



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH BY CVP

**BEFORE:** EMPLOYMENT JUDGE BALOGUN

**BETWEEN:**

Onehundredpercent Publishing Limited

**Claimant**

And

Commissioner for Revenue and Customs

**Respondent**

**ON:** 16 & 17 May 2022

**Appearances:**

**For the Appellant: Jo Phillips, Director**

**For the Respondent: Mr Lewis, Counsel**

## **RESERVED JUDGMENT**

The appeal against the Respondent's Notice of underpayment of National Minimum Wage is dismissed.

## REASONS

1. By an ET1 received on 16 November 2020, the appellant appeals against a Notice of Underpayment of the National Minimum Wage (NMW) and related penalty issued by Her Majesty's Revenue and Customs (HMRC).
2. On behalf of the appellant, I heard from Jo Phillips (JP) Director and Rebecca McNeilly-Tilford (RMT) former Intern. On behalf of the respondent, I heard from Carlton Francis (CF) NMW Compliance Officer; Elizabeth Osborn-Greatrix (EOG) former Intern and Mahsa Dehghani (MD) former Intern.
3. I was provided with a main bundle and a supplementary bundle. References in square brackets are to pages from the main bundle unless prefixed with an S, in which case they are from the supplementary bundle.

### The Issues

4. The Issues for determination were as follows:
  - a. Whether EOG and MD ( the Complainants) were workers within the meaning of the National Minimum Wage Act 1998 ( the Act ) and the National Minimum Wage Regulations 2015 ( the Regs ) and if so;
  - b. Whether the complainants were working during the relevant pay reference period.
  - c. whether the complainants fell within one of the statutory exemptions from payment of the minimum wage and if not;
  - d. whether the amount payable to the complainants in the HMRC Notice of Underpayment is correct and if not, what is the correct amount;
  - e. whether the penalty specified in the Notice of Underpayment is correct and if not, what is the correct amount.

### The Law

5. Section 1 of the Act provides that:
  - (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.*
  - (2) *A person qualifies for the national minimum wage if he is an individual who—*
    - (a) *is a worker;*
    - (b) *is working, or ordinarily works, in the United Kingdom under his contract;*
    - (c) *has ceased to be of compulsory school age.*
6. Section 54(3) of the Act defines a worker 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;*

7. By virtue of section 28 of the Act, there is a presumption that an individual qualifies, or, as the case may be, qualified at the time for the national minimum wage unless the contrary is established.
8. Regulations 51-54 of the National Minimum Wage Regulations 2015 (the Regs) sets out the category of workers undergoing training or work experience who are excluded from entitlement to the NMW. The appellant accepts, and I agree, that the individuals concerned did not come within any of the exemptions.
9. Section 19 of the Act provides that, where, on conclusion of an investigation, an HMRC compliance officer believes that a worker who qualifies for the NMW has not been remunerated at a rate at least equal to the NMW, the officer may issue a notice of underpayment or, where there are a number of underpaid workers, multiple notices of underpayment setting out the arrears of NMW to be paid by the employer together with a financial penalty for non-compliance.

#### Findings of Fact

10. The respondent is in the business of digital interactive magazines that write about art, fashion, literature, architecture and anything else creative. The revenue stream arm of the business specialises in making digital content, building websites, building digital assets and other digital content. The business trades under the name .Cent JP is a Director and majority shareholder and runs and manages all aspects of the business. Although JP tried to suggest that .Cent was a wholly separate and distinct non-profit arm of the business, that is not borne out by the facts. It was not a separate entity, it was operated by the company (from its premises) and within the bundle are a number of invoices issued by the respondent to lifestyle clients on headed paper bearing the .Cent logo. I am satisfied that it is an integral part of the business.
11. The respondent uses the services of students, self-employed personnel, volunteers and Interns on the magazine. Interns are generally taken on through Erasmus (an EU student exchange programme) and other University placement arrangements for work experience. Internships were also advertised on Internwise, a dedicated internship job posting website. The length of the internship was generally 3 - 4 months.
12. On 20 October 2020, following an investigation into a complaint that the respondent had failed to pay the NMW, CF, sent the respondent a Notice of Underpayment of the NMW in respect of the complainants, both of whom had been engaged by the respondent as Interns. The amount ordered to be paid to MD for the Pay Reference Period (PRP) was £2,199.88, and to EOG, £2,920.51. In addition, a penalty charge of £9,207.62 was imposed [2-4]

EOG

13. EOG was engaged by the appellant as an Intern between 23.8.18 and 20.12.18. EOG, was not a student as she had completed her degree prior to joining the appellant. EOG had responded to an advert on line for an unpaid Editorial Intern. There was no written agreement but it was agreed verbally that EOG would do 3 days a week unpaid and that a home-cooked lunch would be provided, prepared by JP. In return for providing her time and skills, EOG would receive guidance and training on how to be a professional worker in her chosen field. In addition, any published output generated or contributed to would be attributed to her and could be used at different employers.
14. EOG was an editorial intern typically involved writing up reviews of books, new products, art exhibitions etc. Any articles written by her needed to be sub-edited and proof-read by another intern and amendments made, as appropriate. EOG would also proof-read articles of others. EOG's articles would then appear in the digital magazine. One such article she wrote was titled "The Wonderful World of Weird Plants" which was a review of a book titled "Weird Plants". Another article written by EOG was titled "Bohemian Living in Creative Homes" taken from a book of the same title. EOG would attend regular editorial meetings where topics such as the "theme" of the month and potential article topics would be discussed. Interns could then put themselves forward to write on the topic. EOG also represented the appellant at London Fashion Week where she filmed some of the shows and posted them on social media.

