

EMPLOYMENT TRIBUNALS

Appellant: Nursery Rhymes LLP

Respondent: Her Majesty's Revenue and Customs

Heard at: Leeds On: 6, 7, 8 November 2018

Before: Employment Judge Davies

Representation

Appellant: Mr J Parker (Director)
Respondent: Mr S Redpath (counsel)

JUDGMENT

- 1. By consent the Notices of Underpayment issued on 1 March 2017 against the Appellant are rectified as follows:
 - 1.1 For the period 6 April 2009 to 6 March 2014 the sums due in respect of the following named workers are as set out below:

D Harvey £nil

J Harding £nil

N Stevens £nil

E Jarvis £nil

F Hodgson £nil

S Heath £nil

K Lewis £nil

E Prince £48.60

1.2 For the period on or after 7 March 2014 the sums due in respect of the following named workers are as set out below:

J Shaw £15.02

R Swales £nil

B Spink £nil

D Harvey £nil

J Harding £nil

C Wood £nil

D Sanderson-Lees £22.25

N Stevens £nil

E Jarvis £37.86

F Hodgson £55.37

L Middleton £nil

S Heath £nil

M Taj £nil

- 2. The sums specified as due to workers S Malik, S Baines and C Rayner in the Notices of Underpayment issued on 1 March 2017 against the Appellant are incorrect and those Notices are rectified as follows:
 - 2.1 For the period 6 April 2009 to 6 March 2014 the sums due in respect of those workers are as set out below:

S Malik £nil
S Baines £nil
C Rayner £nil

2.2 For the period on or after 7 March 2014 the sums due in respect of those workers are as set out below:

S Malik £55.38 S Baines £432.89 C Rayner £284.49

- 3. The Notices of Underpayment issued on 1 March 2017 are therefore further rectified as follows:
 - 3.1 For the period 6 April 2009 to 6 March 2014 the total underpayment is £37.88, the total arrears due to the workers is £48.60 and the total penalty to be paid to HMRC is £100.
 - 3.2 For the period on or after 7 March 2014 the total underpayment is £1111.14, the total arrears due to the workers is £1249.31 and the total penalty to be paid to HMRC is £ 1111.14.

REASONS

Introduction

1.1 This is an appeal against Notices of Underpayment of National Minimum Wage issued by the Respondent, Her Majesty's Revenue & Customs, against the Appellant, Nursery Rhymes LLP. The Appellant has been represented by Mr J Parker, Director, and the Respondent by Mr S Redpath of counsel. At a previous preliminary hearing I determined that 15 workers the subject of the Notices of Underpayment did salaried hours work within the meaning of the National Minimum Wage Regulations. This was the final hearing to determine the remaining outstanding issues in respect of some of those workers.

1.2 Each party had produced a further substantial file of documents for the final hearing and a number of additional documents were admitted by agreement during the hearing. I heard evidence from Mr A Stead (National Minimum Wage Compliance Officer) and Mr G Powell (National Minimum Wage Operational Adviser) for the Respondent and from Mr Parker for the Appellant.

1.3 The proceedings to date have been concerned with the salaried hours workers. although the Notices of Underpayment refer to some workers performing time work. The issues to be determined at the final hearing were set out by me in a Case Management Order dated 6 August 2018. However, at the outset of the final hearing, Mr Redpath indicated that the Respondent had recalculated the sums due to the time workers and had discovered some of them to be incorrect. He invited me to deal with those workers at this hearing. I refused to do so. First, I indicated that the appeal was only made in respect of the salaried hours workers and I did not consider that I had jurisdiction to deal with the time workers. Secondly, in any event, introducing those workers at this stage would have been contrary to natural justice. Further, given the extensive history of these proceedings to date and the relatively small sums at stake, adjourning to enable the time workers to be dealt with would have been disproportionate. During the course of the hearing, Mr Parker identified that the appeal had originally included three time workers, and indicated that he agreed with the revised calculations provided by the Respondent in respect of those three workers. Both parties consented to the Notices of Underpayment being rectified in respect of those three workers. I considered that I had jurisdiction to deal with those workers and the notices of underpayment are accordingly rectified by consent in that respect.

