EMPLOYMENT TRIBUNALS

Appellant: **The Best Connection Group Limited**

Respondent: Her Majesty's Revenue and Customs

Heard at: **London Central** **On:** **3, 4 May 2017**

Before: **Employment Judge Goodman**

Representation
Appellant: Mr T.Brennan Q.C.

Respondent: Mr T. Poole, counsel

RESERVED JUDGMENT

The appeals do not succeed.

REASONS

1. This is an appeal against penalty notices issued for failing to pay the national minimum wage.

2. The Appellant, Best Connection Group (Best) is an employment agency employing workers supplied to Sports Direct International Ltd to work at their Shirebrook warehouse in Nottinghamshire. It has done so for a number of years, and on a large-scale, supplying, on average, 1,500 to 2,000 workers each week. Best opened a Mansfield office to manage the contract, and have a representative on site.

3. Sports Direct itself employed relatively few workers (about 200) at Shirebrook. Another 3,000 who worked there were supplied either by Best, or by another agency, Transline.

Enforcement of the National Minimum Wage

4. The Respondent, HMRC, is charged with enforcing the payment of the national minimum wage.

5. The National Minimum Wage Act 1998, as amended, at section 17, provides for underpaid workers to be paid arrears at current minimum rates, even though a lower rate was in force at the time of the underpayment. Of itself this may encourage employers to pay what they should, and rewards workers for delayed payment. Other measures to assist compliance with the law are the reversal of the burden of proof if a worker brings a claim, and the creation of offences for employers refusing or wilfully neglecting to pay the statutory minimum.

6. Apart from these measures, there is provision for the payment of penalties to the state. Under section 19, officers may issue Notices of Underpayment to employers of underpaid workers.

> **"Notices of underpayment: arrears**
> (1)Subsection (2) below applies where an officer acting for the purposes of this Act is of the opinion that, on any day ("the relevant day"), a sum was due under section 17 above for any one or more pay reference periods ending before the relevant day to a worker who at any time qualified for the national minimum wage.
>
> (2) Where this subsection applies, the officer may, subject to this section, serve a notice requiring the employer to pay to the worker, within the 28-day period, the sum due to the worker under section 17 above for any one or more of the pay reference periods referred to in subsection (1) above.
>
> …
>
> (4) A notice of underpayment must specify, for each worker to whom it relates—
>
> (a) the relevant day in relation to that worker;
>
> (b) the pay reference period or periods in respect of which the employer is required to pay a sum to the worker as specified in subsection (2) above;
>
> (c) the amount described in section 17(2) above in relation to the worker in respect of each such period;
>
> (d) the amount described in section 17(4) above in relation to the worker in respect of each of such period;
>
> (e) the sum due under section 17 above to the worker for each such period.
>
> (5) Where a notice of underpayment relates to more than one worker, the notice may identify the workers by name or by description.
>
> …
>
> (8) In this section and sections 19A to 19C below *"the 28-day period"* means the period of 28 days beginning with the date of service of the notice of underpayment."

7. While by section 19(2) an officer has discretion whether to issue a notice, by section 19A(1), any notice issued must require the employer to pay a financial penalty to the Secretary of State within the 28 day period. The amount of the penalty, by section 19A(4) :

> "is the total of the amounts for all workers to whom the noticerelates calculated in accordance with subsections (5) to (5B)"

8. The basis of calculation has changed over time:

8.1 From 6 April 2009 until 7 March 2014, the penalty was 50% of the total arrears due to the workers covered by the notice, subject to a cap of £5,000 per notice.

8.2 This was then increased to 100% of the total arrears to the workers covered by the notice, subject to a cap of £20,000 per notice, with a transitional provision that this did not apply where the notice specified an amount which included a sum which related to a reference period starting before 7 March 2014. So notices where arrears included earlier periods were capped at the earlier £5,000 level. Notices of arrears all after 7 March 2014 were capped at the new level.

8.3 With effect from 26 May 2015, the cap was altered to £20,000 per worker, rather than £20,000 per notice.

8.4 With effect from 1 April 2016, the penalty increased from 100% to 200% of total arrears due to the worker, with the cap still set at £20,000 per worker. Again, the transitional provisions state that these changes are not retrospective, that is, the notice with the new penalty cannot include earlier pay reference periods. As currently expressed in section 19A:

> "(5) The amount for each worker to whom the notice relates is the relevant percentage of the amount specified under section 19(4)(c) in respect of each pay reference period specified under section 19(4)(b).
>
> (5A) In subsection (5), *"the relevant percentage"*, in relation to any pay reference period, means [200%] [4].
>
> (5B) If the time £20,000."

8.5 There is a minimum penalty of £100, unchanged from 2009, except for the change on what is being capped (from per worker to per notice) in May 2015.

Appeals

9 A person on whom a notice of underpayment is served may appeal against the decision to serve the notice, a requirement to pay a sum to any worker, and against "any requirement imposed by the notice to pay a penalty" – section 19C(1)(c). This appeal is about the requirement to pay a penalty.

10 Section 19C (6) limits an appeal under section 19C (1) (c) to either or both of two grounds, and only the latter is relied upon here:

> "that the amount of the financial penalties 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)."

11 If the appeal is allowed the tribunal can rectify the notice, which then has effect from the date of the tribunal decision - section 19 C (8).

Evidence

12.To decide the tribunal heard evidence from **Andrew Sweeney**, director of the appellant, Best, from **Gabriel Murphy**, the HMRC compliance officer responsible for operations in the investigation into Best, who issued the first set of notices of underpayment, and from **Mark Collier**, the HMRC compliance officer who issued the second set of notices of underpayment. There was a bundle of documents including correspondence, tables of calculations, and minutes of meetings. There was little dispute about facts.

Factual Summary

13. In January 2016 HMRC began an investigation into the pay of Shirebrook workers in conjunction with the trade union, Unite, and their employers. It was established that workers at Shirebrook were underpaid for two reasons. Firstly, if a worker clocked in even a minute late for his shift, the time recording system would automatically default to the next 15 minutes, with the result that the worker would not be paid for part of that quarter hour at work. Secondly, after clocking off, workers had to undergo security searches, for which there were long queues. While these were worse on some shifts than others, it seems to have been agreed that on average workers were detained another 11 minutes on site for searches, so more unpaid working time. As a result, when weekly pay was divided by working time, they were being paid less than the national minimum wage.

