Case No: «case_no_year»1303230/2018

EMPLOYMENT TRIBUNALS

Appellant: **The Community Foundation**

Respondent: **The Commissioners for HM Revenue and Customs**

Heard at: **Birmingham** **On:** **20 November and 3 December (in chambers) 2018**

Before: **Employment Judge Benson (sitting alone)**

Representation
Appellant: Mr N Hussain – lay representative
Respondent: Mr E Beevor - Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. Neither Ms Begum or Ms Akhtar were employed under a contract of apprenticeship or apprenticeship agreement (within the meaning of section 32 of the Apprenticeships, Skills. Children and Learning Act 2009).

REASONS

Claim and Issues

1. This is an appeal brought by The Community Foundation against the decision of the Comissioner for HM Revenue and Customs to issue a National Minimum Wage Notice of Underpayment dated 24 May 2018. The right of appeal is contained in the National Minimum Wage Acts 1998 ('the Act') at section 19C(1) – (3), which sets out three grounds of appeal, as result of which the Tribunal may recind or rectify the notice.
2. On the face of the notice of appeal, it appeared that the Appellant was appealing in respect of only one of the two workers specified in the penalty notice. That worker was Ms Thaslima Begum. At the outset of the hearing, Mr Hussain clarified that the appeal was also intended to relate to the second worker, Ms Nazreen Akhtar. Having taken instructions, Mr Beevor

confirmed that the Respondent consented to the appeal also relating to Ms Akhtar.

3. It was accepted that neither worker was paid at the rates appropriate for their age bands under the National Minimum Wage Regulations 2015 ('the Regulations'). The basis of the appeal in relation to both workers was that they were engaged under a contract of apprenticeship in respect of which the Regulations provide for a different hourly rate, and that they were paid that rate. The primary issue for the Tribunal to consider was therefore whether the two workers were (a) employed under a contract of apprenticeship or apprentiship agreement (within the meaning of section 32 of the Apprenticeships, Skills. Children and Learning Act 2009) or treated as employed under a contract of apprenticeship, and (b) were within the first 12 months after the commencement of that employment or under 19 years of age. Both employees had commenced employment in April 2016 and both were over the age of 19. As such the issue to determine was whether they were employed in accordance with (a) above.
4. Mr Hussain confirmed that the Appellant also challenged the amounts set out in the notice.The respondent clarified at the outset of the hearing that having received further information since the issue of the penalty notice, they have amended the Notice of Underpayment such that there was a lower figure which they consider had been underpaid. It was agreed that the question of whether the figures which were the subject of the Notice of Underpayment were accurate would be considered after the preliminary issue of whether the workers were employed under a contract of apprenticeship had been determined.

Evidence

5. I heard evidence from Mr Hussain, who is the founder and Chief Executive of the Appellant and who works on a voluntary basis. The respondent called 3 witnesses, Ms Begum and Ms Akhtar, and Miss Wright who is a compliance officer with the respondent. I was referred to an agreed bundle of documents, together with douments attached to Mr Hussain's witness statement. There were some areas of factual dispute and where such areas existed I made my decisions based upon the oral and documentary evidence available to me on the balance of probabilities. I was provided with written submissions and case law by Mr Beevor, supplemented by oral submissions. Mr Hussain provided oral sumissions. I have considered these carefully in coming to my judgment.

Findings of fact

6. The Respondent is a non profiting making organisation which seeks to improve the condition of marginalised and hard to reach members of the local community by providing training, employment opportunities and work experience. It has a small number of staff and volunteers. One of Communitiy Foundation's enterprises is a nursery for children aged 2 to 4. The nursery know as Rainbow Day Nursery is registered with Ofsed and Birmingham City Council.

