



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE C HYDE (sitting alone)

**BETWEEN:**

**Appellant**

**SPEED CAR WASH SPECIALISTS**

**AND**

**Respondent**

**COMMISSIONERS FOR H M REVENUE AND CUSTOMS**

**ON:** 10 September 2019

**APPEARANCES:**

**For the Appellant:** Mr R Owen-Thomas, Counsel

**For the Respondent:** Mr S Redpath, Counsel

## RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that: -

1. the National Minimum Wage Act appeal is dismissed.

## REASONS

### Preliminaries

1. Reasons are provided in writing for the Judgment above as the Judgment was reserved. The reasons are set out only to the extent that the Tribunal considered it necessary to do so in order for the parties to understand why

they have won or lost. Further, they are set out only to the extent that it is proportionate to do so.

2. All findings of the fact were reached on the balance of probabilities.
3. The Appellant company presented a claim form on 10 January 2018. The appeal was said to be for the reasons set out in section 19C(1) – (c), and the grounds were set out in a two page attachment (pp24 & 25). In essence the appeal was brought on the basis that the amount calculated was incorrect.
4. The appeal was against a replacement Notice of Underpayment ('NOU') issued on 22 June 2018 (pp48-69).
5. The Commissioners (hereinafter referred to as "the Respondent") represent the arm of the Government which enforces the national minimum wage legislation on behalf of individual workers. HMRC has teams of Compliance Officers based around the country who investigate circumstances in which it appears that an employer may be contravening the NMWA.
6. The NOU was issued on 12 December 2017 following the Appellant's failure to pay the claimed arrears of national minimum wages owed to several workers for £38,433.14. A penalty of £61,662.70 was also imposed in accordance with section 19A of the Act. The Appellant exercised its right to appeal against the notice to the Employment Tribunal.
7. The NOU dated 12 December 2017 was later withdrawn in accordance with section 19F of the NMWA and replaced with an NOU dated 22 June 2018 under section 19G(1) of the NMWA (notice of withdrawal p43 and replacement NOU referenced above). The replacement notice identified arrears in the sum £33,368.67 and imposed a penalty of £52,725.23.
8. The Respondent submitted its response to the appeal and the grounds of resistance on 4 April 2018. Employment Judge Baron gave directions on the appeal on 12 April 2018 and the first date on which the full merits hearing was listed was 3 July 2018. The hearing did not proceed on that date and a further hearing date was listed for 23 November 2018. Notice to the parties was sent on 9 August 2018. Mr Bhatia had health difficulties which led to that hearing date also being postponed.

#### **Evidence Adduced/Documents Considered**

9. The Respondent prepared a bundle of document including the documents that both parties wished to rely on which ran to just under 400 pages. In addition, the Respondent produced and initially relied on two witness statements from Mr Tomasz Ignasiewicz, a former worker; and another

from Ms Jowita Romanek, the Compliance Officer (“the CO”) marked [R3]. Mr Ignasiewicz’s witness statements were produced in both Polish and English. Mr Ignasiewicz had not attended for the hearing. If he attended a Polish interpreter would be needed. Upon further consideration the Respondent decided not to use the evidence or witness statements of Mr Ignasiewicz, so no exhibit number was allocated to them.

10. The Appellant company relied on the witness statement of Mr Moez Bhatia which was marked [APP1].
11. The Respondent prepared a written submission entitled ‘Respondents’ position’ for the hearing on 10 September 2019. The Tribunal marked that document [R2].

### **Closing Submissions**

12. The Respondent’s Counsel, Mr Redpath, relied on the position document [R2] in closing. In addition, he reminded the Tribunal that as it was an appeal the Tribunal was considering the matter afresh. It was not simply a matter of considering the reasonableness of the original decision. However, he noted that the evidence relied on in this appeal was the same as the evidence before the original decision maker. The Tribunal’s evaluation therefore would need to be the same as the original officer had made. The officer would have used their ‘best judgment’ in considering all the information and circumstances in the round and reaching a best judgment as to whether the arrears arose. The Tribunal could have regard for example to the methodology applied in calculating whether there were arrears due.
13. The burden of proof, he submitted, was clearly on the Appellant to show that the national minimum wage had been paid. He also asked the Tribunal to have regard to the responsibility under the NMWA on the employer to keep sufficient records.
14. He then addressed the documentary evidence which the company relied on to show the Tribunal that the national minimum wage had indeed been paid to the workers affected. These were the time sheets and other documents (pp299-305).
15. He outlined the evidence that the officer had relied on, namely interviews with employees; the earlier investigation; notices in this case arising from Ms Romanek’s investigations; and consideration of the limited records provided to Ms Romanek. He also relied on the fact that Ms Romanek herself conducted interviews with employees and had telephone calls with a number of employees. He submitted that this provided a cogent evidential basis for her findings and conclusions. He contrasted that with what he submitted was a clear absence of any coherent record kept of the workers’ times by the appellant. He submitted that the Tribunal had to

assess whether the time sheet records were reliable for these purposes. He addressed the various aspects of that submission. He submitted that the documents did not support the case that Mr Bhatia was arguing in this appeal.

