



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr GD Collier**

**v**

**Nuffield Garage Ltd**

**Heard at:** Watford (by CVP)

**On:** 10 & 11 August 2021

**Before:** Employment Judge R Lewis

## **Appearances**

**For the Claimant:** Mr GD Collier (his father)

**For the Respondent:** Ms M Sharp (Counsel)

## **JUDGMENT**

1. The respondent is ordered to pay to the claimant £11,696.38 in respect of under-payment of National Minimum Wage.
2. The respondent is ordered to pay to the claimant by consent the sum of £381.15 in respect of notice.
3. The respondent is ordered to pay to the claimant the sum of £97.02 in respect of holiday pay.
4. The respondent has failed to issue written particulars of employment and is ordered to pay to the claimant the sum of £762.30 in accordance with s.38 Employment Act 2002.
5. The total sum payable under this award by the respondent to the claimant is therefore £12,936.85.

## **REASONS**

1. After judgment had been given and calculations checked, these reasons were requested by the claimant.

2. This was the hearing which I directed on 19 May 2021. Following that hearing, a Case Management Order was sent on 5 June, and written reasons on 14 June.
3. For the purposes of this hearing, there were further witness statements from the claimant, his mother, and Mr Nathanielsz. A witness order required the attendance of Mr Harmer. All four witnesses gave evidence. The respondent had prepared a supplemental bundle, in which the most single useful item were extracts from the respondent's accountant's contemporaneous notes (159-162). Ms Sharp presented a full skeleton argument.
4. I had had the opportunity to read the material before the start of the hearing. There was considerable delay on the first day caused by CVP issues. The claimant, who in May had heard the proceedings but chosen to remain off camera (see paragraph 7) took part, joined by camera, and gave evidence.
5. Despite the loss of time, all oral evidence was given on the first day of hearing, followed by Ms Sharp's closing submissions. Mr Collier asked for the overnight adjournment so that he could reply briefly the following morning.
6. I gave judgment in the late morning of the second day and emailed the parties a draft calculation. I met the parties again in the early afternoon, to hear their views on calculations so that I could make any corrections. The figures were agreed, as to calculation only, and are set out in the Appendix.

### **General approach**

7. I repeat paragraphs 17 and 18 of the May Judgment and add the following points.
8. There was strong feeling at this hearing, and Mr Collier at times expressed his closing submissions in personalised language.
9. I have told the parties that it is my task to judge cases not people, to decide cases on the quality of the evidence not of the representation, and to decide on evidence, without speculation about matters of which there is no evidence.
10. I go no further in decision making than addressing the issues before the tribunal. It is not for the tribunal to advise any respondent how to manage its affairs or run its business. When hearing and deciding a case I should bear in mind that I do so with the benefit of hindsight, and without the operational demands placed on any respondent. I should not expect of any party or witness a standard of perfection; I should bring to decision making a standard of realism, of which perhaps the single major element is acknowledgment that when human beings go to work, they make mistakes.

11. That said, I repeat the observation at paragraph 20 of the May Judgment. I was concerned that this case may have been heard without full disclosure by the respondent. I raised a question on the first morning about the holiday systems applicable to other comparable employees, there being no evidence documented about any holiday system applicable to the claimant. Shortly afterwards the respondent's solicitors emailed a letter of appointment sent by the respondent to Mr Thi, appointed a mechanic on 23 July 2018 at NMW rate. That was a useful indication of systems. I noted that it referred to other documents, such as policies or a handbook, which were not available.
12. My approach to the absence of documentation has been that the burden of any prejudice caused by a failure of the respondent to produce a document falls wholly on the respondent.
13. The claimant is not to be criticised for failing to ask for a document (eg a contract) which it was the respondent's responsibility to produce. Likewise, the claimant's parents' failure to challenge the claimant's pay may indicate acquiescence, but does not discharge the respondent from its obligations to pay the NMW.
14. Finally, I note in fairness to Mr Nathanielsz that certainly for the first seven months of the claimant's work, he was, on my judgment, under no obligation to issue written terms and conditions, because the claimant was not then an employee. I accept that Mr Nathanielsz did not appreciate that the claimant was an employee until I gave judgment on the point in May 2021.
15. Even making allowance for that point, it is not easy to understand why a business in which written record keeping is important in itself should, through Mr Nathanielsz, have taken a deliberate decision not to produce any form of document, record or paperwork to or for the claimant. In 30 years or more in the motor trade, Mr Nathanielsz must have dealt countless times with paper-heavy matters such as leases of premises, purchase of equipment, insurance, and all the documentation relating to motor vehicles. Certainly, Mr Thi had received a well presented written contract of employment. Even if the respondent were, for seven months, technically correct not to provide the claimant with written particulars, it is a matter of prudence and self-interest to make written records of matters which might subsequently prove contentious or controversial. It not easy to understand why Mr Nathanielsz failed to do so.