7. In 2016, the nursery advertised for new staff.

Ms Beglum

8. Ms Beglum has a CACHE level 3 qualification in Childcare and Education and 3 years work experience whilst training in nursery and school settings. After finishing her qualifications, she went into a different career in sales. A couple of years later, she heard about the role in Rainbow Day Nursery, and attended an interview with Mr Hussain. She was aware that the role was as an apprentice and therefore at an apprentice rate, as she was told by Mr Hussain that there was an Ofsted and/or Birmingham City Council requirement that a nursery nurse needed to have GCSE Maths and English. Ms Beglum did not have Maths GSCE. The only document produced by Mr Hussain which confirms the basis of the arrangement was the email exchange of 7 April 2016. This confirms that the role was of nursery nurse (apprenticeship) and notes that Ms Beglum was required to undertake an NVQ which would be discussed with her when she joined.
9. Ms Beglum states that she accepted the role on the apprenticeship basis but gave evidence that Mr Hussain stated that after successful completion of her probationary period of one month, she would go onto the appropriate NMW rate for her age. I am not convinced that this was the position as I consider that Ms Beglum who was very forthright in the evidence given to the Tribunal would have rasied this with Mr Hussain after one month, however she did not.
10. Upon being offered the role, Ms Beglum was aware that she would have to undertake a level 3 NVQ course. A representative of the the training provider met with Ms Beglum in April 2016 to discuss an NVQ in Business Adminstration. As far as I am aware there is no suggestion that this course would have provided the necessary GCSE qualification in Maths. Ms Beglum did not see the point in doing a level business administration course when she already had an NVQ level 3 that was relevant to the job she was carrying out and it was agreed with Mr Hussain that she would enroll for a Maths evening course at Birmingham Metropolitan College at a later date.
11. Ms Beglum then proceeded to carry out her role in the nursery. As she had the level 3 qualification, she was able to carry out a full range of duties, but I consider that this was done under the supervision of the Manager or Deputy Manager. I do not however consider that she was being trained for the role. She was already qualified to level 3 and had experience of working in a nursery setting. At most she was refreshing her skills.
12. In August 2016, the requirement of Ofsted/Birmingham City Council changed and nursery nurses no longer needed to have a GCSE in English and Maths. Mr Hussain therefore advised Ms Beglum that she could be employed as a nursery nurse rather than an apprentice and as such her rate of pay would be adjusted to the NMW for her age which was £6.70. Mr Hussain advised her however that she would be issued with a new contract for 20 hours (rather than the 35 hours she had been working) and could work a further 15 hours voluntarily if she wished to do so. She was not issued with a new contract and continued to work 35 hours per day.
13. On 18 September 2016 she wrote to Mr Hussain raising a complaint about her rate of pay and asking that she be paid the appropriate NMW for her age backdated to the beginning of her employment. On 30 September, Ms Beglum raised with Mr Hussain the fact that her rate of pay on her pay slip was correct but the hours she had worked were incorrect as she had worked the full 35 hours per week. Her employment was terminated on 30 September 2016.

14. Mr Hussain has not provided documentary evidence of any training provided to Ms Beglum. It is accepted that other than a couple of internal courses, Ms Beglum was not enrolled on any training courses.

<u>Ms Akhtar</u>

15. Ms Akhtar was qualified to level 3 NVQ. She had 10 years experience working at Birmingham City University nursery, and had then worked on a part time basis when raising her children. She saw the advertisement for the role at the Appellant and was interested because of the flexibility in that it was a term time role. Following an interview with Mr Hussain she decided to accept it. She was aware that the role would be as an apprentice as she did not have GCSE Maths and English. Ms Akhtar was provided with a contract dated 20 April 2016 which was headed Nursery Placement Acceptance Form. It states that the employee wishes to undertake an NVQ. She understood that the Appellant would be providing training in the form of assisting her to obtain her GSCE Maths and English. In fact no arrangements were put in place and Ms Atkhar made her own enquiries and the next available course was to start in September 2016.
16. Ms Atkhar was an experienced nursery nursery nurse and undertook the full range of duties. She was not provided with training other than a couple of basic training sessions in first aid and child protection. Although she reported to a Manager and Deputy Manager, she was not being trained in the skills necessary to become a nursery nurse as she was already qualified to level 3 and experienced. Although she did not have Maths or English GCSE, she was carrying out all of the duties of a nursery nurse.
17. In September 2016, Ms Akhtar was notified by Mr Hussain that the position regarding GCSEs had changed and offering a new contract on the increased NMW adult hourly rate, but notifing her that her hours would be reduced to 29 hours per week but that she would work an additional 6/7 hours on a voluntary basis. Ms Ahktar was not willing to work on that basis and therefore from that date worked 29 hours per week for which she was paid the appropriate NMW.
18. No documentary evidence has been produced by the Appellant of any training provided to Ms Ahktar as part of the apprenticeship programme. It is accepted that Ms Akhtar was not enrolled on any training courses.
19. Evidence was also produced of another apprentice nursery nurse Sonya Ahmed who was enrolled on an appropriate NVQ course. It was pointed out by Mr Hussain that it can take time for an apprentice to be enrolled on an appropriate course and just because Ms Atktar and Ms Beglum had not been enrolled by July, did not mean that they were not going to be provided with the training. There was however no documentary evidence that either employee were registered with the training provider Learn Direct for any future courses that might be available. The respondent also referred to the apprentice Ms Ahmed and the documentation which was produced for her, as an example of how the Appellant undertook the arrangements for an individual engaged under a genuine contract of apprenticeship.

