



# EMPLOYMENT TRIBUNALS

**Appellant:** East Lancashire Box Company Limited

**Respondent:** The Commissioners For Her Majesty's Revenue And Customs

**HELD AT:** Liverpool

**ON:** 21 October 2021  
& 9 November  
2021 (in  
chambers)

**BEFORE:** Employment Judge Shotter

## REPRESENTATION:

**Claimant:** Mr J Holborn, counsel  
**Respondent:** Mr P Livingston, counsel

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Notice of Underpayment was served on 5 May 2021, the appeal was received by the Tribunal on 3 June 2021 outside the statutory time limit, the Tribunal does not have the power to extend the time limit and it does not have the jurisdiction to consider the appeal, which is dismissed.

## REASONS

### Introduction

1. By a notice of appeal received on 3 June 2021 the appellant appeals a Notice of Underpayment. There is an issue about the date the Notice of Underpayment was issued and served under the National Minimum Wage Act 1998 ("the NMWA"). This preliminary hearing was listed to consider whether or not the appeal was presented within time and whether the Tribunal has jurisdiction to hear it.

2. I have before me a 220-page bundle consisting of various documents including case law relevant to this application and the issue as to whether the Tribunal has a power or discretion to extend the time limit, which I do not intend to set out in full. I heard oral submissions from Mr Holborn and Mr Livingston and took into account both Skeleton Arguments, the documents to which I was taken and case law. The following findings of facts are largely undisputed.

### The Facts

3. In a letter dated 9 April 2021 the appellant was provided by the respondent with sample calculations for 18 employees concerning alleged underpayments of the minimum wage as a result of deductions allegedly made that relate to a savings club, birthday club, bonus ball scheme, fantasy football league and tea and toast fund. At para. 19.4 the appellant was informed **“You will have to right to appeal against the notice of underpayment and must do so within 4 weeks of the date the Notice of Underpayment is issued.** Details of the appeals procedure will be included with the Notice of Underpayment” [my emphasis].

4. The letter was followed with an exchange of emails concerning whether the appellant agreed to the Notice of Underpayment being issued by email. Without the appellant’s agreement the Notice of Underpayment must be served by post. The email dated 29 April 2021 sent by the respondent confirmed **“By consenting to the notice of underpayment being issued via email will not impact the timeframes set out in the draft calculations letter** you were issued with on 09 April 2021 [my emphasis]. The appellant was aware therefore that it had 4 weeks from the date the notice of underpayment was issued to file an appeal.

5. In a return email the appellant consented to receiving the notice via email. The email stated, “I shall look out for your email and we look forward to progressing with our official appeal against the notice and hopefully putting an end to this nonsense.” The appellant understood that once the Notice of Underpayment was served it could then file an appeal, and it had 4 weeks from the date of the notice in which to do so.

6. In accordance with the agreement the Notice of Underpayment with supporting letter and factsheet was sent to the appellant at 15.11 on 5 May 2021. The appellant responded at 19.21 “I confirm receipt of this email...We shall now proceed to appeal.” The 5 May 2021 was the date of issue.

7. The Notice of Underpayment was incorrectly dated 6 May 2021, the day after the date of service.

8. The 6 May 2021 Notice of Underpayment served under section 19 of the National Minimum Wage Act 1998 (“NMWA”) sent by email, set out the amount of the arrears allegedly due, the total penalty to be paid and the final due date for payment. The Notice stated if the company disagreed with the Notice: **“You have the right to appeal against this notice. The time limit for appealing against this notice is 28 days from the date of service. The date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise.**

The Tribunal may not accept your appeal if they receive it after this date. There's more information about this in the enclosed factsheet NMW FS3" [my emphasis].

9. The appellant was provided with "Guidance notes on the notice of underpayment". Under the heading "How do I appeal against a notice?" it states:

"You have 28 days from the date of service of the notice to lodge an appeal – the date of service will be taken as 2 working days from the date of issue of the notice, unless proven otherwise.

You can appeal against the notice on any of the following grounds:

- Our decision to serve the notice.
- Any requirement imposed by the notice to pay amounts outstanding to a worker.
- Any requirement imposed by the notice to pay a penalty.

You may also appeal where a replacement notice has been issued which relates to a worker not included in the original notice.

General information about making an appeal can be found at [www.gov.uk/employment-tribunals/make-a-claim](http://www.gov.uk/employment-tribunals/make-a-claim).

