RESERVED JUDGMENT **Case No. 2411497/2019**
2411498/2019

EMPLOYMENT TRIBUNALS

Claimants: Miss K Gyumisheva (1)
Mr A Arsenov (2)

Respondent: Iliyan Petkov

Heard at: Manchester **On:** 3,4 and 6 May 2022 (and in chambers on 6 June 2022)
.

Before: Employment Judge Leach, Mrs C Bowman and Mr R Cunningham.

REPRESENTATION:

Claimants: **In person**
Respondent: **Ms C Urquhart (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The first claimant's complaint under the Equality Act 2010 (protected characteristic, disability) fails.

2. Neither claimant was paid in compliance with the National Minimum Wage legislation. Accordingly, their complaints of unlawful deductions from wages succeed. The respondent is ordered to pay the first claimant unpaid wages of **£13,925.21** and the second claimant unpaid wages of **£13,925.21**.

3. The respondent failed to pay the claimants for the final 8 days of their employment (1-8 July 2019) and their complaint of unlawful deduction from wages succeeds. The respondent is ordered to pay the first claimant unpaid wages of **£548.24** and the second claimant unpaid wages of **£548.24**.

4. The respondent failed to comply with regulation 13 and 13A of the Working Time Regulations 1998 (entitlement to annual leave) and is ordered to pay the first claimant the sum of **£2517.21** for accrued paid annual leave and the second claimant the sum of **£2517.21** for accrued paid annual leave.

5. The respondent failed to comply with regulation 11 of the Working Time Regulations 1998 (entitlement to weekly rest period) and is ordered to pay the first claimant compensation of £500 and the second claimant compensation of £500.

6. The complaint of failure to comply with regulation 10 of the Working Time Regulations 1998 fails and is dismissed.

7. The complaint under the Equality Act 2010 (pregnancy discrimination) is dismissed on withdrawal.

8. The Employment Tribunal has no jurisdiction to determine the respondent's breach of contract claim and it is dismissed.

9. Accordingly, the respondent is ordered to pay the following total amounts:-

   a. **£17490.66** to the first claimant
   b. **£17490.66** to the second claimant

REASONS

A. Introduction

1. The respondent operates a hotel business in Blackpool called the Fairview Hotel ("Hotel").

2. The claimants worked and lived at the Hotel between February 2018 and July 2019.

3. Following the termination of those arrangements, the claimants brought these Employment Tribunal proceedings raising a number of claims (1) under Part II of the Employment Rights Act 1996 ("ERA) for unauthorised deductions from wages (2) for various breaches of the Working Time Regulations 1998 (WTR) (3) for not paying the national minimum wage, contrary to the National Minimum Wage Act 1998 and National Minimum Wage Regulations 2015 (together referred to as "NMW legislation") and (the first claimant only) for discrimination (protected characteristic disability) under the Equality Act 2010 ("EQA").

4. At a preliminary hearing held in May 2021, it was decided that the claimants were workers for the purposes of the ERA, WTR and NMW legislation and employees for the purposes of the EQA. At that hearing the Tribunal made various findings of fact, some of which are relevant to the issues determined at the final hearing, at least as relevant background.

B. The Hearing

5. All parties are of Bulgarian nationality and English is not their first language. The claimants had asked for an interpreter which the Tribunal arranged. The respondent's spoken English is very good, and he did not request (and did not need) an interpreter. The same applied to the respondent's witness who is also Bulgarian.

6. This final hearing was initially listed on 9-11 February 2022 before the same panel. The respondent claimed not to have received various documents from the claimant. We decided then that it was in the interests of justice to postpone and relist the hearing although dealt with various case management points at the hearing in February. Clear instructions were provided to the parties about steps that needed to be taken and case management orders were made. A document summarising those discussions and confirming the case management orders were also sent to the parties, setting out clearly what steps needed to be taken before the final hearing.

7. The respondent did not take the steps required of him. He claims (again) not to have received emails. Ms Urquhart applied for a further postponement. Ms Urquhart made other applications at the commencement of the hearing which we considered and determined. We detail these further below.

8. One outcome of those applications was to proceed with a hybrid hearing therefore allowing the respondent (who had provided us with a positive test for COVID 19) to attend whilst isolating. Everyone else attended in person except for the respondent's witness who chose to give evidence by CVP.

9. We are grateful to the appointed interpreters for their hard work over the hearing.

10. We heard evidence from the following people:-

a. Kristina Gyumisheva, claimant ("KG")

b. Asen Arsenov claimant ("AA")

(together, referred to as the claimants)

c. Vanislav Danchev,(VD) who worked at a hotel in Blackpool owned by VB (see below)

d. Iliyan Petkov (respondent)

e. Ivan Balkandzhiev (IB), VB's son.