The Law

20. The relevant law is set out in the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015.
21. The National Minimum Wage Act 1998 sets out the rights and the obligations upon the employer. These include:

Section 1: (1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

Section 9: 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.

Section 19C:

(1) A person on whom a notice of underpayment is served may in accordance with this section appeal against anyone on one or more of the following –
    (a) The decision to serve the notice;
    (b) Any requirement imposed by the notice pay a sum to the worker;
    (c) Any requirement imposed by the notice pay a financial penalty;
(2) An appeal under this section lies to an employment tribunal
(3) An appeal under this section must be made before the end of the 28-day period.
(4) An appeal under subsection (1)(a) above must be made on the ground that no sum was due under section 17 above to any worker to whom the notice related on the day specified under section 19 (4)(a) above in relation to him in respect of any pay reference period specified under section 19 (4)(b) above in relation to him.
(5) An appeal under subsection (1)(b) above in relation to a worker must be made on either or both of the following grounds-
    (a) That, on the day specified under section 19(4)(a) above in relation to the worker, no sum was due to the worker under section 17 above in respect of any pay reference period specified under section 19 (4)(b) above in relation to him;
    (b) That the amount specified in the notice as the sum due to the worker is incorrect
(6) An appeal under subsection (1)(c) above must be made on either or both of the following grounds –
    (a) That the notice was served in circumstances specified in a direction under section 19A(2) above, or
    (b) That the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason)
(7) Where the employment tribunal allows an appeal under subsection (1)(a) above it, must rescind the notice.
(8) Where, in a case where subsection (7) above does not apply, the employment tribunal allows an appeal under subsection (1)(b) or (c) above –
    (a) The employment tribunal must rectify the notice, and
    (b) The notice of underpayment shall have effect as rectified from the date of the employment tribunal's determination.

Section 28: (1) 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.

Section 54:
Meaning of "worker", "employee" etc.
(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment; or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4)In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5)In this Act "employment"—

(a)in relation to an employee, means employment under a contract of employment; and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

22. The Regulations include the following provisions:

Regulation 4A(1)(d): [£3.30] for a worker who to whom the apprenticeship rate applies, as determined in accordance with regulation 5.

Regulation 5.—(1) The apprenticeship rate applies to a worker—

(a)who is employed under a contract of apprenticeship or apprenticeship agreement (within the meaning of section 32 of the Apprenticeships, Skills, Children and Learning Act 2009), or is treated as employed under a contract of apprenticeship, and

(b)who is within the first 12 months after the commencement of that employment or under 19 years of age.

(2) A worker is treated as employed under a contract of apprenticeship if the worker is engaged—

(a)in England, under Government arrangements known as Apprenticeships, Advanced Apprenticeships, Intermediate Level

Apprenticeships, Advanced Level Apprenticeships or under a Trailblazer Apprenticeship;

(b)in Scotland, under Government arrangements known as Modern Apprenticeships;

(c)in Northern Ireland, under Government arrangements known as Apprenticeships NI; or

(d)in Wales, under Government arrangements known as Foundation Apprenticeships, Apprenticeships or Higher Apprenticeships.

23. I have been referred to the judgment of the EAT in HMRC v Jones UKEAT/0458/13, specifically paragraphs 9.1 and 9.2 in the judgment of HHJ Birtles, which state:

‘9….I accept this useful summary of the law in respect of contracts of apprenticeship:

9.1 The contract of apprenticeship is of a special character and a distict entity from other contracts of employment as its essential purpose is training, the execution of work for the employer being secondary…

9.2 It is an essential characteristic of the relationship that education and training is provided in the trade or profession and that the employee agrees to serve, work and follow all reasonable instructions of the employer. The absence of such a contractual requirement (on either side) is fatal to the assertion that the contract is one of apprenticeship…’