16. Further, in relation to pay statements, although they appeared to reflect the RTI submissions, they were not sufficiently detailed to be reliable. There were no supporting documents such as contracts of employment which should assist in interpreting them.
17. He reminded the Tribunal that the Respondent has a public duty to try to enforce compliance with the NMWA. He urged the Tribunal to find that such evidence as the Appellant had produced did not reach the necessary legal standard of proof.
18. For all these reasons he submitted, there was no rational basis or no proper basis in terms of evidence on which the Tribunal could interfere with the notice of underpayment.
19. In support of the Appellant company, Mr Owen-Thomas, made oral submissions. The appeal was brought on the ground that the amounts calculated were incorrect. He accepted that the burden was on the company to prove that they were incorrect. He submitted that there were two ways, at least, of demonstrating the inaccuracy. The first was to look at the alternative correct figure from the company or to see if the company had sufficiently undermined the evidence on which the CO relied. He acknowledged that the position in law was that the notice stood unless the Appellant showed that the sums were incorrect.
20. He urged the Tribunal to review the cogency of the evidence from the CO which necessarily depended on the cogency of the evidence that she had relied on. Was, he submitted, the evidence which Ms Romanek gathered in the course of her investigations sufficiently cogent to support her conclusions? He urged the Tribunal to bear in mind that whilst the CO relied on statements from certain employees as to what the position was, the employees had an interest in the outcome and stood to be awarded potentially significant sums.
21. He specifically submitted that the hours that the Respondent was relying on were inherently improbable. It was inherently improbable that anyone was likely to accept £25 per day and tell the Revenue a lie when given the opportunity. He further submitted that it was inherently improbable that the employees or workers would sign time sheets which were so wildly inaccurate. He submitted that this called into question whether the employees or workers understood what they were signing. All in all, he submitted, that the evidence of Mr Bhatia was to be preferred.
22. He further submitted that the question that the Tribunal should ask itself

was whether I was satisfied on Mr Bhatia's evidence that he was stating the correct number of hours worked by the employees and he urged me to answer that in the affirmative. He also made some further submissions about the evidence that had been heard in terms of the hours worked and the arrangements in relation to any breaks and absence from the site.

23. Mr Owen-Thomas submitted that if I accepted Mr Bhatia's evidence, I could find that the time sheets were correct and the deductions were correct but not the hours Mr Bhatia required the staff to be present. Alternatively, the Tribunal could find that the time sheets were correct but the deductions were not authorised. If so, it was still incumbent on the Tribunal to find the notice was incorrect. If the Tribunal considered that the notice needed to be rectified, it ought to direct it to be rectified in accordance with the summaries (p305); or, in accordance with the time sheets, ignoring the deductions.
24. He addressed the Tribunal on the issue of Mr Bhatia's credibility.

#### **Relevant Law**

25. There was no dispute as to the applicable law.
26. Although most references in these reasons are to the National Minimum Wage Act, there was no dispute that the National Minimum Wage Regulations 1999 ('the Regulations') were also applicable.
27. Section 1(1) of the Act provides that: -

"A person who qualifies for the national minimum wage shall be remunerated by the employer in respect of his work in any pay reference period at a rate which is not less than the minimum wage."
28. Section 19 of the Act gives a compliance officer power to issue a NOU. Section 19A provides for a compulsory penalty which at the time that the NOU in this case was issued, was set at 200% of the underpayment due to the worker, but no less than £100 and no more than £20,000.
29. A person on whom an NOU is served may, pursuant to section 19C, appeal within 28 days to the Employment Tribunal against one or all of the following: -
  - a) The decision to serve the notice;
  - b) Any requirement imposed by the notice to pay a sum to a worker; and
  - c) Any requirement imposed by the notice to pay a financial penalty.

30. Section 28 of the Act, with the sub heading “Reversal of burden of proof”, provides that:

“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.”

31. Further, it is the responsibility of the employer to keep sufficient records to show that the national minimum wage has been paid. Section 9 of the NMWA provides that:

“For the purposes of this Act the Secretary of State may by regulations make provision requiring employers

- (a) to keep in such form and manner as may be prescribed, such records as may be prescribed; and
- (b) to preserve those records for such period as may be prescribed.”

32. Section 14(1) of the A provides that:-

“An officer acting for the purposes of this Act shall have power for the performance of his duties –

- (a) to require the production by a relevant person of any records required to be kept and preserved in accordance with regulations under Section 9 above and to inspect and examine those records and to copy them”.

33. In this context regulation 38(1) of the Regulations provides that:

“The employer of a worker who qualifies for the national minimum wage shall keep in respect of that worker records sufficient to establish that he is remunerating the worker at a rate at least equal to the national minimum wage”.

Further, regulation 59(1) provides that:

“The employer of a worker who qualifies for the national minimum wage shall keep in respect of that worker records sufficient to establish that he is remunerating the worker at a rate at least equal to the national minimum wage”.

34. Finally, the parties were agreed that the workers in question were ‘unmeasured workers’ for the purposes of the national minimum wage calculation. Part 5 of the regulations cover hours worked for the purposes

of the NMW. Regulation 30 provides that:

“Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid –

- (a) by reference to the time worked by the worker;
- (b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or
- (c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.”

35. Further, regulation 44 provides that:

“Unmeasured work is any other work that is not time work, salaried hours work or output work.”

### **The Issues**

36. As set out above the parties appeared to be in agreement that the workers in question were ‘unmeasured workers’ under regulation 44 for the purposes of the national minimum wage issue.

37. The working hours were disputed. The Appellant company relied on the time sheets and RTI returns which provided a much-reduced number of hours worked. The Respondent did not accept that the time sheets (and therefore the RTI data which was based on the time sheets) were an accurate or reliable record of the working time. The NMW Compliance Officer preferred the evidence given by the workers in interview which is that they worked throughout the opening hours of the business. The Compliance Officer had taken an average number of workers’ hours and included relevant deductions from this.