C. Respondent's applications and our decisions.

11. We set out below the applications that were made by Ms Urquhart on behalf of the respondent and our decision against each.

12. An application was made to postpone this hearing. There were broadly two reasons for this application. The first is that the case was not ready to be heard because of the poor state of the bundle of documents and the fact that the respondent

has not been able to put forward various documents and other information, and secondly because the respondent had tested positive for coronavirus.

13. We have decided that the postponement application should be refused. An important part of our reasoning here is what happened at the hearing in February 2022. It was clear that prior to that hearing the claimant had gone to some length to provide the respondent with documentary information and statements. The claimant was clear that she had sent all of that information to the respondent's correct email address, and had also made other attempts to contact the respondent in relation to that hearing. The respondent attended on that occasion to say that he had not had anything from the claimant.

14. In the interests of justice on the last occasion we decided to give the respondent the benefit of the doubt; to allow the parties additional time to prepare the bundle and statements and to provide the respondent with an opportunity to include those documents he wanted to. We also discussed and provided him with an opportunity to present a counter schedule of loss, witness statements and so on. We went through everything very clearly with the parties at the last hearing. No-one could have left that hearing in any doubt about the steps that needed to be taken.

15. The respondent, through Ms Urquhart, accepted that he had not carried out any of the steps, but that he did not know they were required. He asked the Tribunal to give him the benefit of the doubt for a further time, and to postpone the hearing. Considering (as we must) the various elements of the overriding objective, including proportionality, saving expense and avoiding delay we decided not postpone the hearing for a second time.

16. As for the respondent's positive COVID test; we accepted that he had tested positive for COVID and we had documentary proof of that. In the note prepared for this hearing it was helpfully proposed that the respondent could take part by video if the hearing was converted to a hybrid one. In her submissions today, Ms Urquhart casts some doubt about that, noting that the respondent has told her that his symptoms had become worse. We had no information, for example from the respondent's GP or the respondent himself about this. The respondent's representatives are aware of the Presidential Direction on seeking postponements. We decided that the postponement should not be allowed on the basis of the respondent's ill health. We converted the hearing to a hybrid one and therefore allowed the respondent to attend by video conference. We are satisfied that the respondent was able to contribute fully to the hearing.

17. Jurisdiction. The respondent's newly instructed solicitors and Ms Urquhart raised a jurisdictional point in relation to the acceptance of the claim of the second claimant, over three years ago. The two claimants rely on the same claim form. The Regional Employment Judge at the time scrutinised the claim forms and made a decision to accept the claims against the respondent, although also made 2 other decisions:

a. to reject claims against an additional respondent (as there was no ACAS EC Certificate relevant to that person)

b. to require further particulars of the complaints.

18. The acceptance against both respondents was not challenged until the first day of the final hearing. There had by then been five previous hearings in this case, including a hearing in September 2020 when the respondent was legally represented.

19. We dismissed the respondent's application for rejection of the second claimant's ET1 for these reasons:-

a. there has already been a judicial determination and acceptance of the second claimant's claim form. Any appeal against that should have been to the Employment Appeal Tribunal;

b. in case we were wrong on this first reason we also considered and found that regulation 3(1)(a) of the Employment Tribunals (Early Conciliation) Exemptions and Rules of Procedure Regulations 2014 applied. We decided that the second claimant was allowed to institute these proceedings without an EC Certificate because the first respondent had complied with the requirement to obtain an EC Certificate and the second claimant had instituted proceedings on the same claim form as the first respondent.

c. We considered Ms Urquhart's argument that the second claimant's name does not appear in the body of the claim form itself. A claim form only has space for one claimant. In the process of an online submission of the claim there is an ability or stage when additional or multiple claimants' details may be added. That then generates an ET1A form which is an attachment to and therefore part of the claim form.

20. In February 2020 at a case management hearing, and following substantial discussion between the parties, the claims brought by each claimant were clarified and it was abundantly clear since then what complaints are raised by each of the claimants.

21. Amended response. Moving on to the application to amend the response; those parts of the proposed amendment that raised jurisdictional issues fell away because we dealt with those (see above).

22. As far as the amendments to (or additional details about) the respondent's response to the complaints are concerned, the information in the proposed amended response inform the claimants and the Tribunal what the arguments are. They could have been made by way of a combination of witness statements and opening or closing submissions, but we accepted them as amendments to the response even at such a late stage.

