



## THE EMPLOYMENT TRIBUNALS

**Claimants:** Mr Adrian Torres-Gomez  
Ms Fanny Claire Godfrin

**Respondent:** ADKN Ltd

**Heard at:** East London Hearing Centre

**On:** 28th November 2019 and in Chambers  
on receipt of written submissions

**Before:** Employment Judge Brook

**Representation:**

**Claimant:** Ms Nickson of Whitechapel Legal Advice Clinic  
**Respondent:** Mr Zovidavi of Counsel

## JUDGMENT

The Judgment of the Tribunal is:

1. The Respondent's application to strike out the Claim brought by the Second Claimant, Ms Godfrin, under Case No 3201185/2019 is dismissed. This Claim was properly issued contemporaneously with Case No 3201184/2019;
2. The Claimants were in breach of their employment contracts by failing to give three months' notice when terminating their employments. The Respondent's purported summary dismissal by reason of gross misconduct was of no legal effect.
3. The Respondent's Counterclaims against each Claimant are dismissed. The Respondent has not established that the Claimants' conduct &/or work whilst employed, or in resigning & not working their respective notice periods, were causative of loss to the Respondent as alleged or at all;
4. The Respondent's Counterclaims made pursuant to Clause 5.4 of the employment contracts are dismissed. The Respondent has not established that Clause 5.4 is a reasonable pre estimate of loss resulting from breach;

5. The Claimants' claims for paid overtime are dismissed. It was the common contractual intention of the Parties that such further weekday hours as each Claimant worked beyond their respective contracted hours would not be separately rewarded beyond their respective basic salaries;
6. The Claimants' claims made pursuant to the provisions of Regulation 4 of the Working Time Regulations 1998 limiting the total hours worked by each Claimant to an average of 48 hours per week over a 17-week period are dismissed. There was no breach of Regulation 4.
7. The Claimants' claims made pursuant to the National Minimum Wage Regulations for underpayment of the minimum wage are dismissed. There was no underpayment in the pay periods December 2018 and January 2019;
8. The Claimants' claims for unpaid notice pay are dismissed. At the time of their resignations neither Claimant intended to work their contractual notice periods. The Respondent's purported subsequent dismissal of each Claimant was of no legal effect;
9. The Claim by the First Claimant, Mr Torres-Gomez, for accrued holiday pay for 2019 succeeds. The Respondent shall pay the First Claimant 1.5 days gross pay less lawful statutory deductions;
10. The Claim by the Second Claimant, Ms Godfrin, for accrued holiday pay for 2019 succeeds. The Respondent shall pay the Second Claimant 1.5 days gross pay less lawful statutory deductions forthwith;
11. The Claim by the First Claimant, Mr Torres-Gomez, for 9 days unpaid wages worked in the period 1<sup>st</sup> to 13<sup>th</sup> February 2019 succeeds. The Respondent shall pay the First Claimant 9 days gross pay less lawful statutory deductions forthwith;
12. The Claim by the Second Claimant, Ms Godfrin, for 9 days unpaid wages worked in the period 1<sup>st</sup> to 13<sup>th</sup> February 2019 succeeds. The Respondent shall pay the Second Claimant 9 days gross pay less lawful statutory deductions forthwith;
13. The sums due to each Claimant are ascertainable by the parties & are to be paid together with an itemised payslip in respect of the same. Leave to apply for determination of the said sums if the Parties are unable to agree the same. Application to be made in writing within 28 days of the date hereof.

# REASONS

1. This Judgment must begin with my apology for the delay in promulgation. The fault is entirely mine and not in any part that of the Tribunal staff who have recently been working particularly hard in difficult circumstances. Such a delay is a disservice to all concerned and I am grateful to the parties and representatives for their patience and forbearance.

## The Hearing

2. This matter came before me for final Hearing on Directions given on 19th August 2019 by Employment Judge McLaren, the written summary to that Hearing including an agreed List of Issues. At that earlier Hearing the Claimants appeared in person and Mr Zovidavi appeared for the Respondent. Mr Zovidavi again appeared for the Respondent and Ms Nickson now appeared for both Claimants. This Hearing was listed for one day for full determination however, by reason of the increase in the list of issues, the number of witnesses and length of the necessary cross examination, it ran on into the early evening. This concluded the evidence but there was then no further time for oral submissions and each representative subsequently served helpful detailed written submissions for which I am grateful. It was agreed that the Hearing would deal with liability and, depending on the outcome, be relisted for remedies. In the event the Claimants' succeeded in part and the Respondent not at all. The sums awarded should be readily and accurately ascertainable. If this proves impossible then provision is made in the Judgment for the Parties to apply for determination of the same.

## Hearing Bundle

3. Judge McLaren ordered the Respondent to prepare the hearing bundle but it emerged that there had been some difficulties in the preparation of this. At the outset of the hearing it was apparent that the bundle prepared by Ms Nickson was the most complete. Accordingly, this became the bundle to which all referred and to which additional documents provided on the day of the hearing by each representative were incorporated. No objections were taken to the inclusion of these documents which went to the Counterclaim.

## The Issues

4. The agreed issues identified by Judge McLaren that fell to be determined at this final Hearing were as follows:
5. When the Claimants' employment came to an end was she/he paid all the compensation to which she/he was entitled under regulation 14 of the Working Time Regulations 1998
6. It was agreed that the holiday leave year ran from 1st January. The Claimants were entitled to 20 days per annum plus the 8 bank holidays. Both had taken

leave on 1st January 2020 and therefore calculated the accrued but untaken holiday at 1.5 days.

7. The Respondent stated that the Claimant is not entitled to accrued but untaken holiday pay because they had been dismissed for gross misconduct.

### **Unauthorised Deductions**

8. It was agreed that the Claimants' contract of employment specified that overtime was unpaid. It was further agreed that in the month of December the Claimants worked every Sunday and received in the December payslip overtime payment for those additional Sunday hours but not those hours worked on weekdays;
9. Did the Respondent make unauthorised deductions from the Claimants' wages, contrary to the provisions of Section 13 of the Employments Rights Act 1996, by failing to pay overtime worked during December and if so how much was deducted;
10. The Claimants state that they also worked 21 hours per week overtime each week for a period of four weeks. The First Claimant calculates this at £1269.23 outstanding and the Second Claimant at £609. The Respondent accepts that some voluntary overtime was worked but disputes it was as many hours as this and further relies upon the fact that overtime was voluntary and contractually provided to be unpaid.
11. How many hours of overtime did the claimants work each week in December?
12. Was that overtime voluntary or compulsory?
13. If compulsory is the Respondent required to pay it?
14. If unpaid then, whether voluntary or compulsory, did the Claimants' average wages fall below the national minimum wage level in December when taking into account the additional hours worked?

### **Breach of Contract**

15. It is not in dispute that the Claimants' contractual obligation was to give 3 months' notice and each was entitled to 1 months' notice from the employer.
16. The parties agreed that the Claimants decided to give notice on 13th February. The Claimants' stated they were asked to leave immediately and to give the keys back. The Responded disputes this. Both parties agree however that some 20 minutes or so after the Claimant had given their resignation the Respondent sent an email dismissing them for gross misconduct. The Respondent states that this was because the Claimants had each breached their contract by quitting without giving any notice.