MD

15. MD was engaged between 1.10.18 and 31.12.18 for 4 days a week. Her terms of engagement were also verbally agreed and were the same as EOG's save that MD did 4 days a week and was engaged predominantly on the art side of the business. MD started off working mainly on the All.I.C magazine collaborating with 2 other artworkers on the layout. Once that project was finished, she worked on the art work on the main set magazine. MD sourced images that were free to use, illustrated fictional stories, helped with a perfume photo shoot and created digital illustrations for the magazine. She was also involved in coding.
16. The Complainants were not able to send a substitute to carry out tasks in their place.
17. JP accepted that the Complainants carried out the above activities but contended that they were not workers; did not do the work of workers and were not treated as workers. She said that they only ever undertook light basic tasks and did not do the amount of "work" they would have done had they been workers. In addition JP said that the Complainants were slow and that if she had considered them workers, both would have been sacked for being very under par. Further, JP contended that the tasks carried out by the Complainants were for their own benefit and of no benefit to the appellant. The suggestion that the appellant received no benefit from the Interns was disingenuous. Any articles, or illustrations done by the Complainants that appeared in the magazine were clearly in furtherance of the appellant's business of producing digital content for its online magazine.
18. JP accepted that the Complainants did not do shadowing all of the time but contended that they spent the majority of their time being guided on basic items and never worked on anything on their own. However, this is belied by her own witness statement in which she says: "*Often artworkers had a lot of freedom to take an idea and run with it and do*

*whatever they felt they wanted to create. We would discuss the central theme of an article that would need an image creating but after that they were given full creative freedom...* When asked what the Complainants were doing when they were not shadowing, JP said: *"there is not a term for it"* but she was adamant that it was not work.

19. JP said that the Complainants could come and go as they pleased. However I accept their evidence that they were required to be in the office from 9.45am for a 10.00am start and could not leave until 6pm. In her witness statement, in reference to lunchtime at the office, JP says: *"We encourage each person to sit down not to look ta (sic) computer screens phones during lunch etc so that they rest their eyes (8 hours of looking at screens is very bad for the eyesight and general health)"*. The reference to 8 hours can only be to the length of the working day and is consistent with the working hours of between 10am-6pm.
20. When MD decided to end her internship, JP sent her an email containing the following line: *"I believe you should come in and at least do a hand over day with me so that I know where everything is that you did and also so I'm up to speed on all the work you did"*. [230]. That is more consistent with work than it is shadowing. It also suggests that the Complainants were not free to come and go as they pleased, as claimed by JP.
21. When interviewed by CF, the Complainants provided details of the hours they spent working for the appellant over the period of their internship. MD's stated hours were 252.28 and EOG's 356.16. They stand by that information. JP disputes these hours but has not provided alternative hours and did not keep any records. I accept the hours as accurate.
22. The appellant also challenges the penalty imposed but has not provided a sufficient explanation as to why. Having heard evidence from CF as to the basis of calculation of the penalty, I am satisfied that penalty has been properly applied.

### Submissions

23. The respondent provided written submission, which were supplemented orally. The appellant made oral submissions. These have been taken into account.

### Conclusions

24. The starting point is that under section 28 of the Act, there is a presumption that an individual qualified for the NMW at the relevant time unless the contrary is established. The Complainants do not fall within any of the statutory exemptions from the NMW. They were not voluntary workers. There was a verbal contract between them and the appellant which they were expected to work to. They were not student interns. Whilst the Complainants did some shadowing, they did not do this exclusively. When they were not shadowing they were carrying out the tasks identified in my findings above. Those tasks amounted to work and the appellant's arguments that they were not are unmeritorious. The assertion that the tasks were done too slowly and were not done well enough is a comment on the quality of the Complainants' performance rather than the status of the tasks. The Complainants were providing their services personally and were not doing so as part of any profession or business undertaking carried on by them.

25. I am satisfied that the Complainants were workers within the meaning of section 54(3) of the Act. I am also satisfied that they were carrying out work for the appellant.
26. There is insufficient evidence to rebut the presumption of entitlement to the NMW. In those circumstances, I find that the Complainants were entitled to be paid the NMW for the hours worked. As no payments were made at all, it follows that there was an underpayment of the NMW and that it was appropriate for HMRC to issue the Notice of Underpayment.
27. I am satisfied that the hours set out in the NMW notice accurately reflect the pay due to the Complainants. Further, I am satisfied that the penalty applied has been correctly calculated.

### **Judgment**

28. The appeal against the Notice of Underpayment of the NMW and related penalty is dismissed.

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Employment Judge Balogun  
Date: 30 June 2022