For guidance, go to [www.uk/government/publications/making a claim to an employment tribunal t420](http://www.uk/government/publications/making-a-claim-to-an-employment-tribunal-t420).

However, when appealing against a notice use the specific NMW form described below

#### Where to find an appeal form?

For employers in England and Wales go to [www.judiciary.gov.uk/wpcontent/uploads/2015/03/presidential-guidance-making-statutory-appeals-20170911.pdf](http://www.judiciary.gov.uk/wpcontent/uploads/2015/03/presidential-guidance-making-statutory-appeals-20170911.pdf) and choose the form entitled 'Notice of appeal against NMW enforcement notice'.

You must lodge an appeal at an Employment Tribunal before the end of 28 days following the date of service of a notice."

10. The appellant had access to but was not supplied with a copy of HMRC published guidance "NMWM 13290 – Issuing notices of underpayment: date of service of a notice" that dealt with notices of underpayment sent by email which "are **deemed served on the same day it is transmitted provided it is done before 4.30pm unless the contrary can be proved. However, prior consent is required from the employer that a notice can be served by email**" [my emphasis]. I do not know if the appellant or its advisors who were dealing with the appeal read the Guidance, which was available to them and whilst not binding, clarified the service point.

11. The Presidential Guidance 2014 to which appellant was referred by HMRC was issued in accordance with rule 7 of the Employment Tribunals Rules of Procedure 2013 and had effect from 23 June 2014. It states that “Employment Judges and Employment Tribunals are expected to have regard to this guidance but are not bound by it”.

12. In document T420 ‘Making a claim to an Employment Tribunal’ the time limit for making an appeal to the employment tribunal is set out as follows; **“an appeal against notice of underpayment issued under the National minimum Wage Act must be made within 28-days of the service of the notice. It is important that the claim or appeal you make is presented within the appropriate time limit”** [my emphasis].

13. The notice of appeal was received by the Tribunal on the 3 June 2021. The appellant confirmed the respondent had served a Notice of Payment on the 6 May 2021 and the appeal was accepted by the Tribunal.

14. The respondent applied to strike out the appeal on the basis that the Notice of Underpayment dated 6 May 2021 had been served on the 5 May 2021 by email and the deadline date for lodging with the Tribunal was 1 June 2021 for filing the appeal, or if the service date was deemed as the date of Notice of Underpayment, the 2 June 2021 at the latest. Either way, the appeal was out-of-time.

#### The Relevant Law and legal submissions

15. Section 19 of the National Minimum Wage Act 1998 gives power to HMRC to issue an enforcement notice if it is of the opinion that a worker has not been remunerated at or above the relevant rate for the purposes of the National Minimum Wage. Mr Livingston submitted that the purpose of the legislation was to ensure employees received the minimum wage, and if paid less the time limits in which an appellant had to appeal was designed to ensure the employee was not out of pocket for any longer than necessary.

16. Section 19C is headed “Notices of Underpayment: Appeals” and provides that a person on whom a notice of underpayment is served may appeal. By subsection (2), “An appeal under this section lies to an Employment Tribunal”.

17. Section 19 deals with notices of underpayments. Section 19(2) refers to the following “the officer may, subject to this notice, serve a notice requiring the employer to pay the worker within the 28-day period as “the period of 28 days beginning with the date of service of the notice of underpayment.” Section 19(8) provides “In this section and sections 19A to 19C below the 28-day period means the period of 28-days beginning with the date of service of the notice of underpayment.

18. Consequently, by subsection 19(8), an appeal under this section must be made on or before the end of the 28-day period. Contrary to Mr Holborn’s oral submission that he was not seeking an extension of time; in effect this is precisely what he was seeking on the basis that if the appellant was caused confusion by the respondent as to the date of service, the 28-day period should be extended. To put it another way, it was not reasonably practicable for the appellant to file its appeal

within the statutory 28-day time limit given its reliance on the Notice of Underpayment and the reference to the provision that “the date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise.”

19. Rule 8 of the Employment Tribunals Rules of Procedure 2013 provides that: “A claim shall be started by presenting a completed claim form in accordance with any practice direction made under regulation 11 which supplements this rule.” Rule 1 describes a complaint as: “Anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal.”

20. Rule 5 deals with extending or shortening time and provides that: “The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.”

21. The Presidential Practice Direction, made in accordance with the provisions of Rule 7 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, deals with the presentation of claims and provides that a completed claim form in respect of appeals may be used when presenting the appeal. The suggested form was the one used by the appellant.