17. Did the Claimants' letters of resignation amount to an intention to resign and not to work notice? If so then did they fundamentally breach the contract of employment by resigning with immediate effect.

#### **Respondent's Counterclaim**

18. If the Claimants' breached their contracts by refusing to work notice to 13th May is the Respondent then entitled to damages as provided for in each of the contracts of employment for this breach. The Respondent states that the said provisions for a sum equivalent to 3 months' notice is a genuine pre estimate of its loss.
19. What loss did the Respondent incur?
20. The Respondent states that it incurred £4,551 worth of costs in remedying the Claimants' poor work. It asserts a third party had to remedy the Claimants' joint failure to provide correct patterns.

#### **Further and Additional Claims**

##### By the Claimants

21. By the time the matter came before me for the final hearing Ms Nickson acted for both Claimants. Ms Nickson sought to widen the existing unpaid overtime claims for December 2018 to include unpaid overtime said to have also been worked by each Claimant in January 2019. She also sought to introduce a complaint under the Working Time Regulations 1998 which she framed as the aggregate of the overtime worked over these two months breached Regulation 4 in that each Claimant had worked in excess of 48hrs per week but had not contracted out of this restriction. Therefore, as a separate and new cause of action, she claimed payment of such additional hours as might be found to have been worked over 48hrs per week in this two-month period. This new claim, Ms Nickson submitted, was a matter of law arising out of the same facts pleaded for the existing claim in unpaid overtime which dealt with the alleged 'dilution effect' of the additional unpaid hours on the relevant minimum wage. Ms Nickson accepted that this Claim was not amongst the Issues identified by Judge McLaren but at that time the Claimants' were in person. I agreed to this additional claim as one arising out of the same facts as those relied upon in the minimum wage claims and because there was no obvious prejudice to the Respondent, it's evidence already broadly dealing with this new claim. However, as will become apparent, I disagreed with Ms Newton insofar as she chose a two-month period in which to average out the 48hour calculation when the correct period for this calculation is 17 weeks.
22. As to extending the period of the claims for payment of overtime to include January 2019 there was sufficient in the ET1 particulars of the First Claimant, adopted by the Second Claimant, to support inclusion of January and again these issues were covered by the Respondent's evidence. In the event these statutory claims failed for reasons which I shall come to in due course.

By the Respondent

23. The Respondent had leave from Judge McLaren to serve amended Grounds to include in the existing Counterclaim an allegation that, post his termination, the First Claimant had wrongfully interfered with a contract involving the Respondent and the supplier of machinery by falsely notifying this machinery supplier, Eastman Staples, that the Respondent was '*no longer in business*' thereby allegedly causing that supplier to remove '*essential machinery*' from the Respondent's premises. It was not clear to me that the Tribunal had jurisdiction to hear what was essentially the tortious claim of wrongful interference in a contract between this Respondent and Eastman Staples, even though the First Claimant's employment tribunal contained an express contractual prohibition on such conduct. Such a clause would not change the jurisdictional limits of the Tribunal and it would always be justiciable in the Court. However, such was the overlap of evidence, it was agreed I would hear all the evidence and it was then for Mr Zovidavi to address that point in his closing submissions. In the event I was not persuaded on jurisdiction but if I am wrong about jurisdiction then, having heard the evidence, the Respondent failed to discharge the burden of proving this claim to the civil standard. In particular it failed to prove causation for the alleged loss, thus the claim would have failed even if jurisdiction should have been accepted.
24. As with Ms Nickson, Mr Zovidavi expanded upon the amount of the alleged losses identified at the hearing before Judge McLaren. Mr Zovidavi explained these 'expanded' losses as flowing from the Claimant's alleged poor workmanship in the course of their employment and their alleged gross misconduct in allegedly refusing to work their notice periods. These allegations, in particular whether the Claimants' had resigned forthwith with no intention to work their notice, or instead had intended to work their notice but had been summarily dismissed by the Respondent, lay at the heart of the matter. The Claimants and the Respondent had diametrically opposed interpretations of the same events.

**Application to Strike Out Second Claimant**

25. Mr Zovidavi applied, for the first time in the course of these proceedings, to strike out the Second Claimant's Claim on the ground that she had failed to lodge her Claim with the Tribunal in time. Again, such was the overlap of evidence that it was convenient to hear evidence and for this application to then be set out and answered in closing written submissions.

**Decision on Strike Out Application**

26. This procedural issue of jurisdiction can conveniently be dealt with at this juncture. Judge McLaren granted the Second Claimant leave to serve an ET1 to which the Respondent could then serve Grounds, but as to whether the Second Claimant had ever lodged a valid Claim at all was not then raised by Mr Zovidavi, it was simply generally assumed that she had. I intend no criticism of Judge McLaren, quite the contrary, in his implicitly making this assumption,

which in the event proved to be entirely correct, nor of his ordering the Second Claimant to serve 'an ET1', though I can see how those acting for the Respondent might have seen this as the cue to question whether the Tribunal could even hear Ms Godfrin for want of jurisdiction.

27. In the event I found against this application as there was material on the Tribunal file, comprehensively set out in detail by Ms Nickson in her written submissions, confirming that the Second Claimant had 'piggy backed' on the First Claimant's ET1 as a claim arising out of substantially the same facts. The First Claimant, Mr Torres – Gomez, served his completed proforma ET1 form with the Employment Tribunals on 23 April 2019. Ms Godfrin, who became the Second Claimant, was listed on the First Claimant's ET1. The Employment Tribunal's internal record of the ET1 shows receipt of a "*Lead Claim*" for Mr Torres-Gomez which was then allocated claim number 3201184/2019, and this same internal record also shows "*Fanny Godfrin: Case: 3201185/2019*", followed by "*upload completed OK.*" It is plain that the Tribunal had accepted these two Claims at one and the same the same time, allocating the Second Claimant the 'follow on' case number to the First Claimant. Mr Zovidavi submitted that even if Ms Godfrin had successfully 'piggy backed' on Mr Torres-Gomez Claim then she had done so improperly as her Particulars of Claim, when finally served by Order of Judge McLaren, significantly differed from those of the First Claimant. I do not agree. Ms Godfrin's causes of action are precisely the same as those of Mr Torres-Gomez and their respective claims differed only as to degree. Whilst it is true that each commenced employment on different dates and received different rates of pay, the facts relied upon in support of their respective claims are based on the same set of facts going to breach of contract and statute. Rule 9 of the Employment Tribunal Rules of Procedure provides that: "*two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6.*" Rule 6 of the Employment Tribunal Rules of Procedure provides: "*a failure to comply with any provision of these Rules... or any order of the Tribunal... does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just.....*"
28. In the circumstance, and insofar as there were any factual irregularities at all in Ms Godfrin's Claim (see above), in my view these were so insignificant that I held these should be waived to permit Ms Godfrin's Claim to continue. Insofar as her failing to issue her Claim without Particulars constituted an irregularity this was effectively dealt with by Judge McLaren's Order. I find as a fact that Ms Godfrin had issued her Claim 'piggy backing' on that of Mr Torres-Gomez relying on his Particulars. If I am wrong about, though on the undisputed contemporary documentary evidence that seems most unlikely, that then I am satisfied that Ms Godfrin was under the impression that she had properly lodged her claim with that of Mr Torres-Gomez, had no reason to think otherwise, and that her subsequent serving of the ET1 and Particulars by Order of Judge McLaren had anyway effectively regularised the position. In support of that conclusion I agree with Ms Nickson that the Orders and Directions of Judge McLaren bind the Respondent and the Claimants until and unless successfully appealed or