Issues

- 2.1 The issues to be determined at the final hearing were originally identified as follows:
 - 1.1 How should the calculation to ascertain whether national minimum wage has been paid be carried out for a worker whose contractual hours changed during the calculation year?
 - 1.2 In respect of Ms Hodgson, should the calculation be performed for a full year or on a period by period basis?
 - 1.3 Have the calculations in respect of workers whose employment terminated during the course of the calculation year been carried out correctly?
 - 1.4 Did the Respondent unlawfully amend the Notice of Underpayment (Sixth ground of appeal in original appeal)?
- 2.2 By the start of the hearing those issues had narrowed. The Respondent had recalculated the sums due to the salaried hours workers and now agreed that the calculation for a worker whose contractual hours changed during the calculation year should be carried out in the way the Appellant suggested. That issue therefore no longer arose for determination. Likewise, there was now agreement about the amount of arrears due to Ms F Hodgson and about workers whose employment terminated during the course of the calculation year. The fourth issue remained in dispute. As a result of the agreement on the first three issues, the parties consent to rectification of the Notices of Underpayment with respect to most of the salaried hours workers (if the Appellant does not succeed on the fourth issue). In addition

to the fourth issue, the re-calculations have given rise to a small number of further disputes, which it was agreed I should determine, as follows:

- in respect of Ms D Harvey, was there a change in her contracted hours from 30 to 32 hours per week in March 2015;
- in respect of Ms C Rayner and Ms S Baines, in the Pay Reference Period following their return from maternity leave, were their contracts varied to make them time workers during that period, and, if not, were any absences from work during that period to be subtracted from the hours of salaried hours work under Regulation 23;
- 1.7 in respect of Ms Malik, should her unpaid attendance at staff meetings outside the nursery's opening hours be treated as unpaid overtime or unpaid basic hours; and
- 1.8 also in respect of Ms Malik, had the calculation of her hours of salaried hours work for Pay Reference Periods in which she had worked more than the basic hours in the calculation year been correctly performed under Regulation 28?

Findings of fact

- 3.1 I make the following findings of fact. After a lengthy investigation and correspondence, Notices of Underpayment were originally served on the Appellant on 9 February 2017. One related to Pay Reference Periods between 6 April 2009 and 6 March 2014 and the other to Pay Reference Periods from 7 March 2014 onwards. In the light of information provided by Mr Parker, the Respondent realised that the amounts stated in the Notices were incorrect and on 1 March 2017 those Notices were formally withdrawn. At the same time, replacement Notices were served. The replacement Notices made clear that they replaced the previous Notices and that they did not relate to any worker to whom the original Notices did not relate. The material differences between the Notices were identified. The replacement Notices set out the deadlines for paving the arrears and for paving the associated penalties to the Respondent, namely 30 March 2017. They also made clear that if the arrears and penalties were paid by 16 March 2017, the penalties would be reduced by half. The Notices set out the Appellant's right of appeal, which was required to be lodged by 30 March 2017.
- 3.2 Mr Parker provided further information, and this led the Respondent to realise that the replacement Notices were also incorrect. The then Compliance Officer knew that the National Minimum Wage Act 1998 prevents the Respondent from issuing a second replacement Notice (see further below). Advice was sought from Mr Powell. Mr Powell's evidence was that he confirmed that the replacement Notices could not be replaced but said that in his opinion they should advise the employer of the actual arrears that the officer considered were due. He said that he wanted to try to prevent a situation in which the employer paid the wrong amounts to workers, which might be difficult to recover from them. He also wanted the employer to be aware of the actual arrears that were duein case they were considering making an appeal on the basis that the arrears being requested were wrong. He advised that the officer should consider sending a schedule showing the actual calculations. He said that he explained his view on the telephone and followed this up with a confirmation email.