23. Additional Documents. The respondent requested and we provided the respondent with an opportunity to identify other documents from the preliminary hearing bundle that he wanted to be considered at the final hearing.

24. Additional witness statements. The respondent also attended day one of the hearing with 2 previously undisclosed witness statements. One was a statement of the respondent himself. The other was a statement of Ivan Balkandzhiev. Both the claimant and IB had given evidence at the preliminary hearing in May 2021.

25. Whilst the claimants had only just been provided with the statements, we decided to allow them, knowing that the respondent and IB would not give evidence until the morning of day 2. The statements were short and we decided that it was in the interests of justice to accept them and consider the evidence, even though the respondent had not complied with the case management orders that had been explained the hearing in February 2022 and confirmed in writing.

D. Bundle.

26. The claimant had provided a bundle electronically. The Tribunal office found it impossible to print due to the formatting of the bundle. We needed hard copies for the wing members and the witness stand. The respondent had been ordered to attend with these hard copies. He had not. However, his representatives were very helpful on day one and managed, with the benefit of IT expertise, to format and print the bundle.

27. References to page numbers below are references to this bundle of documents.

E. The Issues

28. The issues for determination by the Tribunal were identified at a Preliminary Hearing (case management) in February 2020. Some of them have already been determined (in relation to employment/worker status). We set out the remaining issues still to be determined.

> *Equality Act 2010*
>
> *Disability*
>
> *1. Was the first claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times because of a skin condition?*
>
> *Reasonable Adjustments – sections 20/21 Equality Act 2010*
>
> *2. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?*
>
> *3. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: a requirement to clean carpets by hand, using chemical cleaning materials?*
>
> *4. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that persons without the claimant's skin condition would not have been disadvantaged by the cleaning process (claim under s20(3) EqA)?*
>
> *5. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?*

6. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and she has identified the step of providing a carpet cleaning machine.

7. Further or alternatively was the claimant, but for the provision of a carpet cleaning machine, put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled (claim under section 20(5) EqA)?

Pregnancy and Maternity Discrimination – section 18 Equality Act 2010

8. Did the respondent treat the first claimant unfavourably by the respondent/respondent's wife stating to the claimant, when pregnant, that she would have to undertake an abortion/termination of her pregnancy in order to continue in her employment? The first claimant alleges that this was stated to her on a date between 16 and 23 February 2018.

9. This claim was not presented within the time limit set out in section 123 of the EqA 2010. Has the claim been brought within such period as the Employment Tribunal thinks just and equitable?

Unauthorised Deductions

10. Did the respondent make unauthorised deductions from the claimants' wages in accordance with section 13 Employment Rights Act 1996 ("ERA") by failing to pay the claimants for the final 13 days that they undertook work for the respondent?

Working Time Regulations 1998 (WTR)

The claimants' claim that they were required to work from 6.30am to 9.30pm everyday with no breaks during the day and with one non-working day per month.

WTR- Weekly Working Time

11. Did the claimants' working time exceed an average of 48 hours for each seven days, contrary to regulation Working Time Regulations?

WTR - Daily Rest

12. Did the claimants receive a rest period of not less than 11 consecutive hours in each 24-hour period in accordance with regulation 10 Working Time Regulations?

WTR - Weekly Rest Period

13. Did the claimants receive an uninterrupted rest period of not less than 24 hours in each seven-day period during which they worked for the respondent in accordance with regulation 11 Working Time Regulations?

WTR - Entitlement to Annual Leave

14. Did the claimants receive annual leave in accordance with regulations 13 and 13A Working Time Regulations?

National Minimum Wage Act 1998 ("NMWA")

15. Did the claimants receive pay in accordance with the terms of the NMWA and National Minimum Wage Regulations 2015? The claimants' claim they were each paid £775 - £825 per month. They claim they worked 15 hours a day, every day except for one day a month. Assuming a 30-day month therefore they claim they worked for 435 hours per month. Assuming a monthly pay of £800, they claim they were paid £1.84 per hour.

16. For the period April 2019 until date of termination the NMW was £7.70 per hour (where the worker is aged 21-24) and £8.21 per hour (25 years and over)

17. For the period April 2018 to April 2019 the NMW was £7.38 per hour (where the worker is aged 21-24) and £7.83 per hour (25 years and over)

18. We clarified that the claimants' complaints that they were not paid at the NMW is enforceable as an unlawful deductions claim.