revised on an application to review. Whilst I accept that the Respondent had only recently come alive to the possibility that there might have been no regular issue of proceedings by Ms Godfrin, a possibility I found not be borne out by the facts, there was no appeal or request for a review by the Respondent though there had been quite sufficient time to have done so before this Hearing. For these reasons the Respondent's application to strike out Ms Godfrin's claim is dismissed.

### Witness Statements

29. Written statements from the following persons were before the Tribunal:

- Adrian Torres-Gomez – First Claimant
- Fanny Claire Godfrin – Second Claimant
- Ms Gianina Mihaiela Balazsi – Former Employee
- Ms Meaghan Flint – Former Employee
- Sedina Beckley – Former Employee
- Andrew Kyprianou – CEO Eastman Staples
- Lavinia Rusu – Head of Marketing
- Mohammed Abdul Bari – Sample and Production Machinist

### Application to Exclude Statement of Andrew Kyprianou

30. I acceded to Mr Zovidavi's submission to exclude the statement provided by Mr Kyprianou, CEO of Eastman Staples. This Company removed its machinery from the Respondent's premises and this event now forms part of the Respondent's claim, namely that it suffered this loss by reason of the First Claimant falsely telling Mr Kyprianou that the Respondent had '*gone out of business*'. Mr Kyprianou's statement was served by the First Claimant in defence to that allegation, but Mr Zovidavi succeeded in his submission that it be excluded as it had no statement of truth and because Mr Kyprianou was not called and so was unavailable for cross examination. No requests were made in respect of Ms Beckley, who worked for the Respondent for four days in late 2018, nor Ms Flint, who worked for eight weeks in early 2019, nor Ms Balazsi who worked twelve weeks in early 2019. These statements were taken at face value but with diminished weight. Both Claimants, Ms Rusu and Mr Bari gave evidence and were cross examined.

### Evidence on Substantive Issues

31. The First Claimant, Mr Adrian Torres Gomez, was employed by the Respondent as a Junior Fashion Designer and Pattern Cutter under a contract of employment dated 5 July 2018, his employment commencing on 17 July 2018. The Second Claimant, Ms Fanny Godfrin, was employed by the Respondent as a Junior Pattern Cutter and Grader under a contract of employment signed on 2 October 2019, employment commencing on 3 October 2018. From the evidence it was clear that both Claimants had initially been enthusiastic about their work and, in particular Mr Torres-Gomez, was well regarded by the Respondent.



32. Within a few months Mr Torres-Gomez had taken on additional responsibility and by all accounts he discharged these duties well, Ms Godfrin completed her probation period earlier than expected and both she and Mr Torres-Gomez received pay rises. However, by early December disputes had arisen between the machinists ('makers') and the Claimants over alleged defective pattern cutting and making and as to who was responsible for the same. In their evidence the Claimants' denied they had been responsible for any such difficulties though I was impressed by the evidence of Mr Bari, an experienced 'maker and machinist' with the Respondent, that he had found more errors than usual in the pattern cutting of garments whilst the Claimants had been employed. Though this had been evident from early on neither of the Claimants' had been disciplined in respect of these errors and there was no evidence that any such disciplining was ever anticipated. It was common ground that some degree of error would always arise though it seems that this increased as the work load increased.
33. Ms Rusu denied the Claimants' suggestion that machinists who complained of working overtime were dismissed as untrue. Some machinists had left for other reasons, usually to do with their competence, but the Respondent had sought to retain staff in order to meet the heavy workload and the Claimants' departure was neither expected nor convenient to the Company. For their part the Claimants did not identify any particular machinists who had been dealt with in this way. Ms Flint's statement did not refer to her working overtime, the gist of her evidence being that she experienced difficulties in getting paid and that this was why she left the Respondent. She confirmed, which Ms Rusu accepted, that the Claimants were not replaced, indeed that there was a general outflowing of staff consistent with work having to be being sent out for completion. Ms Beckley's evidence went to the issue of overtime and her unwillingness to undertake this, but she was silent as to any other reasons why her employment lasted just four days, one of which had been day release for College. Again, Ms Rusu denied that whilst expected when work fell behind, overtime was ever forced on anyone and in particular that a refusal would lead to dismissal. In particular she denied the Claimants' suggestion that if they had complained or refused to work overtime then they would have been dismissed along with other staff. Ms Rusu drew attention to the meeting in which the Claimants had objected to working Sunday unless paid and, evidently, they had not been afraid to raise that.
34. Her evidence was that Initially the Claimants' had been enthusiastic about their work and accepted the need for extra effort as work had fallen behind, but as time went on they made it known they did not enjoy overtime work though still seemed to accept that without this the Company could not meet its deadlines. She was adamant that their claims to have worked overtime to the extent now claimed, namely 35 hours per week in addition to a 39-hour working week, was untrue.
35. In cross examination of the Claimants Mr Zovidav pointed out that their claims to have often worked at the factory to 10pm could not be true as this was not born out by the electronic time logs for the opening and closing of the building, which showed only one such 10pm closure in December, and this did not seem to be a

logging out by either of the Claimants. Mr Zovidavi accepted that they could have been present whilst someone else 'logged out' and locked up but the fact of just one such late log out remained. More often than not the logs showed the building would close at 7 or 8pm and even these did not establish that the Claimants had worked up to those times. Mr Zovidavi put it to each Claimant that they had deliberately inflated their claims from the 21 hours put to Judge McLaren and that even this had been an exaggeration. The Claimants denied this but accepted that neither had been involved in the revised Schedule of Loss that now suggested an average of 35 hours overtime was worked by each Claimant each week. Neither could explain why the electronic logs should not be accurate though Mr Torres-Gomez said he did some work at home, which the Respondent accepted, though he could not say on what days or how much work was done at home, typically or at all. Neither the Claimants nor the Respondent kept records of this overtime.