14.By arrangement, Sports Direct's timesheets for individual workers were downloaded automatically to the Best's own system so as to generate the payroll amounts due to the agency's employees, who were paid per hour at the national minimum wage. Best in turn invoiced Sports Direct for the wage cost, plus an agreed margin, plus VAT.

15. HMRC's policy is to engage the cooperation of employers in resolving potential underpayment, so as to save resources. Gabriel Murphy, HMRC's compliance officer, met Best's directors and solicitor on 18 April 2016 to discuss underpayments (at the time they were also investigating other deductions from workers' pay) and how they could be speedily resolved. The various Shirebrook employers met in May, and at the same time Best agreed to identify their workers currently engaged at Shirebrook, and those who have been working there but had now left.

16. On 20 May Mr Murphy confirmed to Best that: "it is HMRC's position that if it is identified that workers have not received national minimum wage rates of pay any underpayments will be subject to a notice of underpayment and penalty".

17. On 3 June Best was told they would be required to extract data and make calculations of underpayments for both current employees and leavers. Only current workers would be included on the formal notice of underpayment, though Best should arrange to pay the leavers as well, when they could trace them. There should be an agreed date for all current workers, wherever employed, to be paid through payroll. There would be a 50% reduction for prompt payment of any penalties levied.

18.A follow-up email on 9 June explained the system of financial penalties, and though the description of the applicable caps was not entirely accurate, there was a link to the policy document on the government website. The calculation method

was explained, and an Excel spreadsheet template was attached so that Best could begin making the necessary calculations.

19.In the meantime, Sports Direct's directors had given evidence about treatment of Shirebrook workers to a parliamentary committee, and the matter attracted a great deal of interest locally and nationally. Best started to draft a question and answer sheet on pay arrears for its workers.

20. The practicalities of making the calculations were discussed at a meeting with HMRC on 20 June. Best explained that they had about 300,000 lines of data to match to individual timings, and that over the period since 2012 they were looking at 6,500 individual workers. HMRC explained that if Best did not carry out calculations, they would bring in their own data analysts to do it, and in the event Best agreed to do the work itself.

21. HMRC explained, inter alia, that not only did arrears have to be paid to the workers, but that the notices of underpayment stating the arrears carried automatic penalties for employers. This issue generated a stream of correspondence about the fairness of this. Best complained they could only rely on Sports Direct's systems, that they had been swept up into matters not of their making, and that they had been brought into it late.

22. In the meantime Andrew Sweeney, Best's director, made calculations on the data himself, analysing which employees would have been on shifts requiring searches, or who had been late, and sent the detailed calculations in HMRC's Excel format to Mr Murphy in a set of emails on 9 August 2016.

23. There was then a meeting on 12 August between Mr Murphy and a Mr Gamble for HMRC, and Andrew Sweeney, his agent, and the solicitor for Best. HMRC explained that they would be using multiple notices of underpayment, each with a penalty. For proportionality, they would not be issuing notices of underpayment for those who had left, and the company could self-correct on these calculations. There would then be 13 notices of underpayment for current worker, consisting of one notice for the period up to 7 March 2014, with a penalty capped at £5000, 11 notices for the period 7 March 2014 to 25 May 2015, each with a penalty of up to £20,000, and for the period after 25 May 2015 there would be one notice for workers, with a penalty of £38,791 39. There was then what the minute taker called "a heated discussion" about HMRC issuing multiple notices bringing multiple penalties.

24. On 16 August, Gabriel Murphy emailed Andrew Sweeney explaining he was sending him four separate emails on matters arising from this meeting. The first of these set out HMRC's position on national minimum wage penalties, and explains section 19A, and how HMRC interpreted it, by links to policy documents. The second, sent on 17 August, covered the issue of multiple notices of underpayment for the period 7 March 2014 to 25 May 2015, explaining workers were being grouped into batches, each batch having total arrears not exceeding £20,000.

25. Attached to the 17 August email was an Excel workbook containing spreadsheets showing the calculations for each worker for each period, using the data already sent by Best itself, with the covering letter explaining: "I have also attached an Excel document detailing how I have grouped workers", and this related to the groups on the notices of underpayment. While Mr Sweeney was

not sure, when giving evidence, if he had in fact opened and read the Excel attachment, the tribunal was shown the sent email and the attachment, and the tabs for the workbook do indeed refer to "NOU1", "NOU2", and so on, "NOU" being notice of underpayment.

26. The other attachment on 17 August was a letter making explicit that in the middle period (March 2014 to May 2015) HMRC were issuing notices of underpayment:

> "with the aim to achieve the maximum penalty issuing the fewest number of notices of underpayment".

It stated:

> "the amounts of arrears to be shown on future notices and the penalty charges are based on calculations that you, The Best Connection, have provided. These calculations have been accepted by HMRC as representing the amounts payable to workers and have been used as the basis of the calculation of penalties due to HMRC".

27. There was a table showing the three periods, the amount of underpayment, the amounts to be paid to the workers (a higher figure because the statute requires workers to be paid at the current national minimum wage, rather than the rate which obtained at the date of the underpayments), and the penalty for each notice of underpayment, together with a list summarising the 11 notices for the middle period to show the totals due to the worker and to HMRC for each notice. In total, Best had to pay the underpaid workers £469,273.83, and penalty payments totalling £263, 628.69. Best was told that if by 14 days after the notice was issued – the target date being the August payroll run on 26 August - they had paid all the workers' arrears, and if by 6 September they had paid HMRC one half the penalty due, they would earn the statutory discount, and not have to pay the other half. This discount is provided for in section 19A of the Act.

The August Notices of Underpayment

28. The 13 statutory notices of underpayment under section 19 of the National Minimum Wage Act 1998 were sent to the company by post on 22 August 2016. Each notice has two pages and is in standard form. Each notice states on its face the total due to workers, the amount of the penalty payable to HMRC, and the final date for payment. Importantly, although paragraph 3 pf each notice said "details of the arrears can be found in the attached schedules, including for each worker: the pay reference periods where underpayment has occurred, the date the underpayment was outstanding (the relevant day), the NMW rate that applied at the time of underpayment, the current applicable rate of NMW and the total amount that was due and the payments you have subsequently made to workers" (the information required to be given on a notice by section 19), no schedules were in fact attached. A guidance note was attached, setting out how arrears were worked out, and how the penalty was calculated, although on the following day Mr Murphy realised that HMRC's post room had attached an out of date version of the guidance note, and he emailed the company with the current guidance note.

