

Multiple penalty notices and the national minimum wage (The Best Connection Group Ltd v HMRC)

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Employment analysis: Alice Carse, barrister at Devereux Chambers, examines *The Best Connection Group Ltd v HM Revenue and Customs* and explains why employers are exposed to multiple penalty notices for underpayment of the national minimum wage (NMW).

Original news

The Best Connection Group Ltd v HM Revenue and Customs [2403063/2016](#) and [2200121/2017](#)

What were the background facts?

Best Connection is an employment business supplying temporary staff to the Shirebrook warehouse of Sports Direct International (SDI). During early 2016 and without the knowledge of Best Connection, workers at SDI were paid at rates below the NMW because of two features of SDI's working practices. First, if a worker clocked in one minute late the time recording system would record the worker as being 15 minutes late. Secondly, workers were searched after clocking out. There were sometimes long queues. The workers were therefore at the disposal of SDI despite having clocked out. HMRC conducted NMW investigations with SDI and the trade union, UNITE, and involved Best Connection at a later stage.

How many notices of underpayment were issued? What did each relate to? What was the cumulative penalty to be paid?

On August 2016, HMRC served Best Connection with 13 separate notices of underpayment. This was because the penalty regime in the [National Minimum Wage Act 1998 \(NMWA 1998\)](#) has changed several times. From 6 April 2009 to 6 March 2014, the maximum available penalty was 50% of the total underpayment specified in the notice of underpayment, capped at £5,000 per worker. Best Connection received one penalty notice for the period to 7 March 2014 in the sum of £5,000. From 7 March 2014 to 25 May 2015, the maximum available penalty was 100% of the total underpayment, capped at £20,000 per notice. Best Connection received 11 notices at £20,000 for this period. From 26 May 2015 to 31 March 2016, the maximum available penalty was 100% of the relevant underpayment capped at £20,000 per worker. Best Connection received one notice for this period in the sum of £38,791.39. The cumulative penalty was £263,791.39.

Best Connection appealed against the notices to the Employment Tribunal (ET). It contended that the penalty notices failed to include information which was mandatory under the statutory regime. HMRC did not withdraw the notices and issue replacements. It maintained that the notices were valid and issued another set of notices on 2 December 2016 which purported to include the mandatory information. HMRC stated that the second set of notices were issued on a 'without prejudice' basis.

On what legal grounds did Best Connection Group Ltd appeal against the multiple notices?

Best Connection appealed against the first set of notices on the grounds that HMRC had failed to include information mandated by [NMWA 1998](#). It contended that the penalty notices were required to include information about the workers, relevant dates or pay reference periods to which they related, the sum due to each worker and how the penalty was calculated. Best Connection alleged that HMRC had issued multiple notices of underpayment in order to avoid the statutory cap. It appealed

on the ground that [NMWA 1998](#) did not entitle HMRC to impose penalties greater than the statutory cap.

Best Connection advanced numerous grounds of appeal against the second set of notices. Again, it challenged the multiple notices as a means for HMRC to avoid the statutory cap.

On what legal grounds did HMRC defend its decision to issue multiple notices?

HMRC contended that the statutory scheme does not require all workers to be included on a single notice for a pay reference period. If this was the legislative intent then [NMWA 1998](#) would have been drafted accordingly. [NMWA 1998](#) would also have made it clear if the cap on the penalty was in respect of each individual employer, rather than in respect of each notice. HMRC asserted that power to issue a notice included the power to do so more than once. If this was restricted then the legislative purpose of [NMWA 1998](#), ensuring compliance and deterrence through penalties, would be undermined.

What did the ET decide? What were its reasons?

The ET did not find the first set of penalty notices to be defective. It decided that HMRC was conferred with the power to issue more than one penalty notice by [NMWA 1998](#). There was no restriction in [NMWA 1998](#) which meant that HMRC is entitled to issue only one notice. The ET relied on the fact that under [NMWA 1998](#) any notice issued must carry a penalty and there is no provision in [NMWA 1998](#) to restrict the overall level of penalty. This was said to indicate that multiple notices are permitted if each notice is capped. Given its findings about the first set of notices it was not necessary for the ET to make detailed findings about the second set of notices, but it stated that they were considered valid.

To what extent does this decision clarify the law? Is it likely to be followed by other ETs?

The ET was clear in its view that HMRC is entitled to issue multiple penalty notices relating to the underpayment of the NMW. While this decision is not binding on other ETs, it is likely to be considered persuasive by other ETs considering similar appeals. Unless and until the matter is considered by the Employment Appeal Tribunal and the higher courts, employers should consider themselves exposed to multiple penalty notices for periods of underpayment of the NMW prior to 26 May 2015.

What are the implications of this decision for employers? Will the change that was put in place from 26 May 2015 of the penalty cap applying per worker rather than per notice make any difference to its significance?

Following its success in the ET HMRC may be encouraged to pursue more employers for underpayment of NMW for periods prior to 26 May 2015, particularly given the financial boon to be gained via the issue of multiple penalty notices. The fact that the penalty cap applies per worker for periods after 26 May 2015 is unlikely to make much difference to the significance of the decision in *Best Connection Group Ltd v HMRC*, although it may be that HMRC will take a more robust approach in investigating NMW compliance given the penalties which are available.

Interviewed by Stephanie Boyer.

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