36. As to the work position after the Claimants' departure Ms Rusu's evidence was that much more work had to be sent out to be completed by reason of their absence, though in cross examination Ms Rusu confirmed that even before their departure work had also been sent out because, despite the overtime, there had not been time for the Claimants, or the other employees, to complete this. She accepted that no replacements for the Claimants' were taken on but that instead work was either absorbed by remaining staff, their number also diminishing as it had before the Claimants departures, or was sent out. After the Claimants departure how much sending out would otherwise have been undertaken by the Claimants had they stayed to work their notices was not at all clear. How much was sent out by reason the alleged poor workmanship, pattern cutting/sizing or making up, was similarly very unclear. In short Ms Rusu could not attribute which of the alleged subsequent expenditure by reason of 'sending out' was attributable to the Claimants' or to a number of other possible reasons, including the dwindling number of staff and not replacing the Claimants. Indeed, the Claimants' salaries for the three-month notice period not worked was a saving. The schedule of work said to have been sent out and costs incurred was created by the Respondent but there was an absence of receipts or invoices in support of the same.
37. The Claimants' verbally resigned together on 13 February 2019. The occasion of this joint resignation was the evening of that day when Mr Torres-Gomez asked to speak with Mr Rahman and Ms Rusu together with Ms Godfrin. Mr Rahman, the CEO and owner of the Respondent who did not appear nor provide a statement, apparently insisted that if there was to be a conversation then it should be with Mr Torres-Gomez on his own. Ms Godfrin joined that conversation and, when Mr Rahman again declined to speak with both of them, there followed a brief further discussion culminating in the Claimants' both saying that they resigned. Ms Rusu had the impression that they had jointly planned to resign that day in any event, so quick and unprompted had been their joint resignation, and that this might have been the intended subjected matter. A few weeks earlier Mr Rahman and Ms Rusu had persuaded Mr Torres-Gomez not to resign when he'd suggested that he would. Mr Rahman asked for the return of their keys, there was a brief exchange as to the transfer of electronic data, and the Claimants' left the premises never to return.

38. There was a yet further conflict of evidence as to whether the Claimants' had said that their resignations were '*effective immediately*' at the time they left the building, the Claimants denying this in evidence, but there is no doubt that shortly thereafter each Claimant sent the Respondent separate emails couched in the same terms stating that their resignations were '*effective immediately*' with no mention of working their notice nor a date on which they expected to leave. Shortly after that Mr Rahman sent emails to the Claimants' stating that they were now dismissed '*for gross misconduct*'. This gross misconduct was said to be the contractual breach of not staying on to work their notice at what was, according to Ms Rusu's evidence, a difficult time for the Company, and as she saw it the Claimants 'walking off the job' had annoyed both her and Mr Rahman. Ms Rusu accepted that the Claimants were not welcomed back after this. There was contemporaneous email evidence that from then on, no persons save employees were to be allowed on site and that this prohibition included the Claimants. Why there was this blanket prohibition was not clear.
39. By the time this matter came before Judge McLaren the alleged gross misconduct had expanded to include the Claimants' alleged negligent workmanship in pattern cutting and sizing though I am satisfied that at the time Mr Rahman wrote his letter he only had in mind what he regarded as the Claimant's 'walking off the job'. Ms Nickson submitted that neither Claimant, for each of whom English was not their first language, had understood the phrase '*effective immediately*' to mean they were just serving notice 'now' or 'with immediate effect' but that each intended to work their notices, at least until they had secured other jobs at which time they would have sought to leave earlier.
40. Prior to this parting of the ways Ms Rusu's evidence was that there was no intention to dismiss the Claimants, such was their importance to the work in hand. Overall, I got the impression that the Respondent had taken on rather more work than it could cope with & was struggling to stay within limited financial resources. Any disruption was unwelcome but I did not accept that the Claimants were themselves at risk had they declined to work overtime. Neither said that they had been directly threatened in this way, rather I got the clear impression that initially each had considerable enthusiasm for their jobs over which they had some degree of autonomy, not least because they had a greater degree of expertise than Ms Rusu or Mr Rahman. The email traffic to which I was referred suggested that each Claimant could 'hold their own' with Ms Rusu and Mr Rahman when they felt wrongly accused of poor workmanship which they felt was in fact poor work by the machinists. Whatever the rights or wrongs of that I did not get the impression that either Claimant were forced into working overtime during the week however irksome and disagreeable this became as time went on. I did get the clear impression that both Claimant's, in particular Mr Torres-Gomez, became increasingly disenchanted with what they regarded as poor management and a lack of resources.
41. In the course of evidence, I was taken to various documents of which the following had particular evidential significance. Mr Zovidavi drew attention to clauses in the Claimants' contracts of employment, including clause 5.1.4: '*Overtime is not payable*' and 5.1.8: '*We may require you to work additional*

*hours according to the needs of the business and/or our clients. Occasionally you may be required to work at the weekend/on public holidays. Time off in lieu may be given at our discretion.*' He noted that in early December the Claimants had discussed overtime with Mr Rahman and it was agreed that Sunday working in December would be paid. This he relied on as evidence that the Claimants had voluntarily agreed to weekday overtime at no additional pay and that this was consistent with the contractual provision.

42. The primary issue relating to the notice pay was one of fact, namely did the Claimants intend and/or communicate an intention to resign immediately without working their notice period? The Claimants' wrote as follows wrote in their respective emails: The First Claimant: *'Please accept this as a resignation from my position... effective immediately. (13/02/2019)'* and The Second Claimant: *'Please accept this as a resignation from my position... effective immediately, the 13th February.'* The natural meaning of these words was that each intended to leave immediately. In their oral testimony each Claimant had a good understanding of English and had received guidance from ACAS. The resignation emails make no reference to a period of notice or a last date of employment, either of which might displace the following ordinary meaning of *'effective immediately'*, and which one might ordinarily find in a resignation letter. There was some further documentary support for an intention to resign immediately in the ET1.
43. In her ET1 Ms Godfrin sets out the following: *'On the 13th February, I couldn't take it anymore, so my colleague and I called ACAS to have some information about what to do. We were told we could leave the same day and still claim our salary until that day. The same day, at the end of the day I notified the directors my intention to quit, they asked me to return my key and leave the property. .... I never received my salary for February.'* Mr Torres-Gomez accepted in evidence that he was a party to the ACAS call. Ms Godfrin makes no claim for notice pay, the relevant box is not ticked and the narrative makes no mention of this. She only claims only her salary for February 2019 and nothing further. Mr Zovidavi uged me to regard this as evidence that Ms Godfrin had never intended to work her notice nor had she worked the extent of the overtime now claimed, such overtime as she had worked was, he submitted, voluntary.
44. Ms Nickson took me to the passage in Meaghan Flint's statement that on 14 February 2019 Ms Flint received a WhatsApp message from Mr Rahman at 9:49 am stating: *"Could you please make sure that the entry doors are properly locked, so that no one can come in easily"*. At 9:50 am and 9:52 am respectively, Mr Rahman sent two further messages to Ms Flint saying *"also if there is anyone at the site, perhaps you don't know or even(do) know. Please do not let them inside the property!"* and *"[t]his list also includes Fanny and Adrian"*. Ms Nickson cited this as evidence that the Claimants, whilst wishing to work their notices, were prevented from doing so.
45. In respect of the Counterclaim Ms Nickson drew particular attention to Clause 5.4 of the Claimants employment contracts which states: *"In case the Employee fails to give written notice of termination as detailed above and refused to engage in their responsibilities as stated in this contract, the Employee will be*

*liable to pay a fine valued at three months' salary pay to the Employer, payable immediately".* This she submitted was clearly intended to be a fine and not a reasonable pre estimate of likely loss. I heard no evidence as to how this clause was arrived at save that it was obvious on its face that it represented the wages of the Claimants payable during their respective notice periods if they worked this, or if paid in lieu. It might have been intended to ensure that in this event neither could claim payment in lieu of notice since this clause might be thought to offset and extinguish these sums. Be that as it may the suggestion that these sums represented a pre estimate of loss was not supported by evidence.