3.3 In fact, the email exchange showed that a Senior Caseworker in Bradford had emailed Mr Powell to summarise their discussion and that Mr Powell had agreed with the summary. Further, the Senior Caseworker said that he had suggested the course of action and that Mr Powell had agreed to it. In cross-examination Mr Powell was quite clear that he had given the advice. I do not think much turns on this. Even if the Senior Caseworker suggested a course of action and Mr Powell agreed with it, it is perfectly clear that Mr Powell's advice was being sought and in agreeing with a proposed course of action he would have been giving advice.

- 3.4 It was suggested to Mr Powell in cross-examination that the caseworkers were trying to find a way around the legislation. He did not agree. He said that the Act is quite explicit and that everybody knew it was unlawful to issue a further replacement Notice. The question being asked was how the caseworkers could continue with their case. His view was that if the caseworkers had now realised that the arrears due were less than stated in the replacement Notice, they needed to tell the employer so. He did not consider that they were amending the replacement Notice. They could not do so. He said that it was purely "customer service" to let the employer know that the arrears were less than stated in the replacement Notice. In practical terms, if the Notice had been appealed the Respondent would have set out the amount they said was actually due and could ask the Tribunal to amend the replacement Notice to reflect that. If the employer did not pay the arrears, the Respondent would, in the light of the revised schedule, instruct its solicitors to pursue that lesser amount. The only alternative would have been to do nothing until such time as the employer appealed, and to make the adjustment at that point. Mr Powell's understanding was that the reason the National Minimum Wage Act only allowed the Respondent to amend a Notice once was to achieve finality. It was to stop the Respondent from increasing the arrears repeatedly so that effectively the matter went on and on. I accepted Mr Powell's evidence about the advice he gave and why he gave it.
- 3.5 In the light of that advice, the caseworker, Mrs Bradley, wrote to the Appellant on 8 March 2017. She apologised for the error in her schedule that Mr Parker had pointed out and said that she was enclosing a revised schedule for the arrears before 7 March 2014. In her letter Mrs Bradley confirmed that the Notices of Underpayment would not be withdrawn and replaced and that the original due dates for payments had not changed, but she made clear that the arrears and penalties to be paid were the newly revised sums. She provided a replacement version of the original schedules, including the heading "Notice of underpayment."
- The Appellant appealed on 25 March 2017. In the appeal form Mr Parker identified the Notices being appealed against as those dated 1 March 2017 (although he included a ground of appeal relating to the lawfulness of the subsequent amendments/revisions). In his evidence, Mr Parker accepted that he understood that the 1 March 2017 Notices had not been withdrawn and that he had appealed against those Notices (subject to his sixth ground of appeal).
- 3.7 Subsequently, correspondence between Mr Parker and the Respondent led to further recalculations and further errors being identified. No further revised schedule was issued (although in the course of these proceedings the Respondent has provided further calculations, particularly following my finding that a number of workers had been incorrectly categorised as doing time work).

3.8 That brings me to the particular individuals in respect of whom there remains a dispute.

Ms Harvey

3.9 In his witness statement Mr Stead explained that he had concluded from the timesheets that there had been a change to Ms Harvey's contracted hours in March 2015. In cross-examination he was shown payslips and other documentation suggesting that there had been no such variation, rather that the timesheet was incorrect. Mr Stead very fairly accepted that proposition. Accordingly, I find that there was no increase in Ms Harvey's contractual hours in March 2015. The Respondent agreed in its closing submission that this meant no arrears were due to Ms Harvey.