29. Best paid the workers their arrears in its 26 August 2016 payroll, and on 6 September 2016, Best paid £131,814.34, which is half the sum of the penalties on the 13 notices, to HMRC.

The First Appeal

30.On 14 September 2016 Best appealed the notices of underpayment under section 19C of the National Minimum Wage Act 1998. Grounds 1 to 6 of the appeal relate to a challenge to the validity of the notices, that the notices "are defective, are not valid notices of underpayment and the penalties are not payable", because they did not specify the workers to whom they related by name by description, they did not specify the relevant day for each worker, they did not specify the pay reference period, or the amounts for the reference pay periods, or the sum due to each worker, (required by section 19A(4)(a) to (e)) or how the penalty was calculated (required by section 19A(9)).

31. The second part of the appeal challenges the issue of multiple notices each with a penalty. Ground seven of the appeal is that "HMRC had issued multiple notices of underpayment solely in order to avoid the impact of the statutory cap on the amount of penalty which is chargeable in order to pre-empt the necessary primary legislation which was required to hire penalties to be chargeable", and "at no time has HMRC been entitled to impose penalties greater than those imposed by the applicable statutory cap", and HMRC's relevant officer is not "entitled to issue multiple enforcement notices in order to evade the impact of the statutory cap. There would otherwise be no point in the statutory cap", and "notice", should not be read as including "notices". Ground Eight is that the documents should be read as a single notice, not 13 separate notices, and capped accordingly.

32. HMRC responded to the appeal that under section 19 C (1)(c) the issue is whether the financial penalties specified in the notices of underpayment have been incorrectly calculated. It was denied that the notices issued were defective because, although the schedules had not been attached, all of the information they contained was already known to Best, save for the relevant day, which had little practical significance given that the arrears were admitted; the amount of underpayment had been calculated by Best and agreed with HMRC, and the penalties were based on the agreed arrears. Best should have recognised that the information required was all that contained in its 9 August schedules. Reproducing the information in the schedules was superfluous. Parliament had not intended total invalidity, because there was provision to withdraw and replace notices which were incorrect or omitted any requirement; further or alternatively, taking account of Best's knowledge, there had been substantial compliance, making the notices valid.

33. Further, HMRC intended to issue further notices of underpayment to Best containing the details omitted on 23 August which would be issued without prejudice to the contention that the originals were valid, and "if the tribunal finds that the notices of underpayment issued on 23 August 2016 valid, fresh notices of underpayment will be redundant. If, on the other hand the tribunal finds the notices of underpayment issued on 23rd of August 2016 invalid, HMRC will rely on fresh notices of underpayment with the consequence that grounds 1 to 6 of the present appeal fall away. HMRC will inform the tribunal when fresh notices have been issued". It was further asserted that under the regime of section 19F and 19G, HMRC had the power to withdraw and replace the notices.

34. On the multiple notices point, it was contended that this misconstrued the statutory scheme which had always permitted the issue of multiple notices of

underpayment. There was no requirement for a notice of underpayment to cover all underpaid workers, if the Act required one notice it would have said so, and if the financial penalty cap was to be applied per employer, the Act would have said so. On interpretation, "notice" should be interpreted as including the plural. Finally, there were 13 notices, which could not be construed as one notice.

The December Notices of Underpayment

35. On 2 December 2016 HMRC issued 13 fresh notices of underpayment. The covering letter to Andrew Sweeney of Best says:

> "as you will be aware HMRC's position is that the notices of underpayment issued to you on 23 August 2016 are valid and are not effective. Notwithstanding HMRC's primary position, we enclose, on a strictly without prejudice basis, fresh notices of underpayment incorporating the information you assert we are required to include",

and referred to an enclosed letter from HMRC solicitor to company solicitor, which

> "explains the purpose of the without prejudice fresh notices of underpayment and what is required from you in this regard".

36. The solicitor's letter repeats the above and invites Best to withdraw the grounds of appeal disputing the validity of the original notices, grounds 1 to 6, on the basis that if Best succeeded on this point HMRC would simply rely on the fresh notices, so the outcome would be no different and costs would be saved. The letter added:

> "for the avoidance of doubt, no further payment is required in relation to fresh notices on the following basis. Your clients have confirmed that all sums due to the workers under the original notices have been paid in full. HMRC have also been paid penalties due original notices. In the event, as we expect, the original notices are found by the tribunal that the fresh notices would be ineffective and any in any event would not be enforced by HMRC. In those circumstances the fresh notices would simply fall away with a further payment required from your client. Obviously, HMRC do not seek double recovery will double payment of any kind. In the event that the original notices are found to be invalid by the tribunal, HMRC would rely on the fresh notices. In that event, HMRC would not require further payment under the fresh notices I the workers or the penalties provided that your client do not require any form of repayment from HMRC or any workers and the except the validity of the fresh notices".

The Second Appeal

37. Best appealed the second batch of notices. It was argued that there could be no such thing as a without prejudice notice, and the second set was invalid; there was no right to issue two sets of notices for the same arrears and penalties. HMRC had told the appellant it did not need to pay any sums in relation to the second set of notices. The notices referred to penalties which did not need to be paid by the due dates or at all. The argument about multiple notices was repeated.

38.HMRC responded to the appeal, explaining that the second set had been issued in the light of the appeal against the first set "to preserve its position in the

event that the tribunal finds the first set of notices of underpayment invalid". Reliance was placed on the letter sent to the solicitors on 2 December 2016. It was stated that Best had misunderstood, that the statutory scheme had always permitted HMRC to issue notices, and the letter did not waive any right to rely on the second set of the first set was found invalid. If the first was invalid and Best asked for penalties to be repaid, HMRC would require payment under the second set pof notices. As for the multiple notices point, HMRC relied on the same arguments as in first appeal.

39. The questions to be asked are firstly, whether the first set of notices is valid, secondly, whether the respondent is entitled to issue multiple notices rather than one notice (the relevant consequence being the amount of the penalty), and thirdly, if the first set is invalid, is the second set effective.