46. I was taken to the following emails, between Eastman and the First Claimant whilst he was employed by the Respondent, as going to the Counterclaim:

19 September 2018 email from Eastman to ADKN:

*"please find attached our final invoice of which 30% deposit is payable now and the balance is due before delivery, which we estimate to be 21 days"*

18 December 2018 email from Eastman to ADKN:

*"With regard to more machines, I am afraid we cannot supply until your account has been brought up to date. Please remember that your account is pro forma and we have only received the deposit for the machines already supplied"*

2 January 2019 email from Eastman to ADKN:

*"Can you please reply to me when a payment will be made to us. I would like at least 50% to be transferred this week"*

7 January 2019 email from Eastman to ADKN:

*"I had a call from Andrew [Kyprianou] advising me that ADKN had made payment to Eastman. We cant [sic] find any record of this so I would be grateful if you could email me the paid amount"*

On 7 January 2019 Mr Torres-Gomez sent an email from ADKN to Eastman:

*"Please, for payments contact my colleague Ashfakur, again, my department is just design and pattern cutting, I literally have no idea if he proceed [sic] with the payment or not ..."*

28 January 2019 the following messages passed between Mr Rahman ('Ash') and Mr Torres-Gomez ('Adrian'):

*"Ash: also keep chasing Eastman please*

*Ash: keep me updated!*

*Adrian: I've the feeling they will contact us since you didn't do the payment*

*Ash: Lol"*

47. Ms Nickson noted that the Respondent's ET3 included general allegations of theft, fraud and dishonesty which were not particularised and in respect of which no evidence was adduced. Part of the Counterclaimed alleged that the Claimants had breached their duty to exercise reasonable care and diligence in the execution of their duties. This claim was first particularised in the Respondent's first ET3 as *"ADKN Ltd incurred expenditure in remedying the claimant's poor work"* with no further particulars. No further details were provided. In its amended ET3 and ET3 in response to Ms Godfrin's ET1, the Respondent further particularised the counterclaim stating that in December/January, the Claimants:

*"... in breach of their express and/or implied duty to exercise reasonable care in the execution of their duties, sent the wrong sample sizes patterns to two different companies for production. Further, the Respondent subsequently discovered that the original patterns produced by the Claimant and his colleague had other defects, such as, seams not joining or sleeves being put on backwards, etc. to rectify these and other defects, the Respondent was put to extra expense"*

The Respondent counterclaimed £4,551.11 in respect of this alleged breach but the Respondent's evidence did not descend into particulars nor did it provide examples of errors that were said to lead to this loss. There were assertions that mistakes were made in the patterns, however proper details of such mistakes were not provided nor was it established that these led to losses. The Respondent cited one such defect as *"sleeves being put on backwards"*. In his oral evidence the First Claimant explained how this is not possible as a pattern error, as patterns for sleeves are *cut in pairs, flipped and mirrored*, to him this indicated a machinist error. The First Claimant explained that much like the pattern for two socks is the same, the pattern for two sleeves is the same. Ms Rusu was unable to counter this and it emerged that in fact she had no expertise in the practicalities of pattern cutting or machining. Whilst this was hardly her fault it did reduce her ability to give persuasive evidence on these matters. A further example was her evidence that:

*"A pattern issue was identified as we were attempting to shoot a second photoshoot. We had two similar dresses in the same size, yet one fit and one was too tight."*

Ms Rusu was unable to expand on these statements and provide more detailed particulars as to what the mistakes were and, importantly, how they caused loss and how this was attributable to the Claimants.

48. Ms Rusu drew attention to the text of messages passing between the First Claimant and Mr Rahman as evidence of pattern errors. However, on a plain reading of these they were evidence only of a disagreement between the First Claimant and Mr Rahman as to the cause of a sizing discrepancy. Further these messages were not accompanied in evidence with the photos and videos of the patterns then sent by the First Claimant showing the error was not attributable to the pattern and thus not to his or the Second Claimant's work. Ms Rusu further relied on two pictures of skirt patterns as evidence of mistakes in patterns however she was not able to explain why, certainly not to my satisfaction. The

most that could be said was that these might well have been graded versions of the same pattern (i.e. different sizes).

49. This then was the evidence on which the facts fell to be determined.

### Findings of Fact

50. I heard very different assessments of the weekday overtime worked in December and January, regarding which no contemporaneous records were kept by any Party, Claimants or Respondent (as to the Respondent's statutory duties to keep records more later), save that of the payslips showing additional pay for Sunday working in December. There was similar divergence concerning the Claimant's intentions when resigning and the Respondent's attribution of fault and cause for supposed escalating losses pre and post their departures. It was however clear that since the Hearing before Judge McLaren the scale of the claims on both sides increased considerably and it was difficult to avoid the impression that each side's claims had expanded in response to the others.
51. Be that as it may and doing the best with this evidence in particular the documentary evidence and in some respects the lack of it, and having particular regard to the narrative accounts each Claimant gave in their respective ET1's, their comments recorded by Judge McLaren in his Summary of the hearing in which they then appeared in person, the largely agreed circumstances of the occasion on which the Claimants orally resigned, the Claimant's inquiries of ACAS made prior to their departures, a natural reading of their subsequent emailed resignations, and the electronic logs then, so far as these hotly disputed matters are concerned, I was able to make the following findings of fact.
52. I am satisfied that during December 2018 each Claimant worked on average 21 hours overtime each week, which included the 7 hours paid Sunday overtime, the remaining 14 hours being spread over the rest of each week, some worked by each Claimant at home but by far the greater part was worked at the Respondent's premises. All overtime was, as a matter of contractual interpretation, compulsory and unpaid pursuant to the terms of the Claimants' respective contracts of employment. However, though compulsory in the sense that the Respondent could as a matter of contract require the Claimants to work unpaid overtime, subject to this being reasonable (on which point Ms Nickson cited **Braganza v BP Shipping Ltd 2015 UKSC 17**) I am satisfied that at the time of the meeting with Mr Rahman in early December the Claimants' willingly agreed to work these hours which might otherwise have been thought unreasonable. That they required payment for Sunday working and that this was agreed tells against this overtime being work 'under threat'. I find that at this time each Claimant was committed to their jobs which they enjoyed, found considerable satisfaction in and for which they received a high level of affirmation from the Respondent. Each had a degree of autonomy which they valued and each it seemed to me thought they could help make a success of the Company.
53. As it panned out however the Claimants found themselves beset with problems which they attributed to the makers/machinists and vice versa. Doubtless the