38. The pay received was also disputed. The Appellant company relied on RTI returns and pay summary documents which reflected the hours recorded on the time sheets. As with hours worked, the Compliance Officer did not accept the RTI and pay summary documents were an accurate or reliable record of the pay received. The Compliance Officer preferred the evidence given by the workers in interview which is that they were paid a day rate irrespective of the total hours worked (cf pp 287 and 291).

39. Regulation 44 which provides for unmeasured work replaces regulation 6 of the 1999 Regulations which provided that unmeasured work included

“work in respect of which there are no specified hours and the worker is

required to work when needed or when work is available”.

These were simply stated to be an example of unmeasured work in regulation 6.

40. There is nothing in the regulations that provides detail of what are sufficient records. The BIS Guide lists the following examples of records that may suffice:
- i. Total pay paid to the worker;
  - ii. Overtime, shifts or other circumstances where there are increased rates of pay;
  - iii. Details of any allowances;
  - iv. Any deduction or payment for accommodation;
  - v. Payments and deductions for expenditure incurred by the worker in connection with the employment;
  - vi. Payments for travelling to a temporary work place and any associated subsistence and accommodation which are allowed as deductions from earnings under section 338 of the Income Tax (Earning and Pension) Act 2003
  - vii. The amount of tips given to the worker through the payroll (although these only counted towards NMW pay up to, and including 30 September 2009);
  - viii. The total number of hours worked;
  - ix. Any absences; for example, rest breaks, sick leave, holiday;
  - x. Any travel or training during work hours;
  - xi. Contracts or other agreements with the worker;
  - xii. Worker’s dates of birth;
  - xiii. Bank statements or other commercial documentation; and
  - xiv. Documents to show why a worker is exempt from the NMW.
41. Regulation 59 in the 2015 Regulations was formerly regulation 38(1) of the 1999 Regulations.
42. The Appellant company is a limited company and has been trading since 5 May 2013 providing car washing, valeting, waxing and minor repair services at premises in London SW8. There was no dispute about the background of the involvement of the Respondent.
43. Following an anonymous report to HMRC, a Compliance Officer (DP) conducted an investigation into the Appellant and the issue of minimum wage compliance in 2016. During that inquiry, Mr Bhatia told DP that working hours were flexible between 8.00am and 7.00pm, and there were no time sheets recording the hours worked. He stated that he currently had six workers who worked between four to five hours per day. The workers confirmed the information provided by Mr Bhatia, stating that they generally worked four to six hours per day over five to six days per week (thirty hours per week) and received the same pay each week at a



national minimum wage rate. The workers also said that they worked between 8.00am and 7.00pm although no specific start and end times were provided and they indicated that they were not being paid if it was not busy (pp220-264).

44. DP advised Mr Bhatia to start implementing time sheets/records of hours worked for the workers; to obtain signatures for cash payments; and to keep relevant records for at least three years (pp73-75).
45. On 12 August 2016 after giving this advice, DP received a written response from one of the workers, Mr El Achkar, with an enclosed letter stating the workers had always been paid NMW for the hours they worked and that there were no payments due to them. The letter was signed by Mr El Achkar, Mr Petrescu, Mr Pekala and Mr Tatar (pp82-83).
46. On 19 August 2016 DP sent national minimum wage questionnaires to seven current and ex-workers seeking further information but no response was received by the deadline provided (pp84-94).
47. The DP then closed the enquiry on 1 September 2016 without having issued a notice of underpayment, writing to Mr Bhatia to confirm his decision. He concluded that the workers at Speed Car Wash Specialist Limited were unmeasured workers for NMW purposes, however, he had been provided with insufficient evidence to demonstrate NMW arrears were due to the workers (pp95-96). In that letter to Mr Bhatia, DP indicated that although the check was being closed, from the information he had seen Mr Bhatia and the Appellant company appeared to be paying their workers at least the correct rate of national minimum wage, he continued:

“If I receive information in the future that suggests you are not paying your workers at least the correct rate of national minimum wage, I may contact you again.”
48. He also recorded the advice that he had given to Mr Bhatia during the review (pp73-75).
49. The workers who were the subject of the investigation were engaged in car washing.
50. Under the heading ‘organisation of work force’ in the notes of DP’s interview with Mr Bhatia on 3 June 2016 (p73) he noted that there were six current workers in the business, that they did variable hours (four to five hours per day, twenty-four hours and thirty hours per week). He noted that they worked on Public Holidays and that there would be two people working per car. Mr Bhatia mentioned that he also allowed temporary use of the premises as the workers’ address until they had their own postal addresses.