Ms Baines and Ms Rayner

- 3.10 At the preliminary hearing I found that Ms Rayner and Ms Baines did salaried hours work. Mr Stead had calculated the arrears due to them on that basis. Each of them had a period of maternity leave, and the dispute in each case relates to the Pay Reference Period in which she returned to work. Neither party called Ms Baines or Ms Rayner to give evidence. Mr Stead's calculation was based on the documents, primarily timesheets and payslips.
- 3.11 There was no dispute that Ms Baines returned to work in the Pay Reference Period starting 29 October 2014. There was a timesheet for Ms Baines for November 2014. It showed that she had attended work on Monday, 3 November 2014 for 5½ hours. She had attended on a further days in that month for 5½ hours, and on two further days for eight hours. She had worked 71 hours in total. A note at the top of the timesheet identified that the first 10 days worked were "Return to work days following M[aternity] leave." Her payslip for the Pay Reference Period showed that she had been paid at her hourly rate of £6.80 for 71 hours work, giving a total of £482.80. Those hours were categorised as "overtime." In addition, the payslip showed a payment for parental pay of £375.06.
- 3.12 Mr Stead calculated an underpayment for that Pay Reference Period. On the basis that Ms Baines was performing salaried hours work, Mr Stead calculated that her basic hours for the year were 1872 and her notional monthly hours were therefore 156. She had worked and been paid for 71 hours, and Mr Stead had not identified any absences from work that were to be reduced from the salaried hours work in that Pay Reference Period under Regulation 23. That gave rise to an underpayment of National Minimum Wage.
- 3.13 Mr Parker said that Ms Baines had returned to work following her maternity leave on 3 November 2014. He said that for that Pay Reference Period (i.e. 29 October 2014 to 28 November 2014) Ms Baines's contract was varied to make her a time worker. There was an agreement that she would only be paid for the hours she worked. Further he said that the first 10 days were "keeping in touch" days and that the employer was free to agree with the worker how she should be paid for such days. That was separate from any statutory maternity pay. As I have indicated, Ms Baines did not give evidence. I asked Mr Parker who had made the agreement with her about her return to work and he did not know. He suggested that it was probably her line manager, Ms Martin. I asked if he had spoken to Ms Martin to find out what was agreed and he had not. Therefore, I did not have any

evidence of the discussions or any agreement made with Ms Baines about her return to work. The timesheet and payslip show the hours work and the sum paid, they do not tell me whether Ms Baines agreed to that or on what basis. The hours are referred to as "overtime". In those circumstances, I am not satisfied on a balance of probabilities that there was a variation to Ms Baines's contract by which it was agreed that she would effectively be paid as a time worker for that Pay Reference Period.

- 3.14 I find that she remained a salaried hours worker during that month. The question therefore arises whether there were any absences from work to be reduced from her salaried hours work under regulation 23. As far as the findings of fact are concerned, the question is whether the Appellant was entitled under Ms Baines's contract to reduce her annual salary for such absences and whether it did so.
- I find on a balance of probabilities that Ms Baines remained on maternity leave on 3.15 29, 30 and 31 October 2014. That was Mr Parker's evidence, and there was no timesheet recording any work by her on those three days. The fact that her payslip referred to parental pay during this Pay Reference Period might suggest that she remained on maternity leave for at least part of it, although Ms Rayner's payslip also refers to a sum for parental pay and there was no dispute that she returned to work on the first day of her relevant Pay Reference Period. That perhaps indicates that the payment of maternity pay related, at least in part, to maternity leave taken in the previous month. That would explain why the amount paid to Ms Baines is rather more than might be expected for three days' maternity pay. The fact that Ms Baines received substantially more in maternity pay than Ms Rayner in the first Pay Reference Period is consistent with the suggestion that Ms Baines was on maternity leave during part at least of that Pay Reference Period. The only evidence I have about Ms Baines's return to work date is Mr Parker's evidence that it was 3 November 2014. I find that it was. That is consistent with the timesheet, and Mr Stead did not identify any other document suggesting that Ms Baines had worked on 29, 30 or 31 October 2014. The Appellant was entitled to reduce Ms Baines's salary due to absence on maternity leave and I find that it did so in respect of those three days. However, there is no evidence before me of any contractual entitlement to reduce her annual salary due to other absences in this Pay Reference Period and no evidence of any such reductions. Mr Parker suggested that the 10 days were "keeping in touch" days in respect of which an employer can agree how the worker should be paid. However, keeping in touch days take place during maternity leave. These 10 days were worked after Ms Baines returned to work. Further, they were specifically identified in the timesheet (presumably by the person who made an agreement with Ms Baines) as return to work days following maternity leave.
- 3.16 The situation in Ms Rayner's case is very similar, save that there is no dispute that Ms Rayner returned to work from maternity leave on the first day of the relevant Pay Reference Period, 29 August 2014. The relevant timesheet shows that she worked 93 hours and the relevant payslip shows that she was paid for those 93 hours at her usual rate of £6.80 giving a total of £632.40. In her case, the hours were categorised as "Basic Pay (Other)." As already indicated there was also an entry on her payslip for the month relating to parental pay of £177.66.

