasonably consistent answers to the questions.

90 I note the workers did have telephones. I would find it extraordinary if they had not had telephones if they were required to work variable hours of shifts in the shops. One of them resigned by text. Everyone these days has a mobile phone. Mr Haskins assertion to the contrary seemed wholly at odds with everything I have seen or been told.

91 As a matter of general comment, it will be clear from the foregoing description of paying individual workers in their shop, with everyone paid in cash, with no receipts and no notes left in the till to say that a certain amount of the shop’s cash takings had been paid out to individual workers, it was impossible to keep the run of the workers’ payments.

92 The workers were all paid a relatively fixed amount but no single person seems to have had oversight of the aggregate hours and the time off in lieu which the Inthrajiths said would be taken rather than extra payments being made. Remarkably it was only at this tribunal hearing itself that I saw stapled to the back of Mr Inthrajith’s statement a specimen scrap of paper taken from a reporter’s notebook and written up in Mr Atheray’s handwriting in an attempt to explain how the Inthrajiths kept track of the hours. It is headed “Illustration”. It was said to relate to April 2017. The 30 days are set out separately. The worker in question has a monthly payslip based on 78 hours; 1 April 5 hours, balance of 73; 3 April 3 hours, balance of 70; 4 April 3 hours, balance of 67, and so forth. I am surprised, disappointed, and frankly sceptical that this

explanation was not given sooner and that not even one of the contemporaneous similar scraps could be found, retrieved, or had been kept. That would have approximated to a “record”. No suggestion was made to Erin Hoey about this *modus operandi*, or who oversaw such a system. It was simply stapled to the back of Mr Inthrajith’s tribunal witness statement without being referred to in the body of that statement.

93 In some ways I consider it is in keeping with other facets of the Inthrajiths’ representation at this hearing, that they are being advised and told what to say by their professional advisors. In the case of a solicitor or barrister that would be seen as improper and contrary to the code of conduct for both professions. I do not know if it is different for accountants.

94 I have already discussed much of the relevant NMW law above. My duties as the tribunal hearing this appeal are set out under section 19C(5)(b) of the NMWA:

“An appeal under subsection 1D [arrears] above, in relation to a worker must be made ... on the grounds

...

- (b) that the amount specified in the notice as the sum due to the worker is incorrect.”

And 19C, subsection (6):

“An appeal under subsection 1(c) must be made on the following grounds –

- (b) That the amount of the financial penalties 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).”

95 I have already dealt with the structure of the Underpayment Notice and the financial penalty which is approximately twice the amount of the arrears payable. The section above shows that my decision is a dispassionate one as to the accuracy of the underpayment calculations – just that.

96 What is lacking in the Inthrajiths’ appeal is hard evidence of records. That evidence always was lacking. Most of the records produced started at the start of the investigation and seemed *ad hoc*, created solely for the investigation, and this appeal, and not inspiring confidence.

97 For reasons which I do not understand and which do not help the Inthrajiths’ credibility, the CCTV evidence was never provided and I find it odd that somebody could not obtain a recording, for instance on a USB memory stick. Ms Hoey had a telephone call to Mr Inthrajith on 9 March soon after the whole investigation started. Her record of the conversation was as follows:

“TI then said he didn’t know what info I wanted. I asked had he not seen a copy of the letter he said no. He then referred to my letter when I asked for info re CCTV. He says he cannot record it. I asked how he would review a robbery for example and he says rewind it and it is recorded

on his hard drive..... He said ... the feed goes into the shop only and not at home.”

98 The Inthrajiths never tried to explain at this hearing why it would be physically impossible for them to make a recording of the CCTV. It seemed to me they had not made any enquiries about how to do this. That would have preserved it if, as Mr Inthrajith said, it went on to a “hard drive”. I was left wondering if he even knew what a hard drive is.

99 I was torn when I started to hear this appeal, which has now been heard over several days. I initially wonder why Ms Hoey did not relent and go to visit the premises and have a face to face meeting. But I came to understand Ms Hoey’s point of view, as a busy case officer with a case load at any time of about 14 investigations. She told us she simply did not have the time to over to Southend from Belfast to visit the Inthrajiths, as it never looked realistically as though she would have found anything of interest there which might have affected the outcome in any way. To have made the visit simply out of sympathy for a distressed employer would not have been a justifiable use of her time. I can understand that now. I did consider at times from the correspondence that Ms Hoey’s pursuit of the investigation was dogged. She did not relax deadlines, but that is part of what her job is. The Inthrajiths came up with several attempted last-minute game-changing moves, hard upon set deadlines. Some of these succeeded in stalling the process for a time, but ultimately could not halt it in perpetuity.

100 Mr Haskins was urging upon me the difficulty the Inthrajiths had with language. That was not apparent to Ms Hoey. Nor, ultimately, was it apparent to me. I, myself, did wonder at times when I saw some of Ms Inthrajith’s own emails where her English was extremely stilted. Some examples are given above (e.g. “threading” = threatening). Nonetheless, these are quite simple concepts that Ms Hoey was dealing with, even if Mrs Inthrajith’s emotional reaction was rather less simple to explain.