51. Under 'terms and conditions' he recorded that the workers were given 'verbal contracts' and that Mr Bhatia said that working hours were very flexible, 'done on trust'. DP recorded that a few hours worked in one month were expected to be carried over to the next month.
52. The Tribunal saw no evidence of any sort of detail which substantiated this description. DP's note recorded that the workers were paid only basic pay and that they worked their respective hours 'between opening times'. He noted that on days when the business was not busy, the premises closed earlier. He also noted that breaks were paid and that workers could take breaks 'as and when required'.
53. He also noted that workers were paid cash on the last working day of the month and that there was no signature for the case payment. The cash from wages was taken from the takings from the business and paid minus any advances.
54. It was noted that Mr Bhatia recorded payments to be made on an Excel spreadsheet and that he had relevant records on PAYE dating back three years.
55. It was also noted at this time that there were no time sheets for the workers and that Mr Bhatia simply trusted the workers to arrive on site and do their respective hours. As stated above, among the advice given to Mr Bhatia was that he should start implementing time sheets/records of hours worked for workers.
56. At the time of the interview in June 2016 the documents that were available to DP were:
  - i. Salary schedule for 2015/2016 with employee names, date of birth, address;
  - ii. Receipt for records posted by Mr Bhatia;
  - iii. Employee pay and deduction records for named employees.
57. Following that interview, DP wrote to Mr Bhatia in essence expressing his dissatisfaction with the evidence provided and based on the interview with the workers in relation to national minimum wage compliance. He set this out to Mr Bhatia in a document (pp76-79) dated 2 August 2016. Mr Bhatia responded by email sent on 17 August 2016 addressing some of the points raised by DP (p80). He explained 'the confusion between the hours worked and payment made as follows':

"The payment to staff are based on the actual hours worked. Therefore, all staff are **currently** offered 30 hours per week but it does not mean that

they actually work for 30 hours, it could be more or less depending on the circumstances.

Staff are paid on actual hours worked of which I have already advised your earlier through my email dated 11 July 2016 where staff are paid by number of hours worked. This was commented by you in your email dated 30 June 2016 at point 4 in that email. For your information, [Mr] El Achkar hours increased his hours to 30 from 1 July 2016.

I have examined the names of the staff in your letter and discussed the matters with them. These staff confirm that they have not/did not work 30 hours. As a result, there has been no underpayment to them.

As a result of this exercise all staff have signed a letter dated 12 August 2016 addressed to you to state that they have always been paid national minimum wage. Copy of the signed letter is attached. ...”

58. Mr Bhatia then went on to explain that one particular member of staff had not signed the letter because he was currently on holiday but that he would be shown the letter from DP of 2 August on his return at the end of August 2016.
59. The Tribunal noted in relation to that letter that the letter contained the names of five members of staff including the member of staff who was described as being abroad on holiday with a space beside for his signature (p82). The letter from the staff was dated 12 August 2016 and one of the signatures was that of Mr L Achker. DP sent a letter to him dated 19 August 2016 which Mr El Achkar acknowledged receipt of (p83). In the letter in response he enclosed a copy of the 12 August 2016 letter signed by him and he referred to it as ‘self-explanatory’ (p83).
60. In essence DP had sent questionnaires to the workers to verify the position dated 19 August 2016 (pp84-94). The reply date was 25 August 2016.
61. It was in the light of the reply from Mr El Achkar and the lack of response from the other members of staff that the letter of 1 September 2016 was sent to Mr Bhatia.
62. On 20 October 2016 HMRC received a completed NMW questionnaire from Tomasz Ignasiewicz (pp97-100) in response to the letter from DP on 19 August 2016. In the questionnaire Mr Tomasz Ignasiewicz stated:
  - i. He worked at the car wash from September to November 2015.
  - ii. He worked from 8.00am to 7.00pm, from Monday to Sunday;
  - iii. He had 30 minutes break from 12.-00-12.30pm;

- iv. His rate of pay was £25 per day for the first two weeks after which the rate was £30 per day;
  - v. His pay was £175 per week and he was paid weekly in cash.
63. As a result of receipt of this questionnaire the case was allocated to another Compliance Officer namely Ms Romanek ("JR"), the Compliance Officer who gave evidence in this case. She was asked to review the questionnaire and complete any follow-up actions.
64. She telephoned Mr Tomasz Ignasiewicz on 28 October 2016 (Notes pp101-102) and he confirmed that the details he provided in the questionnaire were correct. The Tribunal noted that a phone call was received from a person who described himself as Tomasz Ignasiewicz but he was apparently using the telephone of another member of staff, Mr Pekala. The telephone call lasted some 26 minutes.
65. Mr Ignasiewicz was recorded as saying to Ms Romanek that he worked eleven hours per day including one thirty-minute break per day. He could not remember the exact dates of his employment but he believed that he started on 28 September 2015 and left on 20 November 2015. He estimated his absence from work as half a day per week for things such as short breaks and times he asked to have off for other activities.
66. During the same telephone conversation Ms Romanek spoke to a member of staff who described himself as Mr Pekala who had recently ceased working for the Appellant and wanted to provide further information. Ms Romanek asked him why he had previously signed a statement confirming that he was paid national minimum wage if this was not the case. Mr Pekala told Ms Romanek that they 'the workers' were simply made to sign a statement by the employer and had also been instructed to answer by saying that they received £7.20 per hour and worked six hours per day, thirty hours per week. Mr Pekala said that at the time of leaving the employer he had worked in the car wash for over a year.
67. Ms Romanek arranged to speak to Mr Pekala again on 31 October 2016 to discuss matters further. However, he failed to call back (pp102 and 105).
68. On 2 November 2016 at 4.25 Ms Romanek conducted an observation of the business premises. She observed three workers sitting down at the premises and another walking around a car. The lay-out of the car wash meant that some areas were not visible from the entrance therefore it was not practical to conduct any further observations (p103). She left the site within five minutes.
69. On 3 November 2016 Ms Romanek telephoned Mr Ignasiewicz again at

12.03pm and asked whether the workers were at the car wash at all times or if they worked shifts. Mr Ignasiewicz replied that they were required to be at the car wash for a full day from 8.00am to 7.00pm.