3.17 Mr Parker's evidence about Ms Rayner was the same as his evidence about Ms Baines. He said that there was an agreement that she would be treated as a time worker for this Pay Reference Period, but he did not make the agreement, he did not know who made it and he had not spoken to the person who made it. For the same reasons, I am unable to find on a balance of probabilities that there was such an agreement. Having found at the preliminary hearing that Ms Rayner was a salaried hours worker, I find that this was the position in the Pay Reference Period following her return from maternity leave.

- 3.18 There is no evidence before me of any contractual entitlement to reduce Ms Rayner's salary due to any absences following her return to work from maternity leave in the Pay Reference Period nor any evidence of such reductions and I find that there were none.
- 3.19 That brings me to Ms Malik. There was no dispute that Ms Malik's annual basic hours were 1670.4. Mr Stead's evidence was that he calculated that in Ms Malik's first and second calculation years she worked in excess of her basic hours. He set out the basis of the calculation he had performed under Regulation 28. He had concluded that Ms Malik exceeded her hours on 28 May 2014 in the first year and 27 May 2015 in the second year. He had done so by physically going through the timesheets and working out the precise date on which Ms Malik exceeded 1670.4 hours in each year. Mr Parker did not agree the dates, but he did not offer an alternative and the relevant timesheets were not in evidence. I therefore accepted Mr Stead's evidence, which was in any event careful and clear. Mr Stead then set out the calculation he had performed applying Regulation 28.
- 3.20 The second issue in Ms Malik's case was about how attendance at staff meetings should be treated. There was no dispute that at the relevant time staff were required to attend staff meetings and were not paid for doing so. Those meetings took place after the nursery's opening hours and it was agreed subsequently between the Appellant and the Respondent that an hour and a half should be allocated for each such meeting. Ms Malik had attended staff meetings and for each occasion Mr Stead had treated this as unpaid working time within the basic hours. Mr Parker said that the hours should be treated as unpaid overtime, because Ms Malik attended outside normal working hours and after completing a full day's work. He did not suggest that there was any such agreement at the time. The factual position was simply that staff were required to attend the meetings after normal working hours and were not paid for doing so.

Legal principles

- 4.1 The relevant legal provisions are found in the National Minimum Wage Act 1998, sections 19-19H. In particular, s 19C deals with appeals to the Tribunal against Notices of Underpayment, s 19F deals with withdrawal of a Notice of Underpayment once served, and s 19G deals with the serving of a replacement Notice of Underpayment following such a withdrawal. Section 19G(8) provides, "Where a replacement notice is withdrawn under section 19F above, no further replacement notice may be served under subsection (1) above pursuant to the withdrawal." The effect of that subsection is to prohibit the serving of a second replacement Notice of Underpayment.
- 4.2 The National Minimum Wage Regulations 2015 set out the basis for calculating whether workers have been paid national minimum wage. In this case the

Regulations of particular relevance are Regulation 23, dealing with absences from work to be reduced from the salaried hours worked in the Pay Reference Period, and Regulation 28, dealing with determining hours of salaried hours work if the worker works more than the basic hours in the calculation year.

