Case No: 2208155/2016

,

EMPLOYMENT TRIBUNALS

Appellant: **Jasleem Beauty Parlour Limited**

Respondent: **Commissioners for Revenue and Customs**

Heard at: **London Central** **On:** **1 May 2019**
Before: **Employment Judge Goodman**

Representation

Claimant: Ms Jasleem Kaur Nagpal, company secretary and director
Respondent: Ms R. Kennedy, counsel

JUDGMENT

The appeal fails.

REASONS

1. This is the hearing of an employer's appeal under section 19C of the National Minimum Wage Act 1998 against a notice of underpayment dated 10 October 2016.

2. The notice relates to the wages of the employee Soheila Serkani. The underpaid wages are stated as £883.37. The penalty due to HMRC, the respondent, is £797.49. The appellant has paid the penalty by instalments, but has not paid the worker.

3. The appeal was submitted to the Employment Tribunal Service on 27 October 2016, but due to an administrative failing was not sent by its central office in Leicester to London Central Employment Tribunal until February 2019, after the appellant had made enquiries.

Issues for this Appeal

4. The appellant principally appeals against the assessment of the hours worked. She also argues that the claimant was employed under an

exempted scheme. Further, she argues she was entitled to make a reduction of wages on account of gross misconduct causing damage to the business.

Relevant Law

5. The National Minimum Wage Act 1998 provides that the national minimum wage set from time to time is to be paid to workers in Great Britain. A worker is defined in section 54 (3) (b) as

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

6. Section 9 of the Act provides the power to make regulations requiring employers to keep records and preserve them. Regulation 59 of the national minimum wage regulations 2015, replacing the 1999 regulations, requires that the employer keep records "sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage".

7. Section 49 prohibits contracting out: an employer and worker cannot agree to pay less than the national minimum wage.

8. There is power under section 4 to make exemptions for workers over 26. Regulation 51 of the 2015 Regulations provides that a person participating in a scheme designed to provide training, work experience, or temporary work, or to assist in the seeking or obtaining work, which is in whole or in part funded by the Secretary of State under the Employment and Training Act 1973, the Jobseekers Act 1995, or the Apprenticeships … Act 2009, does not qualify for the national minimum wage for work done as part of that scheme.

Evidence

9. To decide the appeal the tribunal heard evidence from:

   Jasleem Kaur Nagpaul, the appellant's company director.
   Soheila Serkani, the worker
   Jowita Romanek, the respondent's National Minimum Wage Higher Compliance Officer, who adopted the respondent's file notes and letters.

10. The tribunal read a witness statement from **Kulwant Kaur**, Ms Nagpal's mother, who supervised the worker at the salon. She was said to be unfit to attend by reason of unstable angina, a heart condition. No formal medical evidence was available. The tribunal was provided only with the

first page of a note of a test procedure on 12 April 2019, without stating the test or the result, and a discharge summary from Chelsea and Westminster Hospital dated 12 April 2019, giving no information about diagnosis but stating the reason for admission was chest pain. The respondent had not been provided with a copy of the statement or that she was unable to attend. In weighing the evidence on disputed points, I have taken into account that it has not been possible to clarify discrepancies by questioning Mrs Kaur.

11. There was a bundle of documents of some 400 pages. This contained one, or more contracts of employment, payslips, letters between appellant and respondent and appellant and worker, emails between the respondents compliance officers with the job centre and read employment, and pages of viper messages between the worker and her boyfriend. Although Ms Nagpal questioned the worker why she had not produced text messages between them about when she was to start work on any particular day, Ms Nagpal has never produced any such messages to the respondent when asked for evidence to dispute their calculation, does not mention them in her witness statement, and did not have them today, saying they were on another phone, of which she has five or six. I conclude that they are hypothetical

Findings of Fact

12. The appellant is sole director of a small business running a beauty parlour in Hounslow with the aid of family members. In April 2015 she was advertising for a part-time assistant through 3 job centres, as the salon was particularly busy at the weekend.

13. The worker, Soheila Serkani, has a young child, and was also studying at the local college for a level II beauty technician qualification, besides being employed at a local school for 3 hours per week. She was looking for weekend work as a beautician. The job centre had referred to her to Reads, an employment agency, to provide support in seeking work. Ms Serkani explained how they helped her draft a CV and gave her interview practice. She was told to go around local businesses with the CV looking for a job. She worked for the respondent on 30 May, with a view to getting the weekend job, and was told that day she could work Saturdays and Sundays, 16 hours per week.