70. Ms Romanek noted that this was consistent with the initial complaint and therefore she decided to make a further unannounced visit to verify the findings from the initial investigation.
71. JR then spoke to Mr Ignasiewicz again on 11 November 2016 (Note on p106) and he informed her that Mr Pekala had gone back to work at the car wash where he lived free of charge, and no longer felt comfortable discussing this matter. Mr Ignasiewicz also expressed the view that it was unlikely that any other workers who could corroborate his version of events would come forward.
72. On 15 December 2016 Ms Romanek then made an unannounced visit to the premises with another Compliance Officer (SV) and Officer IT from HMRC Systems Evasion and Analysis Team (SEAT).
73. Mr Bhatia was at the premises and six workers were also present. The officers identified themselves and informed Mr Bhatia that they had been authorised to conduct an unauthorised visit under section 14(1) of the 1998 Act. Mr Bhatia acknowledged this and agreed to proceed with the meeting. Ms Romanek explained the purpose of the repeat visit and informed him that HMRC had received new information regarding potential non-payment of NMW rates. She indicated that she would also like to check whether the advice from DP in regard to record keeping had been implemented in the business.
74. Notes of the interview were compiled by Ms Romanek on 17 December 2016 from notes that she took during the meeting (pp 108-110). There was no dispute with the substance of them. The material points were put to Mr Bhatia during cross-examination.
75. Ms Romanek asked to see the time sheets that Mr Bhatia had been advised to keep following the previous visit and he stated that he kept time sheets and payslips at home as there was no room for them at the car wash. He stated to her that workers got advance payment with the remaining pay given at the end of the month. When he was asked to give an example of amounts paid in advance, Mr Bhatia said that the amounts given were £10 or similar. He confirmed that he took signatures of workers for cash payments but no paperwork was available for inspection at the visit.
76. Mr Bhatia informed Ms Romanek that the opening hours for the business were 8.00am to 7.00pm or 6.30pm, Monday to Sunday. The car wash was open eleven hours per day and seventy-seven hours in total per week and all workers got a thirty-minute break per day.

77. Mr Bhatia said that he gave the workers one day's notice of the hours they would work the next day and would sometimes provide a sheet with hours to be worked. Mr Bhatia provided an hour by hour breakdown of worker cover for a typical week which Ms Romanek recorded (p111). Mr Bhatia initially said that he did not work at the car wash but at the end of the visit said that he did work hours in the afternoons and that the hours in the morning were covered by the other director, Mr M Barakat. He explained that typically there were five workers present every day of the week for all opening hours which was later reduced to four to five to adjust the figure for bad and good weather days respectively. Ms Romanek put to Mr Bhatia that according to the information which he had provided namely four to five workers for all seventy-seven hours of trading weekly, this gave a total number of hours for which national minimum wage was due of between 308 and 385 hours weekly. Mr Bhatia did not comment but confirmed that the average did not include himself. Ms Romanek told Mr Bhatia that the number of hours worked by each worker was on average at least  $[308/7]$  equals forty-four hours per week on that basis, to which Mr Bhatia explained that sometimes cover is three workers only because they are allowed to go early.
78. He stated that aside from Mr Berisha who worked twenty-five hours per week and had three days off, all other workers worked thirty hours per week and had at least one day off. All seven workers got paid £7.20 per hour and had verbal contracts.
79. In relation to the question of whether any of the workers used the business premises which were in railway arches as accommodation, Mr Bhatia initially denied this but later confirmed that four workers lived at the business address temporarily until they found a room. Mr Bhatia told Ms Romanek that there was no charge for accommodation and there were no beds and no washing facilities on the premises.
80. Ms Romanek took the view, in those circumstances, that there was no requirement to further consider the accommodation off-set.
81. Ms Romanek told Mr Bhatia that Mr Ignasiewicz, his ex-worker, had contacted HMRC stating that he did not receive NMW for all hours he worked for the business and explained the grounds put forward in support of this. Mr Bhatia confirmed that he had no time sheets for Mr Ignasiewicz as he had left before the first NMW visit when he was informed that he must keep records of hours worked.
82. During the visit the six workers who were present were also interviewed. These were Mr B Petresco (at pp265-266); Mr F Berisha, who appeared to be a supervisor (notes at pp266-267); Mr C Frasila (notes at pp267-268); Mr F B Frasila (notes at p268); Mr D Tatar (notes at p269); and Mr K Pekala (notes at p269A).

