

## Employment



## Directors beware

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In 2017/2018, HMRC identified a record £15.6 million in national minimum wage (NMW) underpayment. More than 200,000 workers were found to have been underpaid, the highest number since the NMW came into force in 1999. Employers were fined £14 million, also a record amount, and more than three times the previous year's figure.

With the government's increased focus on enforcing the NMW, directors of errant companies would be wise to heed the recent decision of *Antuzis v DJ Houghton [2019] EWHC 843 (QB)*. In *Antuzis*, the High Court determined that where the officers of a limited company were deliberately involved in causing the company to pay workers below the NMW, they may be held to be personally liable to those workers in the civil courts for the tort of inducing a breach of contract.

The claimants in *Antuzis* were employed by DJ Houghton Catching Services to work at farms catching chickens. The claimants' allegations included that they were paid less than the statutory minimum and that payments were withheld as a form of punishment for alleged transgressions. The matter came before the court to consider an application for summary judgment and a preliminary issue as to whether the two directors of the defendant company were personally, jointly or severally liable to the claimants for the company's alleged breaches of the express or implied terms of the claimants' employment contracts. Under *section 17* of the National Minimum Wage Act 1998, where a worker is paid less than the applicable minimum wage, they shall be taken to be entitled under their contract to be paid (as an additional sum for the period in question), an amount equal to the difference between the payment received and the relevant wage which the worker would have received had they been paid the minimum wage. Accordingly, failure to pay a worker the NMW constitutes a breach of their contract.

The general principle is that directors of a company will be liable for the torts of the company committed at their direction. However, the position is somewhat different where the unlawful act is procuring a breach of contract. In *Said v Butt [1920] 3 KB 497*, McCardie J made the obiter observation that a director of a company is not liable for inducing a breach of contract by that company if the director is acting bona fide within the scope of his authority. The *Said v Butt* principle has been consistently applied by the courts, albeit without any detailed analysis by the courts of what the principle entails and in particular what it means to act "bona fide within the scope of [the director's] authority". In *Antuzis* the High Court revisited the principle in *Said v Butt* and concluded that it is the officer's conduct and intention in relation to his duties towards the company rather than any third party that are the focus of that enquiry.

The nature of the breach of contract that occurs between the company and the third party may inform whether the officer of the company has breached their duties towards the company.

In this regard, the High Court relied on *section 172* of the Companies Act 2006 which provides that:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- ...
- (d)???? the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct"

The court opined that the nature of the breach was directly relevant to the determination of whether, in a particular case, a director has complied with section 172 and the ultimate question of whether inducing the breach is actionable against the director. The court gave the example of a director consciously and deliberately causing a company to breach its contract with a supplier, by not paying the supplier on time because the company unusually has cash flow difficulties, and a director of a restaurant who decides the company should supply horse meat instead of beef because it is cheaper. In the second case the scandal when the director's actions were discovered would be likely to inflict severe reputational damage to the company. The fact that the action violated food and trading standards legislation is relevant as the breach of those standards is indicative of the societal disapproval and resulting reputational damage caused by the director's actions. The court concluded that as a general matter the fact that a breach of contract has a statutory element may point to there being a failure by a director to comply with their duties to the company. Whether such a breach has that effect will depend on the circumstances of the particular case.

In *Antuzis* it was beyond doubt that the directors had acted in breach of sections 172 and 174 of the Companies Act 2006. The court found that neither director honestly believed that they were paying the minimum wage, required holiday or overtime or that they were entitled to withhold those payments. The directors' behaviour had catastrophic consequences for the reputation of the company and was manifestly not in the interests of the company's employees. It followed that the directors could not be said to have acted bona fide vis-à-vis the company. It was accordingly necessary to determine whether the directors acting in their own right were liable for inducing a breach of contract, applying *OBG Ltd v Allan* [2007] UKHL 21. The inevitable conclusion in light of the evidence was that the directors knew that their actions caused the company to breach its contractual obligations towards the claimants. Accordingly, the directors were jointly and severally liable.

*Antuzis* could be relied on to extend personal liability to directors for inducing a breach of contract based on other aspects of the employment contract which have a statutory element. However, there are unlikely to be many cases where the facts support such a finding.

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