Contract Terms

14. The worker and Ms Nagpal both signed a written contract for "salon assistant services" from 30 May until terminated by notice. The signature page is dated 31 May 2015. Paragraph 4 provides at 4.1 that the worker "will be expected work for 2 days per week (16 hours)", and at 4.2 that the net pay per working day will be £40. Next, 4.3 states salary will be paid one week in arrears at the end of every month into the bank account, and 4.4: "Due to the probability of walk-in clients it is requested that lunch will be spent within the shop premises". There are no clauses in the contract which could suggests she was anything but a worker within the statutory definition.

15. Under this contract, if it is correct that she was paid £40 for an eight-hour day, that was only £5 per hour, less than the minimum wage. As result the worker's right to housing benefit was adversely affected, because it is paid to those working 16 hours or more per week, and assumes that they are paid at the national minimum wage for those hours.

16. The appellant has suggested the reference to 16 hours per week was inserted at the worker's request, and disputed that she had asked for work at national minimum wage. It is not clear why she insisted that this is why 16 hours is stated. She stopped short of saying it was just for show (as 16 hours is the required minimum to claim in-work benefits) and did not reflect the real agreement.

Hours of Work and Payment Made

17. According to a schedule provided to the respondent by the appellant the worker worked on 30 May, on 5 days in June, on 7 days in July, and on 1 August, 14 days in all. On each occasion it is said that she took one hour for lunch, and was paid £40. An amended version of this schedule gives precise times of start and finish, with the working day varying between 4 hours 45 minutes and 6 hours 15 minutes, 82.5 hours at £6.50 per hour (national minimum wage) totaling £536.25.

18. In a letter to the worker just after termination of employment, the appellant asserted breaks added up to 1 ½ hours per day, not one hour.

19. The Appellant referred more than once to "records" from which this was derived, and to "timesheets". She and her mother referred to "diaries". In fact, this meant the customer appointment book where, she said, notes would be made when people arrived and left. Between September 2015 and October 2016 she was more than once asked by the respondent to provide records if she disputed the worker's account of her hours. The only record she attached was the short Excel spreadsheet, prepared on the date it was submitted to HMRC, so it is not a contemporary record of working hours. In emails to HMRC she said the appointment book had gone missing during building renovation in the autumn of 2015. In tribunal she said she had subsequently posted this book to HMRC early in 2016. She did not enclose a covering letter, and there is no email saying she had posted it. HMRC have no record of any appointment book being received.

20. The Tribunal does not believe there was an appointment book recording when the worker arrived and finished work, partly because the reasons for not producing it at any stage are unsatisfactory and conflict, and partly because on Ms Nagpal's own account there was no reason to record her start and finish times, as she was paid by the day, not by hours. She agreed an email reference to calculating her remuneration was misleading, as it was not calculated. An email from her mother in 2015 also denied wages were related to time worked, and stated that the salon was open 10.30 to 6.30 on Saturday and Sunday, not from 11 as was suggested by her daughter. In a number of examples when questioned Ms Nagpal gave conflicting accounts, sometimes in the same sentence. She was not a reliable witness.

21. Ms Nagpal at times suggested that the salon was closed for all August.

Her mother's evidence however suggests the worker did not attend because of childcare difficulty. Ms Nagpal herself was abroad on holiday 2- 16 August. In one letter to HMRC she said the claimant ceased work on 16 August (not a date in her schedule). The worker said that her mother kept the salon open in her absence, that it was closed on two Sundays in August for family reasons and she worked Fridays instead. This is supported by the message evidence.

22. The worker says that she took smoke breaks from time to time, but not a lunch break, and did not eat lunch on these Saturdays and Sundays. Given the contractual evidence about remaining on the premises at lunch, the appellant's varying assertions as to breaks, and her other contradictions, the tribunal does not accept the worker took any more than smoke breaks.

23. The appellant paid the worker £320 by bank transfer at the beginning of July for work done in May and June, being 8 days at £40 per day. At the beginning of August she gave her cheque for another £320, but the cheque bounced. Letters from the worker's bank show that it was returned unpaid on 13 August and 18 August. Ms Nagpal suggested in 2016 and today that she had paid this money, but had since closed that account so was unable to trace the record of payments. The tribunal does not accept that the worker has been paid any more than £320 in total for her work for the appellant business.

24. The respondent's schedule of hours is based on information from the worker, corroborated with Viber messages she exchanged with her boyfriend who would drop her off and pick her up from work each day. Ms Serkani did not keep a diary record of her hours. The Tribunal was taken day by day through the two schedules, matching the Viber messages.