83. Mr Petresco confirmed that he did not have a contract of employment but had a verbal agreement. He initially said that he worked from 8.00am to 5.00pm every day and was paid 'when cars come in'. He said that he did not get paid when no cars came in. Later, when asked to specify start and end times each day, he stated that he worked six hours per day between 8.00am and 7.00pm from Monday to Sunday. He stated that he got £7.25 and got paid in cash monthly. He confirmed that he received payslips. He stated that he did not sign for cash payments and that he had started work in April 2015.
84. The next member of staff, the supervisor, Mr Berisha stated that his working hours were varied, that he was off on Monday and Tuesday, and that on Wednesday he worked from 12.00pm to 4.00pm. He stated that on Thursday he worked from 3.00pm to 7.00pm and then on Friday, Saturday and Sunday from 12.00pm to 4.00pm. He said that his hourly pay was £7.20 and that he was paid £180.00 per week. He stated that he was paid weekly on Sunday in cash which he did not sign for. He said that he received payslips and started working three years previously.
85. Mr C Frasila confirmed that he lived at the car wash free of charge and that he worked eleven hours every day and had one day off per week. He stated that his pay rate was £40.00 per day and that he was paid every Sunday in cash. He also stated that he did not get payslips and started work six months previously.
86. Mr F Frasila confirmed that he lived at the car wash free of charge. His hours of work were from 8.00am to 7.00pm, seven days per week and his pay rate was £25.00 per day. He was paid in cash. He had no contract and did not get payslips. He started work two months previously.
87. Mr Tatar's information was along similar lines but it is not necessary to set out the evidence relating to him as he was excluded from the effect of the notice.
88. Finally, Mr Pekala confirmed that he lived at the car wash free of charge, that he did not have a contract and that Mr Bhatia wrote down his hours of work. He stated that he worked six days per week from 8.00am to 7.00pm and that everyone had a thirty-minute break. He said that he was paid every Sunday and that the previous week he had got paid £240.00 in cash which he did not have to sign for. He started work in either April 2013 or 2014 but could not remember which.
89. During the visit Mr Bhatia was asked by the officers whether Officer I Thompson could have sight of the CCTV images. Mr Bhatia informed them that the CCTV was not recording and he did not know the password (p108). The Appellant's case in oral evidence was that the CCTV machine/camera was operating at the time.

90. At no point subsequently or at the hearing were any CCTV images produced by Mr Bhatia.
91. At the end of the visit Ms Romanek asked Mr Bhatia to provide time sheets and corresponding pay slips for the months of October and November 2016 which he had confirmed to her that he held. In the event, these documents were not provided until the beginning of January 2017, some two to three weeks later. The time sheets showed a steady pattern of hours worked by the workers. For example, K Pekala and D Tatar worked five days each day they worked over the two-month period and both worked one hundred and thirty hours per month (thirty hours per week) and received the same pay (pp299-300). The monthly payslips provided did not show any weekly advances of payments made or rate of pay. The time sheets showed that workers generally worked between 8.00am and 7.00pm with one to two-hour breaks and between two to five additional hours deducted from the working time each day (pp306-362).
92. The information provided by Mr Bhatia at this stage was inconsistent with the information provided by the workers.
93. Ms Romanek sought to investigate further. She spoke to D Tatar on 25 January 2017. He was the only worker that she was successful in contacting. Mr Tatar's account was that they all worked eleven hours a day. He said that there were four of them now as Mr Pekala and Mr Petrescu had left. Mr Tatar confirmed that he received £40.00 per day and that the other man called Bogdan got £30.00 and that Kristi and Florin got £40.00 per day.
94. This information was consistent with information which had been received earlier by the Compliance Officers to the effect that there was a degree of variance in the pay as between £30.00, £40.00 and one person who got £50.00 per day.
95. Mr Tatar indicated that the workers got a thirty-minute break a day if it was not busy but if it was busy then they did not get that. He stated that he had not had a day off for 10 days and that days off were neither scheduled nor guaranteed. He also stated that if it rained and the business was slow, some would get sent home for half a day off but if it was busy they did not have time off.
96. Ms Romanek asked Mr Tatar to inform the other workers that she would like them to contact her to discuss this matter and get their confirmation of the details that he had provided (p114). On 20 January 2017 Mr Tatar informed her that he had asked the other workers to contact her but they did not want to do this and said that they just wanted to work (p115).
97. There was then further telephone contact between Ms Romanek and Mr



Tatar on 14 March 2017. He informed her that Mr Pekala was now back at the car wash having returned two or three weeks previously. At that point he reported that there were five of them working at the car wash namely himself, Mr Pekala, Florin, Bogdan and Flamur. He confirmed that their hours of work were still the same with thirty-minute breaks and that they had one day off per week. In answer to Ms Romanek's questions about their working hours, Mr Tatar said that sometimes he sat all day as there were no car and sometimes he worked all the time and it was very busy. She asked whether he was allowed to leave the business premises if it was not busy to which he replied that if a car came, they were required to work (p116). JK tried to contact Mr Tatar again the next day as he had requested at the end of the telephone conversation on 14 March but her call was not answered. She eventually spoke to Mr Ignasiewicz on 17 March 2017, who informed her that the workers did not want to talk as they were afraid of losing their jobs (p117).

98. On 11 April 2017 Ms Romanek received a telephone call from Mr El Achkar who informed her that he was a manager at the car wash. He stated that he worked thirty hours a week and worked various hours from Monday to Saturday for which he was paid £7.20 per hour and he was paid every Saturday cash in hand. He informed Ms Romanek that there were four to five workers employed at the car wash and there could be anything from three to five workers on a shift depending on the weather conditions (p118).
99. At that point Ms Romanek believed that the employer might have been paying the correct NMW rates for the predetermined 24-30 hours per week: R3 para 37. Those hours covered those which the employer estimated the business had customers and had determined should count as working time. She concluded that the remaining hours were unpaid as was indicated by the responses from numerous workers to the effect that there was a 'no car – no pay' arrangement. This was also supported by evidence that the employer was consistently deducting regular hours as evidenced in the time sheets provided.
100. In relation to this evidence, the Tribunal found it quite unlikely that the flow of cars into the business would yield such a regular result.
101. There was no evidence produced of the timings of the cars being dealt with at the car wash.
102. Ms Romanek took the view that the responses from the interviews undertaken during the unannounced visit on 15 December 2016 were a truer indication of what happened in practice and she believed that the earlier responses to DP on 3 June 2016 were as a result of the workers having been schooled on how to answer the questions to support the employer's position. The Tribunal noted that the visit in June 2016 was announced whereas the visit in December 2016 was unannounced.