22. Rule 6.26 of the Civil Procedure Rules 1998 provides “a document, other than a claim form, served within the United Kingdom in accordance with these Rules or any relevant practice direction is deemed to be served on the day shown in the following table...If the email...is sent on a business day before 4.30pm, on that day, or in any other case, on the next business day after that day.” Rule 6.26 reflects HMRC published guidance NMWM 13290 and the provision that if the notice of underpayment is emailed before 4.30pm that day is the effective date of service.

#### Submissions made on behalf of respondent

23. There is no issue between the parties that the Notice of Underpayment was sent to the appellant on 5 May 2021 by email. There is no issue that the Notice of Appeal was received by the Tribunal on 3 June 2021. As far as the respondent is concerned the key issue to be decided is when the date of service was; was it 5 May (the email date) or 6 May 2021 (the date of the notice of Underpayment) or as far as the appellant is concerned, a later date i.e. on 10 May 2021, thus giving the Tribunal jurisdiction to consider the appeal.

24. It is agreed between the parties that the NMWA 1998 does not define ‘date of service.’

25. Mr Livingston’s Skeleton Argument runs to 23 paragraphs supplemented by oral submissions, which have been taken into account.

26. The key submissions are as follows:

- 26.1 As confirmed by the EAT in Bajracharaya v The Commissioner for HM Revenue and Customs [2019] UKEATPA/0796/17/BA at paras 11 and 17, there is no power for the ET to extend the prescribed time limit for bringing such an appeal or to exercise its discretion to excuse the requirement. The Court of Appeal refused permission to appeal on this point, confirming that the legislation was clear and unambiguous, and did not provide for any exception or discretion to the 28-day time limit.
- 26.2 There is no definition of 'date of service' in the NMWA 1998, however it is defined in other legislation and rules which may be considered useful by analogy: Under Rule 90(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('ET Rules'), the date of delivery, where a document has been sent "*by means of electronic communication*" is "*on the day of transmission*".
- 26.3 Under the Part 6.26 of the Civil Procedure Rules 1998 ('CPR 1998'), a document sent by other electronic method is deemed served "*If the e-mail or other electronic transmission is sent on a business day before 4.30p.m., on that day*".
- 26.4 HMRC's publicly available guidance ('NMWM13290 - Issuing notices of underpayment: date of service of a notice'), it records that "*Notices of underpayment sent by email are deemed served on the same day it is transmitted provided it is done before 4.30pm unless the contrary can be proved.*"
- 26.5 The Notice of Underpayment told the Appellant that "*The time limit for appealing against this notice is 28 days from the date of service. The date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise.*" It is submitted that in this case, it is "proven otherwise" that the date of service was 05.05.21. An assumed date of service of two working days later is only necessary in circumstances when a Notice is sent via post, as there is no record of exactly when it is received and there are delays in post being transmitted. When a Notice is sent via email, as in this case, there is a perfect record of when it was sent and received, and no such delay. This is likely why the ET Rules and the CPR 1998 note that the date of service via email is the same day as it was sent. I agreed with Mr Livingston's submission.
- 26.6 The Notice of Underpayment itself was dated 06.05.21. That is of no legal consequence in circumstances when it was received by the Appellant on 05.05.21. I agreed taking into account all of the information before and available to the appellant; the appellant was informed beforehand of the 28-day time limit and had agreed to service by email with the consequence that the Notice of Underpayment was not sent by post and the additional 2-working days for service was not applicable.

#### Submissions made on behalf of the appellant

27. Mr Holborn confirmed this was not a case where an "extension of time was required."

28. As “service” is not defined under the NMWA 1998 it must therefore be interpreted in accordance with its obligations under Article 6 of the ECHR and as a matter of common law fairness. It is, in essence a procedural question, not a question that is to be determined by statutory interpretation alone. It is clear that such a distinction can be drawn in principle – see the discussion in Pomiechowski v Poland [2012] 1 WLR 1604 at [6]. I found it was made clear to the appellant via the communications cited above, that service of the Notice of Underpayment was the day sent and received by email, and the appellant could have filed its appeal, as it confirmed immediately following receipt, within the 28-day statutory time limit.