extra hours and additional administrative duties which in particular Mr Torres-Gomez voluntarily took on, began to take a toll. I did not see this as the cynical exploitation of two willing and enthusiastic employees, rather that the Respondent had taken on more work than it could cope with and for which it lacked the required management and quite possibly the financial resources. Mr Torres-Gomez in particular came to realise this and in late January had approached Ms Rusu with a view to resigning. That he was then persuaded to stay on was not in my view because he had no other job to go to but because he still retained a small hope that the Respondent might produce the resources to correct his perceived management failings. It soon became apparent that this was not to be and I am satisfied that by 13<sup>th</sup> February both he and Ms Godfrin had '*had enough*' and resolved to resign. I am satisfied that when they did resign that day neither had any intention of working their notice. That neither had any alternative employment lined up was a measure of their frustration at what each regarded, rightly or wrongly, as a lack of resources and inadequate management. Throughout December work was being sent out and this continued through January 2019. By January Sunday overtime had stopped and I am satisfied that overtime then decreased to 8 hours per week unpaid. I heard no persuasive evidence either way of overtime in other months.

54. The employment contracts provided, at the Respondent's discretion, for time off in lieu (TOIL) for overtime worked, though evidently none was given. Whether there was any intention to grant this was not addressed in evidence. Be that as it may I am satisfied that neither Claimant was threatened or coerced into working the December or January overtime, whether expressly or by implication under threat of their own dismissal or that of others, and that they had agreed to this level of extra work albeit later came to regret it.
55. The Respondent did not establish causation between the losses claimed, which varied in amount and remoteness between that first flagged up in the ET3 and the later evidence of Ms Rusu, and the Claimants, whether their supposed lack of competence whilst working or the losses attributed to them by reason of not working their notices. I am not satisfied that the alleged losses even arose such was the lack of evidence in support of the same. Furthermore, I am unable to find as a fact that Mr Torres-Gomez made a call to Mr Andrew Kyprianou of Eastman Staples as alleged or at all, or if he did that he told him the Respondent was going out of business. Even if he had made such a call then there is no evidence that this caused Eastman to remove their machines but there was evidence that a dispute as to payment had arisen between the Respondent and this supplier. As to how or why or on what pre estimate Clause 5.4 rested was not addressed in evidence though Mr Zovidavi made a valiant effort to support it in submissions. Through no fault of his, either in his presentation and cross examination or in his submissions, he did not succeed. However, I would add that all Parties were well served by their respective advocates and it seems to me that it was not because of them that much of the evidence did not support the claims and counterclaims.

## **Law and Application to the Facts**

### Counterclaim Against Both Claimants for Consequential Loss



56. The alleged consequential losses claimed against both Claimants fall into two parts: Losses said to be consequent upon the Claimants breach of a duty of care in and about the work they carried out in the course of their employments; and losses said to be consequent upon their failures to work their notice period. A further contractual counterclaim for sums said to be a pre-estimate of loss I will deal with separately. The counterclaim brought only against Mr Torres-Gomez for losses said to have arisen though his alleged interference with the Respondent's contract with Eastman Staples I also dealt with separately.
57. The employment contracts provide that "*an employee guilty of gross misconduct will be liable to summary dismissal without notice, without pay in lieu of notice ...*". I have found that the Claimants' resigned with no intention of working their notice and this ended the employment relationship. The Respondent's subsequent email purporting to terminate their employment for gross misconduct was therefore of legal effect, though it had evidential value in illustrating how Mr Rahman viewed their departures.
58. The standard for breach of a contractual duty of care by an employee is an objective one, that of the hypothetical reasonable employer (***Hall v Brooklands Auto-Racing Club [1933] 1 KB 205***). I am satisfied that each employee owed such a duty to the Respondent but I am not satisfied that they breached this in and about the work they carried out.
59. It is common ground that in December the Claimants were working long hours against tight deadlines. In that context employees are likely to make some mistakes even when exercising reasonable care and competence. Even if there were mistakes by the Claimants, which in my view was not proven, such mistakes as the Respondent had thought them to have made during their employment had not resulted in serious censure and indeed the Respondent argued that they had wanted each Claimant to stay on. Ms Rusu's spoke of errors in patterns being identified and brought to her attention as early as November 2018, at that time the Claimants' denied responsibility but either way it had not diminished the high regard in which Ms Rusu said the Claimants continue to be regarded. Indeed, the Respondent passed Ms Godfrin's probation, earlier than she had expected, on 19 November 2018. When in late January 2019 Mr Torres-Gomez spoke of resigning Ms Rusu actively encouraged him to stay. The Respondent did not discharge the burden of proving that the Claimant's breached a duty of exercising reasonable care and competence to the required standard, that of the balance of probabilities, nor were the losses made out in evidence, as alleged or at all, and it follows that causation also failed.
60. I accept that the Claimants' summary resignations without serving their notice periods was a breach of contract and could in principle have given rise to claims in consequential loss. However, this aspect of the Counterclaim also fails for precisely the same reasons. The figures provided in the Respondent's Schedule of Loss do not match the figures initially claimed by the Respondent and whilst this might well be the product of a simple 'updating of losses' there was no supporting evidence by way of receipts/invoices or of additional hours worked

and paid as a result of the Claimants' abrupt departures. At the Hearing Ms Rusu confirmed that Ms Flint did not receive a pay rise following the departure of the Claimants however the Schedule of Loss lists a cost of Ms Flint's time as £2,338.37. No details of Ms Flint's salary were provided nor was there any evidence of Ms Flint being taken away from other work. Ms Rusu confirmed that the Claimants' were not replaced and that accordingly the Respondent had been spared the payment of their respective salaries. Importantly neither loss nor causation was established and accordingly this aspect of the Counterclaim also fails.

Counterclaim pursuant to Clause 5.4 of the Claimants' Contracts

61. Clause 5.4 of the Claimants' employment contracts states:

*"In case the Employee fails to give written notice of termination as detailed above and refused to engage in their responsibilities as stated in this contract, the Employee will be liable to pay a fine valued at three months' salary pay to the Employer, payable immediately".*

62. Had the Respondent succeeded in its common law counterclaims to an extent exceeding the sums provided for under clause 5.4 there would be no need to consider the lawfulness of this clause. The Respondent did not recover anything at common law and so this clause remains to be considered.

63. I heard no evidence as to how this clause was arrived at save it was obvious on its face it represented the Claimants' wages payable during their respective notice periods had they worked this, or if paid in lieu. It might have been intended to ensure that neither Claimant could claim payment in lieu of notice since it might be thought to offset and extinguish these sums. Mr Zovidavi argued that the legitimate interest was both the consequential loss at common law and also that by their summary departures the Claimants' had failed to complete the range for that season. Be that as it may the suggestion that these sums represented a pre estimate of loss was not supported by the evidence. Without such evidence it cannot stand and that is sufficient to dismiss this part of the counterclaim.