Validity of the August 2016 Notices
Appellant's submissions

40.The appellant argues that because the August notices did not include the information specified in section 19 (4) they are not valid. They do not identify the workers to whom they relate by name or description. They do not state the relevant day for each worker, they do not state the pay reference periods for each worker, so an employer would not know to check it. They do not specify the amount underpaid to each worker, or the amount due to each worker (Grounds 1-5). In answer to HMRC saying that the employer knew all this because of the correspondence and attached schedules sent earlier, they counter that this is unattractive because it was a knowing breach of the statutory provision. In this they rely on **R (Archer) v HMRC (2017) EWHC 296**. They add that as the statutory regime does not specify the consequence of the breach of the statutory requirement, it is necessary to look at the statutory code to see whether Parliament intended the consequence of breach would be invalidity, and it is argued that this is precisely what Parliament intended, as it had provided in sections 19 F and 19 G a means for withdrawal and issue of replacement notices where there were errors and omissions, and specifies the effect of this on any pending appeal. This is said to be a complete scheme. It is useful to set it out here.

19F Withdrawal of notice of underpayment

(1) Where a notice of underpayment has been served (and not already withdrawn or rescinded) and it appears to an officer acting for the purposes of this Act that the notice incorrectly includes or omits any requirement or is incorrect in any particular, the officer may withdraw it by serving notice of the withdrawal on the employer.

(2) Where a notice of underpayment is withdrawn and no replacement notice of underpayment is served in accordance with section 19G below—

(a) any sum paid by or recovered from the employer by way of financial penalty payable under the notice must be repaid to hiM with interest at the appropriate rate running from the date when the sum was paid or recovered;
(b) any appeal against the notice must be dismissed;
(c) after the withdrawal no complaint may be presented or other civil proceedings commenced by virtue of section 19D above in reliance on any non-compliance with the notice before it was withdrawn;
(d) any complaint or proceedings so commenced before the withdrawal may be proceeded with despite the withdrawal.

(3)In a case where subsection (2) above applies, the notice of withdrawal must indicate the effect of that subsection (but a failure to do so does not make the withdrawal ineffective).

(4) In subsection (2)(a) above, *"the appropriate rate"* means the rate that, on the date the sum was paid or recovered, was specified in section 17 of the Judgments Act 1838.

19G Replacement notice of underpayment

(1) Where an officer acting for the purposes of this Act serves a notice of withdrawal under section 19F above and is of the opinion referred to in section 19(1) above in relation to any worker specified in the notice which is being withdrawn ("the original notice"), he may at the same time serve another notice under section 19 above ("the replacement notice").

(2) The replacement notice may not relate to any worker to whom the original notice did not relate.

(3) If the replacement notice contravenes subsection (2) above, that fact shall be an additional ground of appeal for the purposes of section 19C above.

(4) The replacement notice may relate to a pay reference period ending after the date of service of the original notice.

(5) Section 19(7) above applies in relation to the replacement notice as if the reference to six years before the date of service of the notice were a reference to six years before the date of service of the original notice.

(6) The replacement notice must—
(a) indicate the differences between it and the original notice that it is reasonable for the officer to consider are material; and
(b) indicate the effect of section 19H below.

(7)Failure to comply with subsection (6) above does not make the replacement notice ineffective.

(8) 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.

(9) Nothing in this section affects any power that arises apart from this section to serve a notice of underpayment in relation to any worker.

19H Effect of replacement notice of underpayment

(1) This section applies where a notice of underpayment is withdrawn under section 19F above and a replacement notice is served in accordance with section 19G above.
(2) If an appeal has been made under section 19C above against the original notice and the appeal has not been withdrawn or finally determined before the time when that notice is withdrawn—

(a) that appeal ("the earlier appeal") shall have effect after that time as if it were against the replacement notice; and
(b) the employer may exercise his right of appeal under section 19C above against the replacement notice only if he withdraws the earlier appeal.

(3) After the withdrawal no complaint may be presented or other civil proceedings commenced by virtue of section 19D above in reliance on any non-compliance with the notice before it was withdrawn; but any complaint or proceedings so commenced before the withdrawal may be proceeded with despite the withdrawal.

(4) If a sum was paid by or recovered from the employer by way of financial penalty under the original notice—
(a) an amount equal to that sum (or, if more than one, the total of those sums) shall be treated as having been paid in respect of the replacement notice; and
(b) any amount by which that sum (or total) exceeds the amount payable under the replacement notice must be repaid to the employer with interest at the appropriate rate running from the date when the sum (or, if more than one, the first of them) was paid or recovered.

(5) In subsection (4)(b) above *"the appropriate rate"* means the rate that, on the date mentioned in that provision, was specified in section 17 of the Judgments Act 1838.

40. The respondent argues that this code providing for withdrawal and replacement enables HMRC to put right a problem so that the true cause of a dispute can be adjudicated on by the employment tribunal. Within this code there is provision - in section 19F(3) and section 19G(7) - that a failure to comply with a mandatory requirement in a notice of withdrawal and a replacement notice respectively is not fatal. The respondent submits that there is no similar saving provision for the *original* notice of underpayment, with the result if it is not withdrawn and replaced, as provided for, it should be implied that it was intended that failure to comply with the mandatory requirement was fatal, and it is not valid.

41.On ground 6 – that the notices did not state how the penalty was calculated - HMRC has answered that this information was contained in the attached leaflet, to which the appellant says this is not good enough, because it is a penalty in the nature of criminal liability.