### **Findings of fact**

16. The overarching first question for decision was to decide what were the claimant's hours of work for which he was entitled to be paid the NMW, in the period of employment covered by this case. As stated earlier, the claimant joined the respondent's payroll on 15 January 2018 and was an employee until 18 April 2019.

17. As confirmed in Mr Thi's letter of appointment, the respondent's business hours were 8.30am to 6pm Monday to Friday and 8.30am to 1pm on Saturday. Allowing for a 30 minute lunchbreak on the weekdays, I calculate a working week therefore of 49.5 hours.
18. Ms Carter's evidence was that at the relevant time, the claimant was living with her, that she saw him off to work most days in time for his 8.30 start, and that he came home after 6pm. Mr Harmer gave evidence, which I treat with great caution, that he worked those hours, as did the claimant: however, his evidence related to the second half of 2017. The claimant confirmed that he was present at work throughout opening hours, and sometimes longer. Mr Nathanielsz did not dispute that evidence, although he said that the claimant's attendance might be erratic, and he referred to sickness absence or holiday absence, of which I had no record and on which I can make no finding.
19. At paragraph 36 of the May judgment I summarised my findings on the obligation on the claimant, which I repeat:

“The obligation on the claimant was to be present at the garage and undertake the tasks he was given. They included menial tasks, such as sweeping the workshop. They included some tasks related to motor matters, such as driving the respondent's vehicles or customer's vehicles; and they included some supervised mechanical tasks.”
20. I repeat that finding. In light of the evidence I add that in general, the tasks which the claimant undertook were low level tasks, and were allocated to him as necessary.
21. I add that the respondent's expectation of the claimant was that as his tasks did not run in unbroken sequence, but might be intermittent during the day, he was required to be on hand in case he was needed. If he finished one task at 2.30, and there was nothing else for him to do immediately, he was expected to be available in case the next task did not present until 4.30. As a result, it happened that his entire working day was not productive. That is not unusual in any workplace.
22. In evidence at this hearing Mr Nathanielsz adopted the approach which I had summarised at paragraph 39 of the May Reasons: his case was that he set a budget to pay the claimant, divided it by the NMW rate, and explained to the claimant that the resulting figure represented the number of hours for which he would be paid, and that any other hours during the week counted as unpaid, and the claimant was at liberty to remain on the garage premises so long as it was open and so long as he wished.
23. Mr Nathanielsz' evidence was that he repeated this calculation and explanation each time there was a change in the relevant NMW rate. That would have been each time the claimant had a birthday (January 2018 and January 2019) and each time the NMW rate was increased (April 2018 and April 2019). I noted (160) that the respondent's accountant recorded having spoken to Mr Nathanielsz in July 2018, when for managerial reasons, Mr

Nathanielsz stated that the system had been adjusted twice during that month. (The note at 160 is the only contemporaneous documented indication that the issue of pay, or minimum wage, and paid hours was ever in the contemplation of anyone during the claimant's employment with the respondent). That would make a total of six pay adjustments during the period of employment with which I was concerned.

24. The accountant recorded that on the occasion of each of these changes, "The changes in hours were discussed and confirmed at every change." (91A). Mr Nathanielsz confirmed that that was his case. I accept the denials of the claimant (and his parents) that no such conversation took place on any of those six occasions. I find that Mr Nathanielsz' evidence on this part of the case is untruthful.
25. I say so for a number of reasons, some of which I hinted at in paragraph 40 of the May Judgment. First, the respondent's alleged procedure was a cumbersome and difficult way of managing. Secondly, it was at odds with the lack of paper records about the claimant. The meticulous thoughtfulness of the procedure suggested at paragraph 39 was nowhere to be found.
26. Further, I do not accept the respondent's evidence because it would have required Mr Nathanielsz to do a number of other things which I find he did not do. He would have had to explain to the claimant, and no doubt his mother, that apprenticeship was not available, so the starting rate (the £3.50 per hour NMW apprentice rate) was underpaid. That would have involved making up an undeniable shortfall. It would have required him to at least be prepared to explain to the claimant how he proposed to manage the balance between availability to undertake random tasks, with the reduction in paid hours. I do not accept that Mr Nathanielsz went through that explanation once, let alone six times; or that if he explained it once to the claimant, he did so in the understanding that he might well have to explain it again to either or both of the claimant's parents.
27. In rejecting this evidence, I note two other aspects of Mr Nathanielsz' evidence which were unsatisfactory. In oral evidence he stated that he had no understanding of the minimum wage issue and how it might affect hours until he received the claimant's complaint some time after late April 2019. However, I see that the issue is referred to in the accountant's note of conversations in July 2018.
28. When asked about the accountant's report of 17 June 2019, which opens: "Further to our telephone conversation on Friday" (91A), Mr Nathanielsz stated that he had no memory of how the conversation came about. The conversation with the accountant must have been on Friday 14 June 2019. The Tribunal file indicates that Day A was 21 May and Day B was 21 June. It seems to me very likely that Mr Nathanielsz spoke to his accountant, and commissioned a report, at or around the time he was contacted by ACAS; and I struggle to accept that he had no recollection of those events.