101 The Inthrajith family found it a horrifying ordeal and the notice might, yet, put them out of business. But mine is a dispassionate enquiry. That is my duty on this appeal.

102 The Inthrajiths had time between December and March when the investigation started, to assemble some sort of evidence. A problem they had was that they relied for some time on Mr Anpalagan who simply operated a payroll for them who had no idea of the records that were needed in an NMW investigation. But nor did he ask. I have to say Easan & Co were not much better.

103 This is a small HMRC department. I imagine it is quite a specialised niche (and probably low paid) specialism in the accountancy world. I was impressed at the sheer stamina of Ms Hoey who wrote extremely long letters tackling every single point which came from the Inthrajiths and their advisors. Her turnaround of this correspondence was formidable. One always owed her a letter or an email. The Inthrajiths and their advisers may have perceived this as harassment but I consider that Ms Hoey was doing her job and that the Inthrajiths were basically caught out cold with a total lack of records. This was never going to end well for them.

104 I spend a lot of time in the Employment Tribunal considering unfair dismissal cases where justice and equity are central to the decision-making process. Justice and equity has nothing to do with my appeal jurisdiction under section 19C of the NMWA. I have just been asked to challenge the accuracy of the calculations. True, as Mr Haskins would rightly submit, they can validly challenge the methodology but the problem I have here is that they are not putting forward any more reliable methodology than Erin Hoey's broadly evidence-based enquiry based on the memory and recollections of individual workers, and the Inthrajiths who had no records.

105 There was nothing in the content of the interviews with the workers which suggested that they were inherently unreliable. Indeed, Ms Hoey had a good instinct for when she was being given unreliable evidence. Witness her treatment of Diogo De Sousa's evidence whom she completely left out of her underpayment calculations because she did not find his evidence convincing or reliable. It seemed to her he might have been coached and was expecting her call.

106 The effect of this appeal was to stop time running on the penalty notice. The notice was served on 19 September 2018, the appeal was received by the central office of tribunals on 25 September 2018. I presume that then stopped time running. The original notice stated that if the Inthrajiths could provide evidence that they had paid the arrears by 4 October, they could pay half the financial penalty i.e. £12,077.11. The full amount would be due thereafter and had to be paid by 18 October 2018.

107 During the course of this hearing I advised Mr Haskins and, when she was here, (she left half-way through being cross-examined) Mrs Inthrajith, that they must try to contact the individuals who are owed arrears. This needs to be documented. Ms Hoey had told them that. It would never be good enough for them to tell HMRC, just to assert, without some evidence, that they have been unable to trace the workers. As Ms Hoey rightly said, anyone who is expecting a sum of money might be ready to accept that sum. It is inherently unlikely that all these people who were prepared to work for so little would refuse some form of a windfall like this, (if windfall it was).

108 Ms Hoey gave helpful advice in an email to Mrs Inthrajith on 25 September, just after notice of underpayment. She asked to see evidence that they had attempted to contact these workers to show her some call logs and she stated:

"I would urge you to provide me with this as soon as you can. Should you wish to avail of the reduction as explained, both the payments to the workers and 50% of the HMRC penalty must be received no later than 4 October 2018."

She also advised:

"Your agent indicated that one of your workers may not be happy to accept the payment. If that is the case the worker should be advised to contact me directly. Meanwhile from the employer prospective provided you have issued the worker with the ability to receive the payment it is up to the worker what they do with that payment. To use an example if you provide the worker with a cheque and they choose not to lodge the cheque/destroy the cheque you will still have met the legal obligation required of you in this circumstance. I will need evidence that the worker received the cheque (again recorded delivery will help here) and this will be confirmed with any worker who states this."

109 It was simple practical advice. The effect of this appeal judgment being

promulgated is that the notice of underpayment will become live again. Time, as I understand it, is short for the 14-day window for sending sums owed to workers and getting the benefit of the early payment discount of 50%.

110 I come back to the hard law on this matter which is that an appellant without records is bound to fail in an investigation and on a subsequent appeal and this has been a vivid lesson in the necessity for keeping records and the meaning of the 1998 Act and the 2015 Regulations. This appeal has to be dismissed.

111 Finally, Ms Idelbi in a helpful closing submission to me provided me with a revised schedule of underpayments. I accept the revised calculations appear to conform with the evidence in the case. As I explained in the judgment above and at the start of these reasons. I am not minded to adjust the existing notice of payment in any way. That is a legal determination based on section 19C of the NMWA. This is an appeal under 19C(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 ...”

112 It is a jurisdictional point, in my view. This is the employer’s appeal, the Inthrajiths’ appeal. The existing Notice of Underpayment served on 19 September gives me jurisdiction under the NMWA. I do not consider that it would be jurisdictionally admissible for me to vary that notice of underpayment in favour of the workers or HMRC. In law there are certain jurisdictions where it is specifically permitted for an appellant to face a higher penalty, or charge, than originally given, but I consider there needs to be some express statutory basis for such an increase. There is none in section 19C NMWA. S 19C is based squarely on the existing Notice of Underpayment. Therefore, the Notice stands as it is.

Employment Judge Prichard
Dated: 18 November 2019