42. This is argument is developed both in relation the failures to give information about the detail of the calculation in relation to each worker (grounds 1 to 5) and ground 6, which is about how the penalty is calculated. The appellant relies on **Jussila v Finland (2009) STC 29**. This was about a 10% tax charge for inaccurate bookkeeping for VAT, and an issue arose as to whether imposing surcharges amounted to a criminal charge, engaging Article 6 of the European Convention on Human Rights. The European Court held that a starting point was how the offence was classified (criminal or civil) under domestic law, the nature of the offence was important, as was the degree of severity of the penalty. There was no reason why tax cases required a different approach. In that case surcharges were not part of any Finnish criminal regime, but they were imposed by a rule which had "a deterrent and punitive purpose", which was enough to establish the criminal nature of the offence. Reliance was placed on **Bendenoun v France (1994) ECHR 12547/86**, that the law applied to all citizens as taxpayers, that it was not pecuniary compensation for damage but punishment to deter reoffending, and it was substantial. However no one element was decisive, and a decision on whether it was in the nature of a criminal charge must be cumulative. In **King v Walden (Inspector of Taxes) (2001) STC 822**, the High Court held that penalties for failing to declare income for tax were "criminal" for the purposes of article 6, because the system was intended to punish the

defaulting taxpayer, and to operate as a deterrent, the fine was potentially substantial, it was not related to the administrative or other cost of dealing with the taxpayer, and the amount of the fine depended on the degree of culpability.

43.Article 6 (3)(a) provides: "everyone charged with a criminal offence has the following minimum rights: to be informed promptly… in detail, of the nature and cause of the accusation against him". It is argued that failing to give the information required as to calculation of individual arrears and of penalties was a breach of article 6 where the penalties are of a criminal character. The appellant in argument also pointed to article 6 (2) - presumption of innocence. It is said to be "objectionable when the state imposes on citizens a penalty of a criminal character to say "work it out yourself", and go ahead in imposing a penalty".

44. The appellant further relies on **Archer**, which involved a closure notice following investigation, which did not of itself amend the tax return or say what tax was owed. It was found that the closure notice must, implicitly, amend the return to show what tax was owed. There was factual dispute on when the taxpayer did should have been aware of the amount of tax due when it was not amended until six weeks later. The relevant statute at section 114 provided a mechanism for correcting errors in notices which was complete. In this case the appellant argues that HMRC could either abandon their notice, or they could use the statutory scheme, but they chose to do neither.

Respondent's submissions

45.The respondent accepts that the notices were defective but denies that the effect of this is to render the penalties not payable. All the information came from Best's own calculations, carried out in the Revenue's format, and sent back to them by Mr Byrne on 19 August. Sending them again on 23 August with the notices was superfluous. The course of dealing was such that it was not expected Best would object. It is not suggested that Mr Byrne made an error – it is said the omission was intended.

46. The notice should not be rendered totally invalid because it did not provide the required information, when using the test set out by the House of Lords in **R v Soneji (2006) 1 AC 340**. Section 19F provides a notice of underpayment "may" be withdrawn if it incorrectly includes omits any requirement, but this does not preclude reliance on the notice with its omission. **Soneji** concerned a confiscation order imposed following conviction for money laundering, but the order had been postponed more than six months from the date of conviction, which was contrary to statute, unless there were exceptional circumstances, and the appeal concerned its validity. Reviewing much law on the effect of failure to comply with mandatory requirements, it was held that non-compliance must be considered within its place in the scheme of the act, together with the degree and seriousness of non-compliance. On the facts of the case, overlooking the time limit would not make the Parliament's intention to have a time limit ineffective, because courts could use their abuse of process jurisdiction; there was little injustice to the accused, and a countervailing public interest in making a confiscation order in a substantial abuse of process case. The respondent relies on **ex parte JJR Sports v Telford and the Wrekin Borough Council (2008) EWHC 2870**, to illustrate the application of this, being a case where a notice of non-payment of non-domestic rates was defective because it included rates due from more than one payment period, as the statute specified that there must be

only one bill per period. Compliant bills had been sent 8 weeks later. Analysing **Soneji**, it was held that non-compliance did not render the notice invalid; a correct notice had been served 56 days later; the appellant knew the amount of money being demanded, even on the defective notice, though he could not check the amount for the relevant period; it could not be held that failure meant that ratepayer should escape liability. The respondent also relies on **Osman v Natt (2015) 1 WLR 1536,** a case about service of notice by tenants under the Leasehold Reform Housing and Urban Development Act 1993 claiming the right to acquire the freehold of the property. It was defective because it did not, as required, state the full name of one of the qualifying tenants, the address of her flat, or particulars of her lease. It was held at first instance and on appeal that the defect was fatal. The judgment divided decided cases into two broad categories: (1) those in which the decision of a public body set out in a notice was challenged, (2) those where the statute conferred a property or similar right on a private person as a consequence of serving a notice. In the first category, decisions of public bodies, and with reference to **Soneji**, the correct interpretive approach was whether the statutory requirement could be fulfilled by substantial compliance, and if so whether, having regard to the circumstances, there had been substantial compliance. In the second category, on private rights, there had to be certainty in relation to the acquisition and transfer of property interests, which precluded reliance on the state of mind or knowledge of the recipient of the notice or prejudice caused by non-compliance of the facts of the particular case.

47.The respondent argues that the national minimum wage penalty notice falls into the first category, and so argues that Best's actual knowledge of the calculations and of the breakdown of the amounts on the notices is relevant, and that there had been substantial compliance with the statutory requirement. The respondent argues that from 9 June onward Best were given full details of how to make calculations, they made the calculations, they were told there would be multiple penalty notices, and how they would be made up, they had full details of the statutory framework on calculation notices, they had a leaflet explaining this, they had the Excel workbook with the detailed calculations on which the notices were built. Mr Sweeney's evidence was not that he did not know what the notice was, or how it was calculated, and on the basis of the discussions and correspondence between June and August, it is argued that he knew exactly who to pay, how the calculations were made, not least because he had made them, and it was disingenuous to say by reason of the defect the respondent did not know how the notices were calculated or had to pay. Such a defect could, in the abstract be harmful, but on the facts of this case the appellant had all the detail and the notices should not be declared invalid. As for the sixth ground, that he did not know how the penalty calculation was made, they had meetings and emails explaining precisely how it was done, any error in June (about whether the cap was per notice or per worker) had been adequately corrected by August, and the notice itself attached a leaflet explaining. Here the respondent relies on **Elim Court v Avon Freehold (2017) EWCA Civ 89,** upholding **Osman**. In this case there was no prejudice to the appellant, and indeed they did not come back to question whether information was all have notice was made up. On the facts, Best were not in any way concerned about how the calculations, whether of arrears or penalties, were arrived at, but about the fact that multiple notices were being issued.