Decision

24. It was agreed that for the purpose of determining this appeal, the only matter in issue, other than the level of any underpayment, was whether the two employees were employed under contracts of apprenticeship as defined by Regulation 5 such that the lower hourly rate was applicable to the hours which they worked during the period covered by the notice of underpayment. The pay reference periods for Ms Akhtar and Ms Beglum were set out on the notice of underpayment.
25. The burden of proof is on the Appellant. Further it is the responsiblity of the employer to keep sufficient records to show the national minimum wage has been paid. Mr Hussain has been unable to produce many documents to assist in his defence. He accepts that this is an area where the organisation needs to improve and he has put such improvements in place. It does not however assist him in this present appeal.
26. I note that a number of different forms of contracts of apprenticeship exist including those more recent Government initatives as defined in Regulation 5. These each have their own features, some of which are more onerous or give more protection to one or other party. However in all contracts of apprenticeship, as stated by HHJ Birtles in HMRC v Jones, the essential purpose is one of training, the execution of work being secondary. Further such education or training is expected to be provided in the trade or profession in which the apprentice agrees to work.
27. In the case of both Ms Beglum and Ms Akhtar, they were both already qualified to NVQ level 3 in the qualifications which they required in order to work as nursery nurses. They were carrying out the role of nursery nurses. Ms Akhtar was an experienced nursery nurse. She did not need to be trained. She was able and did carry out all of the duties which other nursery

nurses would do. Ms Beglum, though less experienced was still carrying out the work which a nursery nurse would be expected to do. She has in my view exaggerated some of her responsibilities, but they are still part and parcel of the responsibilities of a nursery nurse, not someone who is working in order to learn or be trained. I consider that from the evidence I have before me that both were an integral part of the nursery staff. The roles they carried out were not secondary to their training, it was the primary purpose they were there. This is clear from the fact that in September 2016, when there was no longer a requirement for nursery nurses to have GCSE's in Maths and English, the Appellant offered both individuals roles as a nursery nurses at the appropriate NMW.

28. During their time working for the Appellant through to August 2016, neither of the employees were enrolled on any training courses which would train them for the role. Mr Hussain gave evidence that there was a requirement imposed by Ofsted/Birmingham City Council that nursery nurses needed to have a GCSE in Maths and English. The only training which had any relevance to Ms Akhtar and Ms Beglum was the GCSE qualification. Although both were prepared to study for this, there were no available courses until later in the year. The Appellant was unable to produce any documentation to show what training it had set in motion for the employees, or that it had registered the employees with Learn Direct or other provider. There would have been little point in Ms Beglum undertaking a further level 3 NVQ, this being the only other qualification offered by the provider. Although it included a maths element, this was not a GCSE qualification, which was what Ms Beglum would have required. Although Mr Hussain explained the fact that they were not undertaking any training was because setting these things can take time, that is not the point; studying for a Maths and/or English GSCE was not to train them for the role. In considering the evidence, it cannot therefore in my view be said that the essential purpose of their contract was training.

29. Mr Hussain has within his submissions asked me to consider the purpose of the Appellant organisation which is not for profit and charitable in nature and part of its purpose is to give employment opportunities, training opportunities and work experience to those who would normally find it difficult to access such opportunities. Both Ms Akhtar and Ms Beglum were in positions where they were returning to nursery work and as such, no doubt, there was a benefit to each of them in the Appellant assisting them in returning to such work. As a result of their lack of GCSE Maths and/or English, Mr Hussain however considered that he could not employ either Ms Akhtar or Ms Beglum as nursery nurses and instead categorised them as apprentices, that being the only alternative in his organisation's structure and as such he could pay them at an apprentice rate. This is to misunderstand his options. Just because the two employees could not be employed as nursery nurses did not mean they could not or should not be paid at the NMW appropriate for their age. The question was what was the essential purpose of their being there, education and training or to work.

30. Having applied the test set out in <u>HMRC v Jones</u>, for the reasons set out above, the Appellant has not persuaded me on the balance of probabilities that the essential purpose of the contract was one of training. I have also considered the additional features highlighted in <u>HMRC v Jones</u> as indicative of, or contrary to there being a contract of apprenticeship. These include the way that the parties describe the relationship, whether the contract was for a defined period and how the contract can be ended. Although these are relevant factors, they do not in this case override my

finding that the essential feature of training was not present in either of these relationships.

31. In view of my findings, this matter will now be listed for a hearing on 3 January 2019 in order to determine whether the sums specified in the revised notice of underpayment are correct or whether the notice should be rectified under section 19C(8).
32. Finally, I note that the notice of underpayment also related to a period from 1 to 30 September 2016 in respect of Ms Beglum which was during a period when the Appellant accepted that she was not engaged under a contact of apprenticeship. It seems to me therefore that there is a further issue which needs to be determined. From 1 September Ms Beglum was offered a new contract for 20 hours per week, with 15 hours voluntary work should she wish to do it. The respondent contends that Ms Beglum should have been paid the NMW for all hours worked whether voluntary or not during this period. I did not hear submissions from either party on this point and would request that this issue is addressed at the hearing on 3 January 2019, when this matter with resume.

Employment Judge Benson

Dated: 21 December 2018