103. Working on the basis that the workers were 'time workers' and were therefore being paid an hourly rate and were paid for the hours they worked. She concluded that the hours that the workers were being paid for did not include those hours where there was no work but that the workers were required to remain on the premises at those times. This resulted in her calculations in an underpayment of national minimum wage. She therefore submitted draft calculations to Mr Bhatia with an explanatory letter on 4 May 2017 (R3 para 42).
104. Mr Bhatia responded on 1 June 2017 disagreeing with the calculations (pp125-127). He also challenged the hours that a specific worker was working namely Mr Berisha, who he said worked twenty-four hours per week. As this was consistent with the information previously received about Mr Berisha's working hours from Mr Berisha himself, Ms Romanek reviewed the calculations and removed him from any future calculations. She also amended the calculations to include gross figures as payments made by the employer. However, she did not accept that the time sheets were a true reflection of the hours worked and considered that the pay reflected in RTI could not be relied on as it had been calculated at NMW rates for the reduced hours shown on the time sheet. On that basis she sent revised calculations to the employer on 28 July 2017 (pp138-143).
105. Ms Romanek then had a follow-up meeting with Mr Bhatia at a pre-arranged time on 16 August 2017 (notes – pp144-145). At this meeting she requested sight of additional records including time sheets for the period from July 2016 to the end of April 2017 (excluding the records for October and November 2016 that she had already received) and payslips for the months of February and April 2017.
106. During this meeting Mr Bhatia provided time sheets for the period from December 2016 to the end of April 2017 (pp339-362). He stated that the records for the period from July 2016 to the end of September 2016 were not available as they had been stolen. Ms Romanek provided him with copies of her revised calculations which he said that he had not received.
107. During the meeting the following information was also gleaned: -
- i. In relation to the one-hour break-times that Mr Bhatia recorded on each time sheet, he was asked about the discrepancy between the previous account which had been given that breaks were thirty minutes and that this account had been given both by himself and his workers. Mr Bhatia said that they occasionally had one hour.
  - ii. In respect of the time sheets showing deductions of four hours' work per day from most workers, Ms Romanek suggested that the workers were not being paid for times when there were no cars to wash. Mr Bhatia stated that during those four hours the workers

'walk away' from the business and this time is recorded. No documentary confirmation of this record was produced to the Tribunal. He also stated that when the cars arrived, they were called to come back to work. Ms Romanek pointed out the consistent picture of the number of hours when workers 'walk away' across all the days and that she believed that it was unlikely that the workers chose to 'walk away' for similar hours each day. The Tribunal adds to that observation that it would appear unlikely that the workers would have reason to 'walk away' for similar hours each day. In response, Mr Bhatia reiterated that the number of hours that they were paid for were the number of hours that they worked.

- iii. Another point put to Mr Bhatia was that the time sheets were pre-populated with hours totalling thirty hours work each week without reflecting the actual hours worked. Mr Bhatia offered no comment. There was no dispute that this was an accurate description of the paperwork.
- iv. Mr Bhatia gave Ms Romanek a letter dated 25 July 2017 signed by Mr Pekala. The letter was written in English and confirmed that he had always been paid NMW for hours actually worked and no further payments were due to him (p26). It had been typed up and the only manuscript information on that letter was the name of Mr Pekala, the date underneath it and the name of Mr Tatar beside the pre-populated text which had their names on. Mr Tatar purported to be signing as a witness. Ms Romanek's observation which the Tribunal agrees with is that the content of this statement was a change of position from the information previously provided by Mr Pekala during the unannounced visit on 15 December 2016. She noted that Mr Pekala had previously stated that he had been asked to sign an incorrect statement.

108. Following the meeting, Mr Bhatia was given a further opportunity to review the calculations and to provide any further information relating to them. He sent a letter to Ms Romanek dated 30 August 2017 received by her on the same date (pp146-155) in which he stated that further corrections were needed. He stated that not enough consideration had been given for hours lost due to adverse weather conditions and he provided averages of rainfall for London for the years 1981-2010.

109. Following receipt of this information, Ms Romanek made final adjustments to the calculations and submitted a further letter to the Appellant by letter dated 17 November 2017 (pp156-159). She made the following adjustments: -

- i. An amended end date of employment for Mr Ignasiewicz to 29 November 2015;