4.3 The parties are familiar with the legislative provisions. I have carefully considered them but I do not need to recite them here.

Application of legal principles

- I start with issue 1.4: did the Respondent unlawfully amend the Notices of Underpayment when it issued a revised schedule on 8 March 2017?
- Mr Parker submits that the Respondent was acting unlawfully by issuing the revised schedule. He says that in substance the Respondent was issuing further replacement Notices of Underpayment, and that it was prevented from doing so by s 19G(8) of the Act. Even if it was not in substance replacing the Notices, it was seeking to avoid the effect of the legislation that prohibits such replacement. I asked him what he says should have happened once the further error was discovered and he submitted that the Respondent should be held accountable. Effectively, the replacement Notices of 1 March 2017 should be treated as null and void and the Respondent should write to the workers explaining why.
- I do not accept that the Respondent was in substance issuing further replacement Notices when Mrs Bradley wrote to the Appellant as she did on 8 March 2017. Her letter made clear that the Notices would not be withdrawn or replaced and that the original due dates for payments had not changed. The process to be followed under the Act in terms of payment and appeals remained in place in respect of the 1 March 2017 replacement Notices. Mr Parker understood that this was the case and appealed against those Notices.
- Nor do I find that the Respondent was unlawfully seeking to circumvent the prohibition in the Act on issuing a second replacement Notice. I have accepted Mr Powell's evidence that that was not the intention and it does not seem to me that in substance the effect of the 8 March 2017 revisions had that effect. The Appellant was being told that the replacement Notices remained effective, but that the Respondent had realised that a lesser sum was in fact due. What the Respondent was doing was advising the employer of that at the earliest possible stage to avoid it overpaying its workers. That was in my view a responsible approach by a public authority, rather than leaving the employer to pay a sum the Respondent knew to be too high and which it might have difficulty in recovering from its workers following any eventual successful appeal.
- 5.5 The fundamental question is what should happen if the Respondent discovers a further error (in this case in the employer's favour) after a Notice of Underpayment has already been withdrawn and replaced once. The starting point is, of course, that the fundamental purpose of the Act is to ensure that workers are paid national minimum wage. Mr Parker's suggested approach would be entirely contrary to that purpose. If the original replacement Notice became null and void because a subsequent error was discovered or because the Respondent notified an employer of such an error, workers would not receive underpayments that were due to them. While Mr Parker indicated that the Appellant would pay the arrears in such circumstances, not all employers are so scrupulous. The alternative, namely that the original replacement Notice remains valid subject to any appeal by the employer, meets the underlying purpose of the Act.

It is also necessary, of course, to consider the purpose of the prohibition on issuing a second replacement Notice. It seems to me that that must have been intended, as Mr Powell suggested, to achieve finality. The Respondent cannot simply keep withdrawing and reissuing Notices of Underpayment in a potentially endless cycle. Rather, there comes a point where the Notice cannot be further replaced and the employer can therefore have its appeal determined or can pay the sums identified. That purpose is not circumvented by the Respondent writing to an employer and informing it that a lesser sum is in fact due. The appeal can still run its course. If the employer agrees with the lesser figure, it can withdraw its appeal or ask the Tribunal to rectify the Notice by consent. If it disagrees with the lesser figure it can continue with its appeal, but it and the Tribunal know what the Respondent's actual position is.