64. However, Ms Newton invited me to go on to find that this provision amounts to a penalty and is therefore unenforceable in any event. She submitted as follows. That on its face clause 5.4 requires each Claimant pay a 'fine' valued at three months' salary, an obligation out of all proportion to the Respondent's legitimate interest. In support of this clause being a penalty, she relies both on the wording of the same expressly referring to a 'fine' and cites **Cavendish Square Holding BV v El Makdessi; Parking Eye Ltd v Beavis [2015] UKSC 67** that a penalty is:

*"a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance."*

She argued that penalty clauses are generally unenforceable beyond the actual loss of the innocent party (***Jobson v Johnson* [1989] WLR 1026**) and in this case the Respondent has failed to prove any loss attributable to the Claimants, nor adduced credible evidence to support that the sums claimed are genuine pre estimates of loss referable to legitimate interests.

65. I accept that on its face this clause appears to be directed towards, and calculated only by reference to, each Claimants' salary that would be paid had they worked their respective notice periods, and I accept Ms Nickson's submissions on the relevant law. However, it is precisely the absence of evidence on the issue of pre estimate and legitimate interest that prevents me from also concluding that it amounts to a penalty. Whilst it looks suspiciously like a penalty there is insufficient evidence to reach that conclusion.

#### Counter Claim Against the First Claimant

66. The Respondent seeks consequential losses against the First Claimant for allegedly telephoning Mr Kyprianou of Eastman Staples, falsely telling him that the Respondent was going out of business, which the Respondent says led to the removal by Eastman of its machinery from the Respondent. I share Judge McLaren's concern as to whether the Tribunal has jurisdiction for this type of claim. In the event this part of the Counterclaim failed because the Respondent did not discharge the burden of proof to the civil standard either that the First Claimant had made this call or, if he had, that this had been causative, in part or at all, of Eastman removing this equipment. The First Claimant denied any such conversation. Whilst I'm not required to make findings of fact to support an alternative explanation it seemed to me that the likely reason for the removal of this equipment was a trade debt dispute between the supplier and the Respondent, certainly there was undisputed evidence that such a dispute had arisen at the time of removal. Be that as it may this part of the Counterclaim also fails.

#### Claimants' Claim for Notice Pay

67. There is no obligation, contractual or statutory, on an employer to pay notice to an employee that declines to work his or her notice. Since neither Claimant intended to work their respective three-month notice periods it follows there is no entitlement to notice pay and these claims are dismissed. I was not addressed on constructive dismissal.

#### Overtime Pay

68. There are various reasons why an employee might be asked to work overtime, for example sickness-related staff shortages or to enable an employer to cope with an increase in customer demand. The latter seems to have been the position here. The requirement for an employee to work additional hours over and above their basic contractual working hours will depend on their employment contract. Overtime can be voluntary or compulsory. I am satisfied there was contractual provision in each of the Claimants' contracts requiring them to work extra hours and in that sense it was compulsory.

69. There are two types of compulsory overtime, guaranteed and non-guaranteed. Guaranteed compulsory overtime is that which an employer is contractually obliged to offer and an employee is obliged to accept. Non-guaranteed compulsory overtime is where the employer is not obliged to offer the employee any additional hours although, when offered, the employee is contractually bound to undertake this extra work. This could be where an employer requires an employee to work extra hours during a particularly busy time but doesn't know exactly how much overtime will be required in advance. In my view this latter type is the proper interpretation of the Claimants' contractual obligations to work overtime.

### Braganza Duty

70. I accept Ms Nickson's submission that an employer must exercise contractual discretion honestly and in good faith, which in this case that goes to the extent of the overtime required, particularly so as save for Sunday working this was unpaid. Any such requirement must not be arbitrary, capricious or irrational (***Braganza v BP Shipping Ltd [2015] UKS***). The Claimants were contracted to work 39 hours per week (excluding lunch – also see below re the statutory claims) and Ms Nickson suggested that a reasonable level of overtime over a busy period would be in *'the realm of 5 to 10 additional hours per week'*, as I find to have been the position in respect of the January overtime.
71. I am satisfied that neither Claimant was threatened or coerced into working the December overtime, nor for that matter the January overtime, whether expressly or by implication under threat of their own dismissal or that of other employees, and that they had agreed to the December level of extra work, paid and unpaid, albeit that they later came to regret it, thus in my view *Braganza* unreasonableness is not engaged. As to the January overtime I find this to have been 8 hours per week unpaid and that in the circumstances this was reasonable and contractually provided for. I am not satisfied that overtime was worked in February but had this continued every week from then on without offsetting TOIL, or some other arrangement to compensate, then the Claimants might have had cause for complaint but this never came to pass. There was no evidence as to whether Toil was requested, nor if it was to be offered, let alone whether it would have been granted or refused.
72. Be that as it may on the facts there is no contractual or common law basis for the claims for paid overtime and accordingly these are dismissed. Contract or common law compliance would not however defeat proven breaches of the Minimum Wage Regulations 2015, and/or Reg 4(1) of the Working Time Regulations 1998 prohibiting more than 48 hours work each week, and it to these claims that I now turn.

### Minimum Wage

73. The National Minimum Wage (NMW) Regulations 2015/621 set the NMW in the period April 2018 to March 2019 at £7.83 per hour for persons, such as each Claimant, aged 25 and over. So far as the calculating the hourly rate paid to

each Claimant no premium pay rates were involved for overtime which, where paid, was at the basic hourly rate applicable to each Claimant. For minimum wage purposes I have taken the relevant pay periods to be the month of December and the month of January.

74. By clause 5.1.8 of each employment contract the Claimants' were contracted to attend the premises for 45 hours per week, Monday to Friday, to include one hour and ten minutes for lunch each day. For mathematical convenience I have taken this to be a 39-hour basic working week though, applying the following formulas which I take to be correct for each statutory claim, no breach of statutory obligation is made out even if a 40-hour basic working week were to substituted for 39 hours.
75. Clause 5.1.4 of the Claimants' employment contracts states that overtime is not payable. Clause 5.1.8 of states "*[The Respondent] may require [the Claimants] to work additional hours according to the needs of the business and/or our clients. Occasionally [the Claimants] may be required to work at the weekend/on public holidays. Time off in lieu may be given at [Respondent's] discretion.*" As at 13<sup>th</sup> February no TOIL had been requested, offered or granted.
76. Clause 1.8 provides that "*[t]he obligations and restrictions imposed by [the] agreement are in addition to and not in substitution for the obligations and restrictions imposed or implied by law.*"
77. The First Claimant's witness statement recites that in or around early December, possibly late November 2018, Mr Rahman held a staff meeting to discuss the backlog of work. This resulted in the Respondent requiring all staff, including the Claimants, to work overtime throughout the month of December to clear the same, of which 7 hours worked each Sunday in December was paid but weekday overtime was unpaid. There were five Sundays in December 2018 and, contrary to Ms Rusu's evidence that only three were worked by Mr Torres-Gomez and only two by Ms Godfrin though she was paid for three, I find that that four of these were paid even though Ms Godfrin worked only three whilst Mr Torres-Gomez worked four. I find that each Sunday was 7hrs work. I accept Ms Rusu's evidence that each Claimant received a 'cash bonus' of £200 in December which I have not included for calculation purposes. I made no deduction in respect of Ms Godfrin not working one Sunday in December but still being paid for this.
78. Each Claimant was monthly paid and accordingly I have taken each Claimant to have worked 258 hours [(39hs basic + 21hrs overtime) X 4.3 weeks] paid and unpaid in December 2018 and 202 hours [(39hrs basic + 8hrs overtime) X 4.3 weeks] paid and unpaid in January 2019. These worked hours figures are not entirely accurate as December included paid holiday for Christmas Day and Boxing Day which should reduce the 258 hours by 15.6 hours (2 days X 7.8hrs) and January included paid holiday for New Year's Day (7.8hrs), with commensurate basic pay deductions as these are not worked hours. However, by not complicating matters in making these adjustments (and see above re Ms Godfrin) each calculation is thereby mathematically marginally weighted in