29. Article 6(1) of the ECHR provides for the entitlement to a fair hearing in determination of civil rights and obligations. Mr Holborn submitted that Article 6 is plainly engaged in this context – see Arcadis Consulting (UK) Ltd v HMRC (2206556/2017) at [28] and Ahmady v HMRC (2404258/2017) at [11]. I agree that Article 6 of the ECHR is engaged when the Notice of Underpayment was served on the appellant and the appeal subsequently lodged with the Tribunal.

30. Mr Holborn submitted that the appellants Article 6 rights were engaged by the way in which the Notice of Underpayment was drafted and how it sets out the time limits. Mr Holborn argued the appellant should be entitled to rely on the date of the Notice of Underpayment being 6 May 2021 and the reference to the 2-days with the result that the respondent is now attempting to shorten the time period and its actions are inflexible and not proportionate when the respondent is in a position to determine the date of service which is “not in the appellant’s hands or within the discretion of the Tribunal.” The legitimate aim of enforcing underpayments of the minimum wage disproportionately impairs the appellant’s Article 6 rights because the respondent has imposed a strict interpretation without justification when it was in its gift to alter the position.

31. Mr Holborn referred me to the non-binding first instant decisions on Arcadis Consulting (UK) Ltd v HMRC (2206556/2017) at [28] and Ahmady v HMRC (2404258/2017) at [11] in which it was accepted that Article 6 right was engaged. In relation to Ahmady EJ Robinson found the time limit of 28-days had not affected the appellant’s right to appeal and had not prevented him from doing so. In Arcadis EJ Spencer considered the effect of Pomiechowski v District Court of Legnisia Poland & Another [2012] 1 WLR 1604, which was referred to by Mr Holborn in the context of a late appeal, and concluded that the appellants Article 6 rights are potentially engaged when a time limit is absolute, the relevant statute contains no discretion to extend time and the scope departure from the time limits is “extremely narrow.”

32. I found that the problem for the appellant was that Arcadis, like East Lancashire Box Company, were under investigation and with reference to the latter they were “crucially” made aware of the 28-day time limit early on and before the Notice of Underpayment was served, and knew of this time limit as recorded in the factual matrix above. Despite indicating they intended to appeal on at least two separate occasions no steps were taken until the appeal was lodged on 3 June 2021 after the deadline date, and there was no good reason for it failing to act promptly in the knowledge that the time limits were strict.

33. Mr Holborn submitted that what could not have intended was the potential injustice caused by inflexible time limits combined with the respondent's misrepresentation of what those time limits. I have attempted to paraphrase how Mr Holborn put forward his Article 6 argument that the respondent's "misrepresentation" in the Notice of Underpayment affected how the appellant went about appeal only to find themselves out-of-time after the respondent that changed their position on the date of service. The act of the respondent exacerbated the effect of a rigid application of absolute and inflexible time limits which caused the appellant difficulties in meeting them and lodging its appeal. Reference was made to see Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442 at [59] which concerned defamation and security for the respondent's costs as a condition of the appeal, where it was held Article 6(1) did not guarantee a right of appeal.

34. Article 6 requires that rights to a fair hearing be free of limitations impairing "the very essence" of the right. Further, any "restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" - see Tolstoy cited above at [59]. I do not accept that serving the Notice of Underpayment by email on the 5 May 2021 and taking the 5 May as the date of service restricted the appellant to such an extent that a fair hearing could not take place. The appellant was aware it had 28-days to appeal and chose not to take action within the deadline date despite indicating immediately after service it intended to proceed to an appeal.

35. Mr Holborn made reference to the "overly rigid application of absolute and inflexible time limits" arguing that in Pomiechowski, the Court was considering a similar mandatory time-limit for extradition appeals. In that case, Lord Mance explained at [39] that: "...there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time." The problem with Mr Holborn's argument is that it essentially requires extending the "inflexible time limits" when I had no power to do so in accordance with the EAT decision in Bajracharya cited above.