Comment [GE1]:

Comment [GE2]:

48. On the argument that the penalty is criminal in nature such that Article 6 requires a strict approach, it is argued that this argument is not required to

resolve the points being appealed, and objection is taken that this argument was not flagged up in the grounds of appeal, that the "waters run deep", and this could have wider implications. It is said that there are separate criminal sanctions in the National Minimum Wage Act, indicating it is not of a criminal nature, and this is like other civil penalties schemes, without criminal connotations. In any event, even if it is a criminal penalty, there is no doubt in the appellant's mind about the nature of the penalty or what he had to pay or when, or how it was calculated, unlike **Archer** with a have been some doubt about the amount, and which in any case involved a different statutory scheme. There is no doubt that Best understood the nature of the penalty was worked out what it was based, and there was no breach.

49. As for the coherence of the statutory scheme, the respondent points to paragraph 17 of the appeal notice, where the appellant asserts that "should HMRC withdraw the notice(s) under section 19F, there is no power to issue any replacement notice under section 19G(2)". This subsection says that a replacement notice cannot add workers. No workers were named at all in the first set of notices, so a replacement notice seeking to put this right could be "adding" all the workers to whom the notice related. This indicates that the statutory code for rectifying defects by using section 19F and 19G is not complete, and it is the appellant itself arguing o the one hand that HMRC cannot issue replacement notices, and on the other that HMRC could and should have withdrawn and replaced the notices, and has not used the statutory code. As for the provision in 19F(3) and 19G(7) about defects not invalidating the notice, it is argued that this is explained by the fact that 19F and 19G taken together allow (section 19G(8)) only one chance for the enforcing officer to withdraw and replace a notice, and the saving provisions limited to defective withdrawal and replacement notice must be seen in this context, and it cannot be presumed that because only these errors are stated not no invalidate the notice other errors do make it invalid.

Discussion

50. The question is whether Parliament intended the notices to be entirely ineffective if non-compliant in section 19(4) or 19A(9) particulars. Having regard to cases derived from **Soneji,** the issue is whether there has been substantial compliance, despite the defect on the face of the notice. Following the **Osman v Natt** scheme, this is a category one case, involving challenge to a public body's decision, and not about a property right, so the state of mind of the recipient can be taken into account. On the facts of this case, nothing in the documents or Mr Sweeney's evidence suggests that he was in any doubt about how the arrears were calculated, or how the penalties were arrived at, even if he did not agree with multiple notices being issued. On the contrary, Mr Byrne had taken pains in his emails at the 16 and 17 of August to explain all the points disputed by Best and arising from the meeting. The schedules which should have accompanied the notice had been sent to Best only five days earlier, and grouped the named workers and the arrears and payment sude into batches corresponding to each of the 13 notices and labelled accordingly. They were not queried then or later. There was substantial compliance, and the notices are valid.

51. On the article 6 argument, on the face of it these penalty payments substantial (even if only the £5000 cap should apply, as the appellant argues in relation to multiple notice), at a level where the penalties are punitive, and intended as a deterrent. Their existence and the commercial cost of them

induces employers to pay attention to the national minimum wage requirements and take pains to pay properly, before HMRC start to investigate, and an incentive to put their house in order, which is important as this area involves a body of low paid workers, without much power or recourse to advice and help, unless organised in a trade union. I take the point that the respondent has not fully argued it, and note that the penalty contains no element of mitigation, only the discount for prompt payment. But it may be possible to set point that aside. Even if it is assumed that these are penalties of a criminal character, I hold that there is no breach of Article 6 (3)(a) apparent, as, on the facts, Best knew exactly what the penalty was based on, and did not dispute that workers had been underpaid and had agreed how much was owed to them. Even if it did not agree with it, it knew what the Revenue's case was, as set out in writing by Mr Byrne, and it has exercised the right to appeal. There may be cases where it is right to say that HMRC cannot issue a notice without a breakdown and tell the taxpayer to work it out for himself, but this is not one of them. In **Jussila**, it was held that the oral hearing sought by the taxpayer was not required, even if it was a criminal penalty, because the taxpayer had had the opportunity to make written representations. As for Article 6 (2), the appellant mentioned this only in passing, and the argument that the appellant has been deprived of the presumption of innocence has not been developed.

52.On the completeness of the statutory code, sections 19F and 19G provide an opportunity for HMRC to put right omissions from the notice, except in the case where, as here, the defect is not naming the workers, individually or by description, at all. Their names appear only on the schedules, though in the bundle many have been redacted. The scheme precludes adding a worker in a replacement notice. That of itself might bar use of these sections, even if it could cure the other defects. It is to be noted that section 19 provides that a defective notice "may" be withdrawn, not that it must. Further, 19 G(9) provides: "nothing in this section affects any power that arises apart from this section to serve a notice of underpayment in relation to any worker", suggesting that the provision for putting right defects set out in sections 19F and G is not exclusive, as another notice could simply be issued. I also accept the argument that the specific provision within 19F and 19G to overlook otherwise mandatory requirements within the code is included in the light of the provision that withdrawal and replacement may only take place once, and will not invalidate the notice because of these minor errors in the withdrawal and replacement. Parliament intended that taxpayers should know what they had to pay each worker, and how the penalties were calculated, so they could challenge them if wrong. On the facts of this case Best knew exactly who it had to pay and why. Parliament provided a means to rectify notices, but this was not effective if workers were omitted, and Parliament also specified that there was still power to issue other notices despite the ability to issue a replacement notice, suggesting that this was not an exclusive code for rectifying errors and omissions, but only an administrative convenience.

53. In relation to the reliance placed by the appellant on **Archer,** the scheme there was different to that of the National Minimum Wage Act, and contained its own provision to save defects in section 114 of the Taxes Management Act if the notice was "the same in substance and effect" and conforming to the intent and meaning of the Taxes Acts. It was specifically provided that mistakes in the amount of tax did not invalidate an assessment for tax. The notice in **Archer** was not defective, save that it did not on its face state what tax was now due; there

was dispute too on whether the tax return had been amended, and if so that sufficed to inform the taxpayer what was due, and so when the tax debt had crystallized. Of interest is the discussion within **Arche**r of reasoning in **Bristol and West plc v HMRC (2016) STC 1491**, about an erroneous closure notice which did not state HMRC's case as the amount of tax due, as it should have done, and the conclusion that the issue was "the correct interpretation of the notice as it would be understood by reasonable person in the position of its intended recipient", such as tax payer might reasonably be expected to infer the amount from informational available to him and "the relevant objective contractual scene". **Archer** distinguished between the omission of the actual amount due, and a statement of HMRC's case, and so held the closure notice ineffective despite this reasoning, unless saved by section 114, which ultimately it was. Applying this to the present case, each of Best's notices did state what was due under it, and what was missing was the detail of how that was computed. That missing detail was readily understood, and was within in the knowledge of Best, the intended recipient. The National Minimum Wage Act is silent, unlike the TMA, on the effect of formal defects, but having regard to **Soneji**, and the provision of only partial means to rectify notices, it is not accepted that the effect of the formal omission of detailed breakdown within the notice made it invalid.

