



EMPLOYMENT TRIBUNALS

Appellant

Respondent

**Safira Pandor trading as Al-Noor v The Commissioners for HM Revenue
Playgroup & Customs**

Heard at: Leeds

On: 03 April 2017

Before: Employment Judge Brain

Appearance:

For the Claimant: Mr M Pandor

For the Respondent: Mr A Serr, of Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that the appellant's appeal fails and stands dismissed.

REASONS

1. These reasons are supplied at the request of the appellant.
2. On 25 August 2016 the appellant was served with a notice of underpayment issued by the respondent. On 28 November 2016 the appellant filed with the Employment Tribunal a notice of appeal.
3. Employers have a right to appeal against a notice of underpayment to an Employment Tribunal. There are three grounds upon which an employer may appeal against a notice of underpayment. The two relevant grounds for today's purposes are:-
 - 1) That no arrears were owed to any worker named in the notice on the day set out in the notice in respect of any pay reference period set out in the notice.
 - 2) Any requirement in the notice to pay a sum to a worker was incorrect because no sum was due to that particular worker or the sum specified in the notice was incorrect.

4. The relevant pay reference periods are those set out at pages 3 and 4 of the bundle. In essence, the relevant pay reference period is for each week between 8 September 2014 and 27 September 2015.
5. The notice of underpayment at pages 1 and 2 was replaced by that at pages 103(a) – (f) dated 31 March 2017. The legal effect of this is that the appeal against the withdrawn notice continues as if it were an appeal against the replacement notice. The relevant pay reference periods are the same.
6. The appeal is in summary upon the basis that the appellant's employee was admittedly underpaid in the sum of £13.96 per week between 14 September 2014 and 28 September 2015. However, the appellant then sought of its own volition to rectify that underpayment by overpaying her by £48.62 per week from 28 September 2015. The appellant's case is that the underpayment was therefore rectified and the arrears reduced to zero on or around 2 May 2016.
7. The respondent inspected the appellant's national minimum wage records on 29 February 2016. Jayne Shuttleworth, from whom I heard evidence, was the National Minimum Wage Compliance Officer dealing with this matter. Following upon the visit and an examination of the appellant's records, she entered into correspondence following concerns that she had that the employee had not been paid the national minimum wage by reference to the relevant pay reference periods.
8. On 8 July 2016 (by way of a letter at pages 69 – 70) Jayne Shuttleworth told the appellant that the appellant had not informed her at the inspection of 29 February 2016 that a national minimum wage issue had been discovered by the appellant in relation to the employee. She told the appellant that an overpayment of wages (that is to say payment of wages in excess of the national minimum wage) cannot be retrospectively offset against underpayments in previous reference periods.
9. On 18 July 2016 Jayne Shuttleworth spoke to the employee. She told Jayne Shuttleworth that she was not aware that the appellant had underpaid her and had then increased her wages to correct this. We can see by reference to the appellant's letter of 21 July 2016 (at pages 80 and 81) that the appellant accepts that it did not inform the employee that the increase in her wages with effect from 28 September 2015 was in order to rectify the underpayments made to her over the previous year or so.
10. It is significant, in my judgment that the employee has continued to be paid the increased wages after 2 May 2016. I have before me a witness statement from Adam Pandor. He is the son of Mrs Safira Pandor (who is the proprietor or Al-Noor Playgroup) and Mr Pandor who appeared before me on behalf of the appellant. Adam Pandor's witness statement tells me that the reason why the employee's salary had not been reduced after 2 May 2016 was because of the employee's 'work ethic'. This view was not one shared by Mr Pandor who, in his submissions to me today, said that the employee was not 'the best worker'.
11. The failure to tell the employee that she was being overpaid to correct a national minimum wage error and the failure then to reduce her wages once the arrears had been paid off points away from the appellant's case that there were no in fact no arrears or the notice of underpayment contained an incorrect calculation of arrears.

12. Furthermore, the employee is now being paid the same as the other workers of her age doing the same job. I refer to page 78. According to Jayne Shuttleworth those over the age of 21 who are working 30 hours per week receive £804 every 4 weeks. They therefore receive a salary of £10,452 per year. This is for 1140 hours of work. The 1140 hours of work are in fact undertaken over 38 and not 52 weeks but none the less the employees are paid every 4 weeks. However, the overriding point is that the employees are all therefore paid at £9.16 per hour. Plainly this is above the national minimum wage rate. Were it the intention to have applied part of the monies paid to her in diminution of the arrears owed to her for underpayment one would have expected the employee's salary to have reduced after 2 May 2016. It did not. She continues to be paid at the same rate as the others.
13. In summary therefore I find as a fact that the employee was not receiving remuneration after the end of September 2015 up to 2 May 2016 part of which was to pay off arrears owed to her because of the underpayment of the national minimum wage. As a fact, I find that the employee was in fact entitled to be paid after the end of September 2015 at £9.16 per hour by way of agreed contractual variation. My reasons for so finding are that:-
 - 1) The employee was at no stage told that the increase was to pay off the underpayment.
 - 2) The employee is being paid the same as others doing the same job.
 - 3) The employee's pay has not decreased after 2 May 2016 which one would have expected to be the case had a part of the remuneration that she was paid after the end of September 2015 been towards a discharge of a debt due to her because of the underpayment.
 - 4) The credibility of the appellant's explanation is undermined by the inconsistency referred to in paragraph 10.
14. I therefore find against the appellant's case that they had realised there had been an underpayment before the respondent's visit at the end of February 2016. I find that the payment to the employee was for reasons other than to correct the relevant national minimum wage issue.
15. I reject Adam Pandor's evidence that the increase in September 2015 was for that reason. He was not present before the Tribunal today to have his evidence tested in cross examination by the respondent's Counsel. I therefore attach limited weight to that evidence. I give more weight to the evidence of Jayne Shuttleworth who was present today and whose evidence was tested by Mr Pandor.
16. The inference I draw for failure to reduce the employee's salary after May 2016 (when the purported arrears were cleared), that she was paid the same as others doing her job and that she was not informed of the reason for the increase is that in reality the appellant was simply paying to the employee the correct remuneration for the role that she was carrying out. The true position is that arrears remain and the underpayment has not been corrected. The appellant's appeal therefore fails on the facts.
17. Even if I were to be wrong upon that, then I find the appeal to be on an incorrect premise anyway for the reasons given by Mr Serr. This is social welfare legislation. It is meant to be simply operated. It would create a great deal of

uncertainty for employees if employers who pay more than the national minimum wage could subsequently argue that the excess was being paid to correct previous underpayments rather than for the purported reason given at the time that the payment was made. This would undermine the purpose of an easily understandable legislative regime for those being paid the national minimum wage.

18. The appellant could simply have paid the employee the sums due. However, the appellant has not done so and is in my judgment attempting to pass off as an overpayment sums paid to her for other purposes, namely the agreed contractual remuneration payable to the employee from September 2015.
19. The appeal fails and stands dismissed.

Employment Judge Brain

Date: 11 April 2017

Sent on: 11 April 2017