25. Having heard this evidence and read the document, the tribunal accepts that the respondent's schedule is correct. It is not accepted that the appellant had any contemporary records of her own from which her schedule was prepared. The hours and dates are made up and their accuracy is spurious. I took into account in my decision the evasive responses on various matters to HMRC in 2015 correspondence, the discrepancies in her own account of when the claimant attended for work, the lack of any reason to keep a note of exact times in the missing appointment book, and the absence of any other record despite a number of requests to send it. The burden of proof is on the appellant, as is the duty to keep records. She has not discharged the burden. Further, the worker's Viber evidence is convincing, and the respondent has reduced their calculation to allow for a statutory half hour's break per day, which matches the evidence of smoke breaks.

Reduction from Wages

26. At the end of August the worker went to the premises, with her sister and boyfriend, with a letter of resignation. The resignation letter says that she is leaving for 2 reasons, first, because she is not being paid, because she has been advised by the council that her pay does not reach national minimum wage and that is illegal. She asked the appellant to sign it. She refused to do so, and called the police. The worker's party left the

premises and when the police arrived a police officer took the letter, handed it to Ms Nagpal, and then gave the worker a note to say they had done so. The same day the worker contacted HMRC to make a complaint about not being paid national minimum wage.

27. The appellant argues that this episode caused trouble and that she lost business as a result. In one letter she says she lost a bridal customer worth £800, and in later months said she lost two such contracts. There is no evidence of either, and no detail of these customers' bookings, or the circumstances, and it conflicts with contemporary letters to the respondent saying the business was closed for refurbishment and later that it was closing. In a letter to the worker dated 1 September accusing her gross misconduct it is stated that customers have lodged complaints about her actions and that she was also working for them privately in breach of contract. No further mention is made in correspondence or in her witness statement about this.

28. The contract provides that the company will be entitled to deduct from salary "any amount for loss or damage to the company" that the worker has caused. However, the appellant does not establish there was any loss caused by the worker's conduct. It is not based on investigation, and there is no evidence on which the tribunal can assess such a claim or its value. Her case does not begin to reach the certainty required to establish that a deduction can lawfully be made under the Employment Rights Act 1996, all the national minimum wage legislation.

Exemption

29. When the claimant started work on 30 May 2015 she sent the contract to the job centre and she was signed off for jobseekers allowance because she was working 16 hours a week. The DWP letter confirming that is dated 3 June 2015. At the same time, she got a letter from Read, "in partnership with JobCentre Plus", congratulating her and stating that they provided in-work support, and a dedicated advisor could stay in touchfor up to two years. She should get back in touch if she stopped work, changed jobs, or claimed benefit from the job centre. They did make some follow-up phone calls to the appellant to check that the claimant was still working.

30. Despite patient and persistent effort on the part of the respondent's caseworkers, there is no documentary evidence of the Read scheme. Staff at the Department for Work and Pensions referred them to Read, who in turn did not answer. The appellant made some phone calls herself. The best evidence is an email from a senior employment adviser at Read dated 28 September 2016 saying the worker was: "on the work programme when she started work with you on 30 May 2016 (sic)", and that details had been passed to the recruitment manager so he could liaise with her about vacancies.

31. I cannot conclude on this evidence that it is shown that the worker was engaged on a government funded programme that exempted the employer from paying national minimum wage during her employment. On the evidence, this was a scheme in partnership with the job centre to

assist benefit claimants in finding work. It did not cover them while they were at work, once they had been placed. Work for the appellant was not, using the language of regulation 51, "work done as part of that scheme". If there was participation in such a scheme, an employer would expect documents to show that he was not required to pay national minimum wage, as failure to do so can be an offence with criminal penalty quite apart from the penalty in the notice of underpayment.

Conclusion

32. During the hearing and in submission the appellant said it was not fair that she should be required to pay the national minimum wage when she and the worker had voluntarily agreed that she should work for £40 per day. The Appellant must recognise that Parliament requires employers to pay at least the national minimum wage, and that employees cannot agree to accept less than that. The rules apply to all employers alike.

33. On the evidence the appellant has not established that the calculation of hours worked is wrong, or that she can lawfully deduct an unspeciifed sum for loss caused by any misconduct, or that there was a relevant scheme exempting her, the appeal does not succeed on any point. She is liable to pay any balance to HMRC, and to pay the outstanding wage arrears to the worker, Ms Serkani.

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Employment Judge Goodman

Date 2 May 2019

JUDGMENT SENT TO THE PARTIES ON

9 May 2019

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FOR THE TRIBUNAL OFFICE

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