Multiple Notices

54. The appellant argues that the issue of multiple notices where one would do is "a deliberate ploy by HMRC in order to evade the "her notice" statutory cap on the amount of the penalty". They had all the information available at once, so could have issued one notice, but issued several instead so as to achieve a penalty far greater than £20,000. This tactic was variously described as avoiding evading and dodging the cap on penalties provided by Parliament.

55. The respondent argues that this tactic renders the cap meaningless. Reliance is placed on section 6 of the Interpretation Act 1978, which says:

> In any Act, unless the contrary intention appears,..
> —(c) words in the singular include the plural and words in the plural include the singular.

It is argued that the contrary intention appears because there is a cap on the penalty an employer must pay.

56.The respondent points out that if a large number of employees had been underpaid by small amounts (say, arrears of £4 per week each), HMRC could issue large numbers of notices underpayment, one per worker, or one per worker per week, and charge the minimum penalty of £100 on each. The solution proposed is that enforcement proceedings are a single administrative act, envisaging a single notice describing all the affected employees with a cap for that notice (until May 2015, of course, when it became a cap per worker). Enlarging on this, the appellant argues that although there were 13 pieces of paper, truly it was only a single notice, because it was only a single notification, given all at the same time on the same day.

57.In relation to the provision 19 G (9) about issuing a replacement notice not affecting the power to issue any notice, it is argued that it is an abuse of power to issue multiple notices if there was one batch of workers. This was not a case of some workers being overlooked, requiring a notice to be issued later for their

arrears, with a compulsory penalty on that notice too. It was a deliberate decision, to get round the maximum penalty envisaged by Parliament.

58. The appellant argues that all 13 could have been issued on one day, and as they included arrears from the first period when the cap was £5,000, that should have been the limit. If that is not accepted, the fallback argument is that real abuse was issuing 11 notices, rather than one, for the middle period, when the cap was £20,000 per notice, rather than £20,000 per worker.

59. On multiple notices, the respondent submits that strategy scheme has at all times permitted HMRC to issue not multiple notices underpayment. A single notice can relate to more than one worker, as in section 19 (5), but does not require that all workers are included on a single notice for a particular pay reference period, and if that was the intention of the act would have said so. Further, if the cap on the penalty was employer, rather than the notice, the act could have said so. The statutory framework is about whether individuals are paid, and not why that was the case, except there relates to the criminal offences. Or on Instead it refers to the cap being on the penalty calculated by reference to the underpayment "for all workers to whom the notice relates". The respondent relies on the plain meaning of sections 19 and 19A being that multiple notices can be issued to a single employer, and there being no restriction in subsection 19 (2) on the number of notices which may be served on a single employer. Power to do a thing can include doing it more than once. Restricting the number of notices that can be issued to single employer is an impermissible and unjustified reading in of words which will undermine the legislative purpose of the act, which was to ensure compliance and give effect to the deterrence of civil penalties.

60.On the argument that there is a single administrative act, the respondent points to the fact that the penalty regime has changed twice over the period in question, yet the transitional provisions envisaged notices, provided they are not retrospective, yet these are a single administrative act.

Discussion

61.Bennion on statutory interpretation provides that where an enactment is grammatically capable of one meaning only and informed interpretation does not suggest doubt as to whether the grammatical meaning is the one intended by the legislator, the grammatical meaning is the one to be applied. Only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look at some of the possible meaning of the word or phrase (Lord Reid in **Pinner v Everett (1969) 1WLR 1266**). There is a presumption that the literal meaning is the one intended by the legislator.

62.The appellant's difficulty in the argument that Parliament envisaged only one notice, with one penalty, for all the workers underpaid at that time, is that there is no restriction on the ability to issue another notice, for example, if other workers came to light, or had been missed off by mistake. Restricting the issue of additional notices to such cases could have been specified, but is not. Section 19G(9) says that the power to withdraw and replace a notice is not affected by "any power that arises apart from this section to serve a notice of underpayment in relation to any worker". This is not limited to notices which have been withdrawn, and the provision that the withdrawal and replacement regime cannot

be used to add a worker indicates either that such workers are left without remedy unless they bring individual claims in the employment tribunal, or that other notices can be used to cover them. The latter is more plausible, given section 19G(9). That subsection is not stated to be limited to use for additional workers. Each such notice must carry a penalty, subject to the minimum and maximum, so the effect would be to levy a penalty on the employer of a group of workers that exceeded the statutory cap per notice. This makes it hard to be clear that "the contrary is shown", and that "notice" must mean only notice in the singular.

63.It can be illustrated by taking first the argument that there should have been one notice for all three periods. The transitional provisions bar inclusion of arrears from previous periods in the notice with a new and bigger cap, which accords with penalties not being imposed retrospectively, but do not specify that there cannot be notices for more than one period. Not allowing a separate notice for another period could defeat the intention of Parliament when it raised the level of the penalty, as it could allow employers who continue to underpay after the change has been made only to pay the old penalty. This example suggests that more than one notice is permitted, at any rate, for different periods.

64. On the other hand, what is the purpose of having a statutory cap on the penalty for each notice (as was the case until May 2015)? Capping the notice suggests the intention was to impose a limit an employer's penalty for underpaying. Under the new regime, where the cap is per worker, HMRC could avoid this cap too, if a worker's arrears exceeded £10,000, by issuing more than one notice for that worker for successive periods. These periods would not be defined by the dates of changes in the statutory penalty calculation, as they were in this case, but this too could be permissible. On the other hand, if it was permissible to batch workers so as to achieve a greater penalty, why was it thought necessary to change the penalty from per notice (with no limit on the number of notices), to per worker?