29. My overall finding on the point therefore is that the respondent required and expected the claimant to be present at work for 49.5 hours per week throughout the period in question.

### **Other findings**

30. Turning to the framework of NMWR, Ms Sharp conceded, correctly in my view, that the relationship in question constituted time work in accordance with Rule 30, for which the reference period was one week. In that setting, Regulation 32(1) provides:

“Time work includes hours when the worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.”

31. In submission, Ms Sharp submitted that the claimant, even if on the premises, was not engaged in productive work throughout the 49.5 hours. That may well be, and that may not be uncommon. In my judgment, all 49.5 hours per week spent by the claimant at the respondent’s premises constituted time work, being time either when he was engaged in working on the tasks to which he was allocated, or was available or required to be available to undertake them as and when allocated.
32. I add one final observation. It was open to Mr Nathanielsz to manage and avoid this conflict entirely differently. At the point at which he realised that he wished only to pay the claimant for say 20 hours per week, it was open to him to explain the position to the claimant, and reduce his attendance to for example mornings only, or three days per week; or to put to him in writing that his paid hours were limited, and that the consequence of any other hours was not only that he was not paid, but that he was under no compulsion or obligation to be at the workplace. That might for example have meant that a task which Mr Nathanielsz wanted to have undertaken on a Tuesday afternoon would have to await the claimant’s return on the Wednesday morning. This was not an insoluble problem, and the accountant’s note at 160 indicates that it was known to the accountant (and almost certainly to Mr Nathanielsz) by the beginning of July 2018 at the latest.

### **Other claims and calculations**

33. Ms Sharp conceded the claim for one week’s notice pay.
34. I had no evidence of holiday taken. On the basis of Mr Thi’s contract, I accept that the holiday year began on 1 April 2019 and that there was no carry forward of holiday. I therefore accept Ms Sharp’s calculation at 1.4 days.
35. Ms Sharp submitted that no award should be made under s.38 Employment Act 2002 because of the exceptional circumstance that Mr Nathanielsz was trying to support a vulnerable claimant, and genuinely believed that he need not issue a contract of employment. I cannot accept that submission in principle. The Act is protective legislation, necessitated by the failure of

employers to carry out the obligation of issuing written contracts, for which legislation had been in place since 1963. It cannot be right to exempt an employer who mistakenly believes himself or herself to be outside the scope of the provisions.

36. In brief discussion on the second afternoon, the parties co-operated in correcting my draft calculations, leading to the document which forms the Appendix below, which is the agreed calculation of the award, based on my above findings. Although I did not raise the point at the hearing, I understand the agreed calculation to be mathematical only, and without impact on a party's right to appeal.

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Employment Judge R Lewis

Date:19/8/21

Sent to the parties on: .....

.....  
For the Tribunal Office

**Appendix: agreed calculations**

Period A was 15.01.18 to 31.3.18	
That is 11 weeks	
NMW was £5.60	
C's NMW pay was:	
11 x 5.60 x 49.5 =	3049.20
Period B was 01.4.18 to 30.01.19	
That is 44 weeks	
NMW was £5.90	
C's NMW pay was:	
44 x 5.90 x 49.5 =	12850.20
Period C was 31.01.19 to 31.3.19	
That is 8 weeks	
NMW was £7.38	
C's NMW pay was:	
8 x 7.38 x 49.5=	2922.48
Period D was 01.4.19 to 18.4.19	
That is 2.8 weeks	
NMW was £7.70	
C's NMW pay was:	
2.8 x 7.70 x 49.5=	1039.50
The total NMW pay figure is 19861.38	
Less total of cheques paid (8165) =	11696.38
Week's pay at 18.4.19 was 49.5 x 7.70 = 381.15	
Notice pay:	381.15
Holiday pay:	97.02
S.38 award	762.30
<b>Final Total</b>	<b>£12,936.85</b>