Case number:2600561/2021

EMPLOYMENT TRIBUNALS

Appellant: Grantham Manufacturing Ltd

Respondent: The Commissioners for HM Revenue and Customs

Heard at: Midlands (East) Region by Cloud Video Platform

On: **17 November 2022**

Before: Employment Judge P Britton (sitting alone)

Representation

Appellant:

Respondent: Mr S Lewis of Counsel

JUDGMENT

I hereby rectify the replacement Notice of Underpayment, issued by HMRC on 18.03.22, as follows:

1. The sum entered as the "Total underpayment for pay reference periods on or after 26 May 2015" shall be **£19,859.48**.

2. The sum entered as the "Total amount outstanding for all workers" (i.e. including an uplift) shall be **£22,697.35**.

3. The sum entered as the “Penalty charge due” shall be **£39,718.97**.

As a consequence, the total sum due, under the above rectified Notice of Underpayment, from the Appellant to HMRC, is **£62,416.32**.

REASONS

1. On 18.05.22 and 19.05.22, I heard the Appellant’s appeal in relation to a Notice of Underpayment (“NoU”) issued by HMRC on 18.02.21. On 15.06.22, I published a reserved – and comprehensive – Judgment, on those issues, running to 63 paragraphs. In summary, I upheld the appeal in relation to the “lottery deductions” issue but did not uphold the appeal against the lion’s share of the NoU relating to “timekeeping” and “attendance” allowances.

2. The Appellant had benefit of learned counsel, Mr Van Heck, at that hearing. Mr Lewis of counsel appeared for HMRC and appears again before me today. The Appellant was today represented by its managing director, Mr Martin Howitt.

3. In his written and oral submissions, for reasons I understand, Mr Howitt essentially seeks to revisit my findings and thus Judgment regarding why the appeal failed. He has added to that by his e-mail to the tribunal dated 18 November by which he draws my attention to the praise from Barclays in terms of its sustainability page concerning the rebuilding of the Appellant’s premises following a fire. But that is not a matter for me today. There has been no appeal against my earlier Judgment and it must stand. I also received written and oral submissions from Mr Lewis.

4. In terms of the rectification exercise, I am dealing with the second NoU, issued on 18.03.22, which replaced the first NoU dated 18.02.21. In reality, I am dealing with a recalculation of what remains due, consequential to my earlier Judgment. Mr Singh, of HMRC, had performed a recalculation to be found at page 79 in the bundle before me. Mr Singh, who had given evidence at the last hearing, explained his rationale in a witness statement.

5. Much as I may have sympathy – as I made plain last time – with Mr Howitt and the Appellant, Mr Howitt can't use, in terms of calculating National Minimum Wage ("NMW") pay, the "timekeeping" and "attendance" allowances.

6. As to being able to use overtime premium payments, the law under the NMW act (" the Act") and NMW regulations (2 the Regs")[1], in particular regulation 10(k), and the guidance from the Department for Business, Energy and Industrial Strategy, makes plain that such payments cannot be included for purposes for what is due in calculating the NMW. In other words, the premium rate paid regarding overtime cannot be included and must come out.

7. The third element is whether payments regarding "tea breaks" – those breaks having, in this case, been <u>paid</u> breaks – can be included in the NMW calculations. I have made plain that, in terms of the wider efficacy, and a focus on workers being paid rather than exploited, it might be thought that <u>paid</u> breaks could or should form part of the NMW calculation. That was where I started.

8. The problem with that, though, is, as Mr Lewis took me to, regulation 35, especially when read alongside regulation 10(h). These were "time workers", not salaried workers, and that's an important distinction. Regulation 35(3) makes it plain that, for "time workers", the "hours a worker spends taking a rest break are <u>not</u> hours of time work" (my emphasis added). "Tea breaks", then, even if paid, don't come to the rescue of the Appellant. I feel that I have no choice, as a first instance judge, especially given the HMRC guidance, and the wording of regulation 10(h)(i), to come to any other conclusion. Regulation 10(h)(i) provides (as far as relevant and again with my emphasis added):

> *10. Payments and benefits in kind which do not form part of a worker's remuneration*
>
> *The following payments and benefits in kind do **<u>not</u>** form part of a worker's remuneration – …*

[1] In full the National Minimum Wage Act 1998 as amended by the Employment Act 2008, and the National Minimum Wage Regulations 2015.

> *(h)* ***payments*** *as respects hours, which are not, or not treated as –*
>
> *(i) hours of time work in* ***accordance with regulation 35*** *(absence, industrial action,* ***rest breaks****) …*[2]

9. Thus, an act of Parliament, under its regulatory regime, makes plain that rest breaks don't count for the purposes of NMW calculations. That is not a matter for me. It would be a matter for the Secretary of State / Parliament. It might be thought unfair to penalise an employer found – as I have, in the first hearing – to be a "good employer", which paid its workers for their breaks, in circumstances where the workers did not "clock out", but the regulations are abundantly clear on this point. Rest breaks just don't count for the purposes of calculating NMW pay. Therefore, the amounts relating to "tea breaks" put in the balance by the Appellant in its recalculation, cannot stand.

10. So if we take out the sums relating to "tea breaks" from the recalculations, along with those relating to "attendance" and "timekeeping" payments (for the reasons given in my earlier Judgment) – then, regrettably, we end up with the fact the Appellant has fallen foul of the regulations. The fact that I may not be comfortable with the outcome is neither here nor there. My role is to uphold the law. I have no discretion. Mr Howitt has invited me to be "reasonable" – but I cannot avoid mandatory requirements.

11. I also have no option – it following logically, again, from the Act – to interfere with the imposition of either the uplift or the penalty.

12. Thus, I find that the recalculation performed by HMRC, viz the document (from page 79 in the bundle) headed "Notice of Underpayment" but in fact prepared for the purpose of this hearing, is accurate. As a consequence, the correct totals for the rectified NoU are as follows:

    (a) The "total underpayment for pay reference periods on or after 26 May 2015" is **£19,859.48**.

    (b) The "total amount outstanding for all workers" (i.e. including the uplift to be applied) is **£22,697.35**.

[2] My emphasis.

(c) The “penalty charge” due, on the £19,859.48 figure, is **£39,718.97**.

13. That means, unfortunately for the Appellant, and for Mr Howitt as its managing director and shareholder, that the total due under the rectified NoU is **£62,416.32**.

14. I sincerely hope, given the hardship this will result in for the Appellant, and given that it is a long-established company with workers who have been there on average for many years, that HMRC will take an approach regarding the payment of the sum due which reflects that, and that we won’t see, as a consequence, the closure of the business.

Employment Judge P Britton

Date: 25 November 2022