36. Mr Holborn further submitted that Article 6(1) further implies a requirement of legal certainty – see Magomedov v Russia for an example. If the state creates uncertainty as to when rights of appeal may be exercised, there may be a breach of Article 6. I took the view that whilst it is arguable the reference in the Notice of Underpayment to the provision "*The time limit for appealing against this notice is 28 days from the date of service. The date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise*" could be confusing if interpreted out of context, taking into account all of the information before the appellant as set out above, it was reasonably clear that the statutory time limit of 28-days in which to file an appeal was applicable when served by email. I did not agree with Mr Holborn's argument that the date of issue was 6 May 2021; it was clearly the 5 May 2021. I did not agree the date of "service" was 2 working days after "issue" on the 6 May 2021 unless the contrary was proved, a provision clearly designed to warn appellant's that they would have to prove if they said a document was served more than 2 days after the date of issue, which I found the appellant was unable to do. Mr Holborn argued that the service date, in this case, was 8 May 2021, or being a



weekend, the deadline the 10 May 2021 with the deadline being 7 June 2021 for issuing the appeal. I did not agree. It is unfortunate the Notice of Underpayment was incorrectly dated; however, that date has no bearing on the date of service which is a matter of fact and record that cannot be agreed retrospectively between the parties. There is a requirement for legal certainty, and the date of service of proceedings, whether in the court, tribunal or enforcement proceedings such as notices of underpayment requires legal certainty and as a consequence there are rules that must be complied with.

37. Mr Holborn argued if it were the case that the appellant has missed the deadline for an appeal, then that mistake was induced by respondent misrepresenting the deadline for an appeal. The Tribunal should interpret the word “service” as being the date that the respondent represented the document would be deemed served – that is 10 May 2021. I did not agree the respondent had misrepresented the deadline for appeal for the reasons already stated above; I do accept however that the Notice of Underpayment could be made clearer by differentiating how the 28-days service for appeal is calculated from the day of service in respect of service via email and service by first class post.

38. Mr Holborn submitted the Tribunal must interpret the legislation as such in order to avoid a breach of the appellant’s Article 6(1) rights. He argued that the respondent is a public authority, who made clear representations as to the date by which an appeal might be brought. To find that the date of service was earlier than that asserted by respondent would be to both create legal uncertainty (see Magomedov) and impose an unjustified and disproportionate procedural bar on the appellant’s appeal (see Tolstoy Miloslavsky and Pomieczowski); there is no justification for interpreting the time-limit in a manner even stricter than the respondent’s own publicly expressed interpretation when the statute is plainly open to such an interpretation. I have dealt with these arguments below in the conclusion.

#### Conclusion; applying the law to the facts

39. Sections 19(8) and 19C of the NMWA read together provide that an appeal against a notice of underpayment lies to an Employment Tribunal and must be made before the end of the 28-day period beginning with the date of service of the notice of underpayment.

40. In this case the period of 28 days beginning with the date of service of the notice of underpayment expired after 28-day beginning with the date when the Notice of Underpayment was served on the appellant with their consent on 5 May 2021 in accordance with section 19 of the National Minimum Wage Act 1998.

41. The NMWA does not allow for any extension to the time limit such as can be found in other legislation which provides for claims being made to the Employment Tribunals. Rule 5 does not apply to allow an extension of the time limit specified in the NMWA because it is not a time limit specified in the Rules. The EAT decision in Bajacharaya t/a Newari Handicraft v The Commissioners for HM Revenue and Customs UKETPA/0796/17/BA is clear that the Tribunal has no power to consider an appeal out of time.

42. The Employment Tribunals Rules of Procedure 2013 and the Presidential Practice Direction were made after the NMWA 1998 in the full knowledge of the 28-day time limit specified in the NWMA. Neither refer to how the date of service is defined.

#### Defining the date of service

43. The date of service is the key issue in this case.

44. Mr Livingston submitted the Tribunal's task was to objectively assess what the date of service was, and not what the parties understood the date of service to be. Objectively, it is the date when the email was sent and unlike service by post there is no need to assume date of service. I agreed with this submission.

45. Because there is no definition of date of service in the NMWA, Rule 90(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('ET Rules') and Part 26 of the CPR 1998 are not binding but both suggest electronic communications are delivered on the day of transmission. NMWM13290 records that "Notices of Underpayment sent by email are deemed served on the same day it is transmitted provided it is done before 4.30pm unless the contrary can be proved." Mr Livingstone invited me to interpret the Notice of Underpayment which specified "**The time limit for appealing against this notice is 28 days from the date of service. The date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise**" is evidence that the date of service by email was 5 May 2021 on the basis that the Notice had not been posted to the appellant and therefore there was no uncertainty when it came to the relevant date unlike the situation when serving by first class mail. That is the reason why the Employment Tribunal Rules and CPR provide for the date of service to be on the day the email is received. I preferred Mr Livingston's argument on this point, taking into account all of the information available to the appellant concerning service of the notice of underpayment and time limits, and not limiting it to the Notice of Underpayment.