65. Reconciling the two – the ability to issue more than one notice, say when workers are missed off, or when other infringements come to light, when a penalty *must* be imposed for each notice, with the intention to limit an employer's penalty, requires reading in an ability to issue additional notices in some circumstances, such as when errors being made, but not when it is done only to increase the amount of the penalty. This may be very difficult to achieve where the reasons for issuing more notices are factually disputed or unclear, without clear wording on when single notices only are required or additional ones permitted.

66.An alternative is to read in that the power to issue a new notice, mentioned in section 19G, only occurs where a notice has been withdrawn, and is an alternative to replacement, so that this is a limited and precise exception to there being only one notice issued for one investigation, or one employer, or one period, or one workplace. This too is troubling, because the options could have been presented in the alternative, but are not. If a new notice can only be issued if one has been withdrawn, it would complicate the provisions for pending appeals.

67.The Tribunal has been referred to the decision of E J Holbrook in Liverpool in **Qualitycourse Limited v HMRC, 2403129/2016**. The appellant trades as

Transline, and was the other employment agency at Shirebrook. That appeal concerned only the multiple notices point. That Tribunal heard evidence from the HMRC official responsible for policy about the policy intentions. The point has not been argued here because that argument concerned a public law point about legitimate expectations, rather than the letter of the statute. This Tribunal has to look at the plain meaning of the words, and only depart from that if there is real doubt about the meaning intended.

68. Although it is troubling that the cap is ineffective for a particular employer when more than notice is issued, the lack of restriction to one notice, the fact that any notice issued must carry a penalty, and the lack of any indication of a restriction limiting any overall penalty – for example that notices for additional workers must not carry a penalty that would bring the total over the statutory cap - indicates that multiple notices are permitted if each notice is capped.

69.As for the argument (ground eight of the notice of appeal) that the 13 notices should be read as one notice, subject to one cap, this is hard to reconcile with the power to issue notices (using the Interpretation Act) when 13 notices were in fact issued. It would require reading in a requirement that when the cap was to apply per notice, that meant a cap on the total of the penalties imposed by the notices. That could have been specified but was not. It also seems artificial to construe the issuing of notices to a "single administrative act", so a single notification and a singular notice, as the respondent argues. This is a gloss on the statute that cannot be detected.

70.This Tribunal concludes that the Act confers power to issue more than one notice, unlimited by particular circumstances or to particular reasons for doing so. The government may decide as a matter of policy how to use the powers it has to enforce the law, which may include policy considerations on whether to issue one notice or many. Within the scope of an appeal under section 19C(6)(b), the penalties are not incorrectly calculated or capped.

Validity of the Second Set of Notices

71.The appellant argues that the second set of notices of underpayment cannot validly be issued because the act provides for correction of errors by withdrawal and replacement under section s19F and 19G. If the revenue could issue typical notices encased first batch is invalid, they could be no end to the issue of corrections, and the bringing of appeals against those notices. The appellant adds the argument relating to article 6, is that it is objectionable to impose a condition more and without prejudice penalty, when such charges should be precise. Alternatively, the second set are not in fact notices, because they were accompanied by letters which negated their contents by adding best it did not have to pay. It is argued that the second set of notices did not identify the sum due to any worker because although excess notice, the copy letter said the amounts were not payable. The respondent is said to be trying to have its cake and eat it. Further, the amount of the penalty on the second set of notices is incorrectly calculated because no penalty was due. Finally, the same objection is taken to multiple notices as before, and to construing the group of notices as one, with the single cap.

72.The respondent argues that the second set is valid. If the first set is invalid, has never been a valid notice for these underpayments, and a second notice can

be served. The respondent relies on the leasehold enfranchisement cases, **9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council 2006 1WLR 1186,** and **Poets Chase Freehold Company Limited v Sinclair Gardens Investment (Kensington) Ltd (2008) 1WLR 768 (Ch).** In the first of these, the Court of Appeal held that if the tenant's notice to the landlord was invalid for want of compliance with some requirements statute, there was no bar to the tenant giving a valid notice. The Act said that if the notice was withdrawn, the tenant had to wait 12 months before serving another one, but if the notice itself was never valid, there was no such bar. This was followed in the second case. From this the respondent argues that if as the appellant asserts, the first set of notices was not valid, because it did not comply with the requirement to include certain particulars, it does not have to be withdrawn and replaced, despite the statutory regime. If it was not valid, it was possible simply to issue another one. In fact, in view of the objection that none of the workers was identified in any notice, a replacement notice could not be effective, because of that stipulation as replacement notice must not add any worker. If it was right that incomplete notices were invalid, and could only be completed by using the withdrawal and replacement scheme, they could not be valid notice on either set.

73. To this argument about no restriction on issuing another notice if the first one is not valid, respondent relies on the national minimum wage legislation having its own scheme for correction of errors and the statutory appeal to determine its validity and effect.

Discussion

74.Strictly speaking, having decided that the first set of notices was valid, it is not necessary to decide this point, but in case that decision is wrong, the argument is addressed. The decision to issue a second set follows the assertion in the appeal that the first set is not valid at all. That might be right, and if it was right that the notices should have named the workers, but did not name any of them, the withdrawal and replacement regime could not be used. In the light of that, it is hard to see why, if the first notice was not valid, there is any bar to issuing a second that is correct. The power is explicitly reserved in section 19 G (9). As for the HMRC letters sent to the appellant and its solicitors at the time, these can have given rise to no uncertainty about payment at all. As the appellant had already paid, if the first set was invalid, but the second set was, it would not be necessary to pay again. If the first set of notices was valid, the second set would not be. The statement in the notice that the money was ue was not invalidated if the first notice had not been valid, because it was the notice that mad eit due, and if it did not say so, the money already paid under an invalid notice would have to be repaid, and would not have to be paid under the second notice if it did not say so. This was clearly explained, and arose from special circumstances of this case, and the appellant's case on appeal. There are no grounds for distinguishing the leasehold enfranchisement cases, and if the first set was invalid, the second set is valid. If that is right there might be a need to pay interest on the penalties paid before they were due.

75. In conclusion, for the reasons given the appeals do not succeed.

Employment Judge Goodman
10 May 2017