- ii. Amended periods of work for F Cercel and C Frasila as per the information provided by the employer which was supported by RTI submissions.
110. She decided not to amend the hours as worked that were weather dependent as the static number of hours worked every day as recorded by the employer indicated that adverse weather conditions did not affect the business to the extent that Mr Bhatia had indicated. She arrived at a figure of £38,433.14 for seven workers.
111. There was further correspondence between Ms Romanek and Mr Bhatia, and this culminated in Ms Romanek sending a formal notice of underpayment on 12 December 2017 to the Appellant.
112. There was no issue about the Respondent's compliance with process therefore no reference is made to it in these findings of fact.
113. Ms Romanek also wrote to all the workers named on the notice of underpayment on 18 December 2017 informing them of the outcome of the review and identifying the arrears which, in her opinion, were due to them (pp171-176).
114. Mr Bhatia continued to correspond with her, challenging the basis for her calculations.
115. On 12 March 2018 Ms Romanek received an email with an enclosed copy of an NMW appeal which was sent from another department and was dated 10 January 2018 (pp20-29).
116. In April, May and June 2018 she made further telephone calls to clarify details of hours and pay with the workers, and this led her to reconsider the type of work category (pp186-189). The workers contacted at this stage confirmed that they received the same day rate and the same pay each week. They also said that on occasions they would take additional time off, such as when they needed to do something in the city for a couple of hours or go to a shop for five to ten minutes. They also mentioned that the car wash could close up to an hour early during rainy days or else they could have half a day off during rainy days. Some stated previously that the regular breaks could be shorter or not taken during busy times.
117. Ms Romanek accepted this information coming from the workers of being paid a day rate for varying numbers of hours.
118. In the light of part 5 of the 2015 Regulations, she concluded that the annual hours could not be ascertained so salaried type of work was not appropriate. Further, she could not establish the direct relationship

between pay and hours worked so time work was not appropriate. The workers were not paid in relation to a number of cars washed, therefore out-put work could not apply. In her opinion, therefore, the workers were doing unmeasured work for NMW purposes. She therefore decided to withdraw the original notice and recalculate the arrears in light of this change in the assessment of the type of work.

119. She informed Mr Bhatia of this on 22 June 2018 and sent the replacement notice (pp43-69).

120. The basis for the new notice was as follows: -

- i. In respect of adjustments to hours and pay for absences, she estimated that the workers worked 52.5 per week on average after two half-days had been taken out for bad weather conditions and additional occasional shorter days worked (as notified by the workers during telephone conversations in April, May and June 2018). However, as the work was unmeasured, the corresponding daily rate for the two half-days was not reduced as the payment could not be specifically linked to the period of absence.
- ii. She calculated the notice on the basis that the workers did not receive pay for holidays. Therefore, any period of known holiday absence or breaks in employment had been excluded from the calculations as per details provided in RTI and monthly time sheet summaries.
- iii. The workers' pay had not been increased in line with RTI submissions from January 2017. The workers contacted in May and June 2018 did not confirm an increase in pay.
- iv. Untraceable workers: Mr Tatar was no longer traceable and had been removed from the replacement notice.
- v. The arrears on the replacement notice had been calculated using the rates applying at the date the replacement notice was issued in accordance with the provisions of the Act.

121. In his witness statement Mr Bhatia raised various points about the statements which had been taken and the conversations which had occurred between the Compliance Officers and the members of staff. He did not call any of the workers to give evidence.

122. He also made points about the allowances that he believed should have been made for the weather conditions. However, the Tribunal noted that none of the pay details that he relied on recorded or corresponded with or substantiated any deductions being made in terms of time worked on bad weather days. He also relied very heavily on the fact that the staff had

provided signed statements indicating that they had been paid national minimum wage for actual hours worked.

123. The Tribunal considered that there were considerable discrepancies in the accounts given by Mr Bhatia and about the basis on which he paid his staff and the documents which he produced to substantiate this. Nor indeed did the Tribunal consider that the documentation produced was sufficient. The Tribunal noted that as soon as one tried to correlate any particular pay reference period, it was impossible to arrive at a rational explanation for the pay that was received. The Tribunal concluded on the balance of probabilities that the documentation that was produced by Mr Bhatia as to the pay that was given was not accurate or reliable. Further, the Tribunal considered that the letters purportedly signed by or received from the workers claiming to have been paid national minimum wage for all hours worked were similarly unreliable. Further, there were inadequate records documenting periods of absence. The time sheets were pre-printed with start times, finish times and deducted hours for times when the Appellant stated the workers were not working. Further, the Appellant recorded one-hour lunch breaks every day when both the Appellant and the workers indicated that they had a thirty-minute paid break.
124. The evidence from both the Appellant and the workers substantiated the finding that the business was open from 8.00am to 7.00pm Monday to Saturday and up to 6.30pm on a Sunday. This meant that national minimum wage was due for between 308-385 hours per week based on eleven-hour days worked by four to five workers. The picture portrayed by the time sheets, however, showed a weekly total of 210 hours for the seven workers at an average of 2.7 works on site at any one time. This was also contradicted by the employer's information that there were on average five workers present every day reduced to four in wet weather. This, therefore, further undermined the accuracy of the information from the employer about the number of hours worked.
125. Ms Romanek's conclusions were as follows: -
  - i. That the workers worked 52.5 hours per week on average;
  - ii. That they worked 10.5 hours for four days and 5.25 hours for two days on average at their full daily rates (the replacement notice allowed for two half-days first before a full working day); and
  - iii. The two half-days that had been removed allowed for bad weather and additional occasional shorter days worked.
126. The Tribunal concluded that the assumptions reached by the Compliance Officer were consistent with the evidence and information she obtained, on the balance of probabilities.

127. The Tribunal also had regard to the burden of proof which rested on the Appellant and considered that the Appellant had failed to provide a credible explanation as to how the hours and pay documented in the records provided would allow the business to operate. In addition, the Tribunal took into account the discrepancies highlighted above in relation to the information provided to Ms Romanek and also, for example, to the failure by the Appellant to provide CCTV information.

128. In all the circumstances, the appeal was dismissed.

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Employment Judge Hyde  
Dated: 7 February 2020

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