46. Mr Holborn disagreed. He took the view that the respondent was adopting a "bold" position when what was being argued was contrary to what the respondent said in its own Notice of Underpayment and Guidance. Mr Holborn also relies upon the words used in the 6 May 2021 Notice of Underpayment submitting the correct interpretation should be that the appellant had 28 days plus an addition 2 from the 6 May 2021 and not 28-days from the 5 May 2021. I took the view the documents, on a straight-forward interpretation of the language used, did not support such an interpretation.

47. Mr Holborn argued it was open to the respondent to determine when the Notice of Underpayment was served, and to pick a later date. To paraphrase Mr Holborn's oral argument, once the respondent has picked a later date i.e. 28-days plus 2 working days from the date of service, it cannot then tell appellants that the limitation expired a couple of days before, and the respondent should have kept to their word with the result that the appeal would have been received in time. I do not accept it was open for the respondent to determine the date of service once the Notice of Underpayment had been served. It was only open to the respondent to chose when to email the Notice of Underpayment to the appellant, and after the

email had been sent and received, service had taken place for the purpose of the statutory 28-day limitation period and this had nothing to do with the intention and/or agreement of either party and thus the requirement for legal certainty was satisfied.

48. I do not accept Mr Holborn's argument that the respondent could determine the limitation date once it had emailed the appellant the Notice of Underpayment on the 5 May 2021. Prior to serving the Notice of Underpayment the respondent had in a letter dated 9 April 2021 confirmed "**You will have to right to appeal against the notice of underpayment and must do so within 4 weeks of the date the Notice of Underpayment is issued.**" There is no reference to the date of service being taken as two working days from issue unless proven otherwise. Further, had the respondent intended to extend the time in which to appeal by two days it could have specified 30-days in the notice and it did not as the statutory time limit was 28-days and no longer. Objectively, the date of service cannot be shortened or extended by any party. Whether the date of service is determined by an email being sent or a letter posted first class the 28-day period remains the same and I do not accept that the Notice of Underpayment could be interpreted to mean prospective appellants who are served by email get two extra working days compared to those served by first class post. I am further persuaded by the party-to-party correspondence exchanged, whilst it does not go to the objective assessment of the date of service, it casts doubt on the Article 6 argument adopted by the appellant, who I did not accept faced any impairment to the right of a fair trial.

49. The letter was followed with an exchange of emails concerning whether the appellant agreed to the Notice of Underpayment being issued by email. The email dated 29 April 2021 sent by the respondent was clear in its intent; the objective was to "**issue the notice of underpayment efficiently**" and in order to do so "**I will prefer to do so via email, as opposed to a postal issue**, however I need your prior consent to this" [my emphasis]. If the appellant was in any doubt, it is clear on a straightforward interpretation of the remaining paragraphs, it was consenting to "the notice of underpayment being issued via email" and not post. In a return email the appellant consented to receiving the notice via email; "I shall look out for your email and we look forward to progressing with our official appeal against the notice and hopefully putting an end to this nonsense." The appellant was well aware that when the Notice of Underpayment was sent to it by email that act started the appeal process, which it was aware following the 9 April 2021 letter, entailed a time limit 28-days from the date the Notice of Underpayment was issued. The appellants response cannot reasonably be interpreted in any other way.

50. When in accordance with the agreement reached, the Notice of Underpayment with supporting letter and factsheet was sent to the appellant at 15.11 on 5 May 2021 the appellant responded at 19.21 "I confirm receipt of this email...We shall now proceed to appeal." This is further evidence that the appellant was clear, having been served with the Notice of Underpayment by email, their appeal could now proceed and be lodged with the Employment Tribunal.

51. Much has been made by both parties of the provision set out in the Notice of Underpayment that "the time limit for appealing against this notice is 28 days from the date of service. The date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise."

52. The use of the words “unless proven otherwise” can be deconstructed and interpreted in a number of ways. Mr Livingston suggested that it can be referenced to service by email, i.e. if the email had been sent but not been received. A common-sense interpretation is that “the time limit for appealing this notice is 28 days” full stop which accords with the earlier communications sent to the appellant and reflects the statutory provisions of the NMWA at sections 19 referred to above. The next sentence “the date of service will be taken as 2 working days from the date of issue of this notice, unless proven otherwise” refers to service by first class post with the proviso that if can be proven otherwise that either the notice of underpayment was not posted and/or not received. Such an interpretation of both sentences is in accordance with section 7 of the Interpretation Act 1975 relating to presumed service by post. In short, the second sentence is unconnected to the first and relates to service by post only, and not service by agreement via email where there cannot be any argument as to the whether service has taken place or not providing the correct email address was used.