- 5.7 Mr Parker submitted that this approach has the consequence that an employer could not lawfully comply with the Notice: the Notice says one figure whereas the letter and revised schedule say another. If the employer pays the revised figure it has not strictly speaking complied with the Notice. There seem to me to be two solutions to that potential difficulty. First, the employer can appeal against the Notice and seek to have it rectified to reflect the revised sum. Alternatively, the employer can pay the revised figure and seek written confirmation from the Respondent that no further action will be taken in respect of the Notice.
- Mr Parker also submitted that allowing informal revisions of this sort deprives the employer of the statutory time limits for paying and or appealing. Again, I do not accept that this means that a different approach to the legislation should be taken. The appeal lies against the original replacement Notice and the time limits run from that date. If the Respondent subsequently informs the employer of an error and a revised calculation, the employer will no doubt consider the revised calculations, either agree or disagree with them, and take actions accordingly. I can see that this might give rise to situations where an employer only has a short period of time to consider a revised calculation and decide whether to appeal against the original replacement Notice in the light of that revised calculation. The appropriate course of action seems to me to be that the employer should lodge a protective appeal, which can always be withdrawn. That is preferable to a construction of the legislation that prevents workers from receiving sums due to them because of what might be a relatively minor arithmetical or other error by the Respondent.
- 5.9 For all these reasons, I do not find that the Respondent acted unlawfully by making or identifying a further error in its calculation and/or by writing to the Appellant on 8 March 2017 with revised calculations.
- 5.10 That brings me to the discrete issues relating to individual workers. To a substantial extent those have been dealt with in the findings of fact. My conclusions based on those findings are as follows:
 - 5.10.1 As indicated, there was no change in Ms Harvey's contracted hours in March 2015 and the Respondent accepts that the sum specified as due to her is incorrect. The Notices of Underpayment should be rectified to indicate that no sum is due to Ms Harvey.
 - 5.10.2 Ms Baines remained a salaried hours worker in the Pay Reference Period following her return to work from maternity leave. However, that return to work took place on 3 November 2014. The Appellant was entitled under her contract to reduce her annual salary due to absence on maternity leave. She was absent on maternity leave on 29, 30 and 31 October 2014

and her salary was reduced accordingly. That means that under Regulation 23 three days' absence from work should be reduced from Ms Baines's salaried hours work in the Pay Reference Period. There were no other absences in respect of which the Appellant was contractually entitled to reduce Ms Baines's annual salary and did so during this Pay Reference Period, so there is no basis for making any further reduction under Regulation 23.

- 5.10.3 Ms Rayner remained a salaried hours worker in the Pay Reference Period following her return to work from maternity leave. She returned on the first day of the Pay Reference Period. There were no absences in respect of which the Appellant was contractually entitled to reduce her annual salary and did so during this Pay Reference Period, so there is no basis for making any reduction under Regulation 23.
- 5.10.4 Ms Malik's unpaid attendance at staff meetings outside the nursery's opening hours should be treated as unpaid basic hours. As I have indicated, there was nothing to suggest any agreement at the time that attendance at such meetings was by way of unpaid overtime. This was a salaried hours worker and the nature of salaried hours work is often variable hours of work. The mere fact that attendance at the staff meetings took place outside the nursery's usual opening hours is not enough to indicate that this should be categorised as unpaid overtime. A salaried hours worker was being required to attend meetings for which she was not being paid. I can see no good reason why those hours should not be treated as part of her annual basic salaried hours, in respect of which she is entitled to be paid national minimum wage.
- I have accepted Mr Stead's evidence about the dates on which Ms Malik exceeded her basic hours in the two relevant calculation years. Mr Parker did not advance a forceful argument against Mr Stead's calculation under Regulation 28. His criticism, in reality, was that Mr Stead had not simply subtracted Ms Malik's basic hours for the year from her actual hours for the year, to find the excess hours worked. The answer to that criticism is straightforward: while that might seem to be a common sense approach, that is not the calculation mandated by Regulation 28. Regulation 28 seeks to take into account that the basic hours are deemed to be apportioned evenly through the year. Mr Stead performed the calculation as required by Regulation 28 and no basis for interfering with that has been identified.

Employment Judge Davies 8 November 2018