favour of the Claimants' submission of underpayment. Even on this basis the paid hourly rates were above the minimum wage.

#### The First Claimant

79. Mr Torres-Gomez was paid £2357.13 gross in December 2018 and £1833.33 gross in January 2019. The calculation for his minimum wage compliance is:
- Gross December pay of £2357.13 divided by 258 hours worked yields a gross hourly rate paid for December of £9.13. This is above the minimum wage.
  - Gross January pay of £1,833.33 divided by 202 hours worked yields a gross hourly rate paid for December of £9.07. This is above the minimum wage.

#### The Second Claimant

80. Ms Godfrin was paid £2,063.49 gross in December 2018 and £1666.67 gross in January 2019. The calculation for her minimum wage compliance is:
- Gross December pay of £2063.49 divided by 258 hours worked yields a gross hourly rate paid for December of £7.99. This is above the minimum wage.
  - Gross January pay of £1666.67 divided by 202 hours worked yields a gross hourly rate paid for January of £8.25. This is above the minimum wage.
81. Accordingly, the claims in minimum wage are dismissed.

#### 48 Hour Working Week

82. All working hours, including overtime paid or unpaid, are governed by the Working Time Regulations 1998. The regulations limit the number of hours that employees can work each week, albeit on an average basis. Regulation 4(1) WTR 1998 provides that, subject to regulation 5(1) WTR 1998, an employee's working time, including overtime paid or unpaid, shall not exceed an average of 48 hours per week. Regulation 5(1) WTR 1998 excludes the application of regulation 4(1) WTR 1998 in circumstances where an employee has agreed with their employer in writing that it should not apply (a lawful 'opt out'). Neither Claimant had opted out of the WTR 1998 thus Regulation 4(1) WTR 1998 applies.
83. When calculating an employee's working hours for regulations purposes these are averaged out over a period of 17 weeks save for specified classes of employees to which neither Claimant belongs (e.g. junior doctors). Unless the employee has opted out of the 48-hour week then worked hours must not exceed an average of 48 hours weekly over this period. An employer can require an employee to work more than 48 hours in a single week, indeed over a number of weeks, provided the employee's hours are reduced within the relevant timeframe to even out their average weekly hours. Working time does not include breaks when no work is done, e.g. lunch breaks, nor unpaid overtime

volunteered when staying late to finish something off. However, in this case each Claimant was contractually required to work unpaid overtime and so for the purposes of this calculation I have included all the hours I have found to have been worked.

84. The 17 week period includes December and January which I have taken to be 8.6 working weeks in which a total of 460 hours were worked by each Claimant (see above). Had I accepted Ms Newton's submission that just these two months is the appropriate period over which to calculate the average hours then she would have been correct in her submission that average weekly hours exceeded 48. I do not accept that submission. Taking the relevant period as 17 weeks then the remaining 8.4 weeks yield a further 327.6 hrs (8.4 weeks x 39hrs) which, when aggregated with the 460 hours, yields 787.6 hours worked over the 17-week period. On this calculation the average weekly hours worked was 46.3 hours. To have breached the 48 hour limit would have required each Claimant to have worked in excess of 816 hours over this period. According to this claim does not succeed.

#### Unpaid Holiday Pay

85. Entitlement to minimum paid annual leave of 28 days including statutory holidays is provided pursuant to Sections 13 and 13A of the Working Time Regulations. The Claimants were so entitled but the Respondent withheld this in part satisfaction of its Counterclaim. In that they acted unlawfully contrary to the provisions of Section 13 of the Employment Rights Act. The Respondent agreed that each Claimant took holiday on New Year's Day and was owed accrued holiday pay for the period 1<sup>st</sup> January to 13<sup>th</sup> February 2019, a total of 32 working days, less the one day already taken. The Claimants' initially estimated the accrued remaining holiday at 1.5 days, which estimate Mr Zovidavi adopted without separate calculation. Ms Nickson offered a somewhat more complex calculation which yielded a slightly different figure. Conveniently, GOV.UK provides a ready reckoner for calculating accrued holiday. Using this the accrued holiday for that period was 2.5 days, less the one day taken, leaving 1.5 days still due to each Claimant. Thus, gross pay for 1.5 days is due to each Claimant subject to statutory deductions in respect of income tax and national insurance. The Respondent is to pay the appropriate sums forthwith less lawful deductions and provide each Claimant with an itemised pay slip in respect of the same.

#### Unpaid February Wages

86. The law on this is plain and straight forward. It is common ground that each Claimant worked 9 days in the period 1<sup>st</sup> to 13<sup>th</sup> February 2019. Again, the Respondent withheld pay for these 9 working days in part satisfaction of its Counterclaim and again in this they acted unlawfully contrary to the provision of Section 13 of the Employment Rights Act. Thus Mr Torres-Gomez and Ms Godfrin are each owed 9 days gross pay subject to statutory deductions in respect of income tax and national insurance. Again the Respondent is to pay the appropriate sums forthwith and provide each Claimant with an itemised pay slip in respect of the same.

**Guidance for the Respondent**

87. This case was beset by disputes of fact. In a case such as this I would expect the Respondent's minimum wage records to come into evidence and these should have settled the issue of what hours were in fact worked. These records, if accepted, would have determined the statutory claims and the extent of the extent of the overtime claims. In the event these records, the keeping of which is required by statute, were conspicuous by their absence.
88. There are a number of offences relating to the minimum wage regulations including that of refusing or wilfully neglecting to pay the minimum wage and of failing to keep or preserve minimum wage records. The fine on conviction for each offence is up to £5,000 when tried in the magistrates' court and the most serious cases are triable in the Crown Court.
89. I make no assumptions but it seems to me the Respondent might not have properly considered its obligations under the minimum wage regulations. As a matter of guidance from this Tribunal it would be as well if the Respondent's directors were to review the Company's overtime practices and ensure that it is properly compliant.

**Employment Judge Brook  
Date: 8 December 2020**