53. The HMRC published guidance “NMWM 13290 – Issuing notices of underpayment: date of service of a notice” which was available to the appellant provides that notices of underpayment sent by email “are deemed served on the same day it is transmitted provided it is done before 4.30pm unless the contrary can be proved. However, prior consent is required from the employer that a notice can be served by email.” In document T420 ‘Making a claim to an Employment Tribunal’ the time limit for making an appeal to the employment tribunal is set out as follows; an appeal against notice of underpayment issued under the National minimum Wage Act must be made within 28-days of the service of the notice. It is important that the claim or appeal you make is presented within the appropriate time limit.”

54. There is uncertainty about whether the email should be transmitted before or after 4.30pm which, Mr Holborn argued, requires resolution. I did not agree given the fact the appellant received the Notice of Underpayment before 4.30pm. The point made by Mr Holborn was there could be situations where the serving party emails the notice at 11.55pm curtailing the time in which an appeal can be made by one day, and that party’s Article 6 rights may be engaged. This is not one of those cases. The Notice of Underpayment was sent to the appellant at 15.11 on 5 May 202 and responded to at 19.21 confirming receipt and the intention to proceed to an appeal. The appellant had the full 28-days starting from the day of service to lodge an appeal, to which the appellant was legally entitled and its Article 6 rights were not undermined.

55. Mr Holborn submitted the day that the day of service should not be included in the calculation. I do not agree, and prefer Mr Livingston’s submissions on this point that the date of service is the date when the notice was emailed to the appellant. Section 19(8) NMWA defines “the 28-day period” means the period of 28 days beginning with the date of service of the notice of underpayment.” In the appellant’s case the Notice of Underpayment was served on the 5 May 2021 and that is the relevant date of the 28-day period calculation which expired on 1 July 2021, the deadline date for the appeal. I do not accept that dating the Notice of Underpayment 6 May 2021 incorrectly somehow invalidated the date when the Notice of Underpayment was served by email, and whilst it is regrettable the notice was

incorrectly dated, which Mr Livingston confirmed was a mistake on the respondent's part, once served, the incorrect date does not invalidate the legal effect of the Notice of Underpayment and the inflexible time limit of 28-days.

56. The respondent, a public body, could have made the position clearer in the Notice of Underpayment by clarifying whether a prospective appellant has 28 days from the date of issue, 28 days plus two working days from the date of issue if the notice is posted, and 28-days from the date of issue if the notice is emailed. I do not accept the respondent gave the appellant false or misleading information about the time limit. There is no confusion about whether the time limit starts on the 5 May or on 6 May; it is 28-days from the date of service and not 28-days on the day that falls after service, giving the words their ordinary common sense meaning. I prefer Mr Livingston's argument that "date of service " is a statutory term and it is not for the respondent to determine this; either the Notice of Underpayment was emailed to the appellant or not on the 5 May 2021. It is not within the respondent's gift to say as per our agreement we will email the notice to you, but the date for service will be either the 6, 7 or 8 May 2021 depending on the date of the notice. This scenario undermines any legal certainty. The date of service is pivotal when accessing the right to an appeal, and it would not be logical if the respondent could decide any date of service to suit before or after the Notice of Underpayment was emailed.

57. The time limit started ticking on the 5 May 2021, and it makes no difference to this that the Notice of Underpayment was incorrectly dated 6 May 2021. There was no evidence before me to the effect that the respondent had "induced" the appellant by misrepresenting the deadline for appeal. Mr Livingstone described the 6 May 2021 date as a mistake, and bearing in mind the appellant was aware service took place on the 5 May 2021 it is difficult to see how the deadline for appeal was misrepresented on the basis that the common denominator of all the information before the appellant was that it had 28-days from the 5 May 2021 which expired on the 1 June 2021.

58. By the 3 June 2021 date, when the Notice of Underpayment was received by the Tribunal, it was outside the statutory time limit, the Tribunal does not have the power to extend the time limit and it does not have the jurisdiction to consider the appeal, which is dismissed.

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9.11.21 Employment Judge Shotter  
JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 November 2021

FOR THE SECRETARY OF THE TRIBUNALS