29. The claimant did not provide any evidence in support of the complaint of pregnancy/maternity discrimination (see issues 8 and 9 above) . KG told us that she understood that complaint had been dismissed. Whilst there is no record of the case having been dismissed at a previous hearing, it is likely that KG will have been informed that there were considerable time limit issues as far as this particular complaint was concerned. The claimant confirmed that she was not proceeding with the complaint and this judgment therefore records its dismissal on withdrawal.

30. Ms Urquhart noted the presence of a breach of contract claim on the response form. Neither claimant had raised a breach of contract complaint against the respondent and therefore the Tribunal did not have jurisdiction to hear and determine the respondent's claim. However, whilst this may have been discussed at a previous preliminary hearing, Ms Urquhart was right to raise this and to note there had been no dismissal of the claim.

E. Previous findings of Fact.

31. The Judgment which followed the preliminary hearing May 2021 set out various findings of fact. Those findings were made by Judge alone (also Employment Judge Leach). We read the judgment, which has not been challenged. This helped provide some relevant background, context and information to all members of the Tribunal. All 3 of us are willing to accept those previous findings. Some passages have been repeated below.

F. Findings of fact

32. We set out below our relevant findings of fact. We have made these findings to the best of our ability based on the evidence that was provided.

KG's medical condition

33. KG provided Bulgarian health records (translation at p142). The medical record is dated January 2016. She also provided oral evidence about her condition.

34. We find as follows:-

a. KG has a skin condition which is hereditary. It is called Epidermolysis Bullosa Simples Weber Cockayne (the Condition).

b. The Condition affects KG's hands and feet where blistering occurs

c. The medical record notes that the working conditions which may affect/worsen the condition are adverse climatic conditions (which we take to mean extreme heat or cold).

d. Having heard from the claimant, we also find that the Condition (or rather the blistering resulting from it) can also be caused/worsened by exposure to some chemicals in some cleaning products.

e. The claimant was, on the whole, not adversely affected whilst working at the Hotel. However, towards the end of her employment there, she worked with a carpet cleaning product and this caused blistering on her hands. On this occasion she was asked to clean the carpet (with a specialist carpet cleaning product) by hand as a carpet cleaning machine was broken.

f. There is no medical record more recently than January 2016. There is nothing from a UK based GP or skin specialist. There is therefore no medical evidence of the extent or severity of the blistering in 2019, how long it lasted and/or whether medical treatment was required.

g. Prior to the flare up caused by the carpet cleaning product, the respondent was not aware of the claimant's condition.

The Hotel

35. The Hotel is one of a large number of hotels and guest houses in the well-known seaside resort of Blackpool. It accommodates up to 34 guests. It provides guests with bed and breakfast accommodation.

36. The respondent leases the hotel building and runs it as a business.

37. Most of the guests book their accommodation through the website Booking.com although there are also telephone bookings and in person bookings.

38. The respondent's partner, VB, also operates a hotel business in the same way. VB's hotel is called The Iona Hotel.

The commencement of the claimants' work at the Hotel

39. The claimants are a couple. By the time they started work at the Hotel they had lived in England for about two years obtaining short-term employment through employment agencies.

40. The claimants became aware of the opportunity of working at the Hotel from an advertisement that the respondent placed on a Bulgarian website called ALO.BG. This was the only place where the opportunity was advertised. A copy of the advert was not included in the Bundle.

41. The claimants responded and were interviewed by the respondent and VB via video chat. In the course of that interview the claimants were provided information about the work. They were informed that it was to manage the hotel; they needed sufficiently good English to be able to run the reception; they needed to clean rooms; they needed to make breakfasts. KG was able to inform the respondent and VB that she had previous experience as an employed cleaner.

42. Prior to the claimants starting work at the hotel they met with the respondent and VB in person, at the hotel and spent a couple of days there. VB's son, IB, was also there on this occasion.

43. The claimants were given a series of instructions. They were provided with a plan of the hotel and the rooms, they were told how the rooms should be arranged, given instructions about laundry and cleaning, about what was required on reception, and instructions about the booking arrangements, including through Booking.com (although the Booking.com arrangements were controlled and administered by the respondent).

44. Further instructions were provided about breakfasts. The respondent instructed the claimants about what to provide for English and Continental breakfast options. The respondent had an online account with a supermarket and breakfast foodstuffs were chosen and paid for by him and then he arranged for delivery or collection although the claimants also needed to shop for foodstuffs for the Hotel (we have seen receipts indicating the claimants have brought bread for example, sending to the respondent for reimbursement).

45. The claimants were also instructed about maintaining a cash balance which would include cash received from direct bookings and a requirement to provide a daily report to the respondent.

46. During that same few days, the respondent observed the claimants at work, including their dealing with hotel guests. He continued to provide instructions throughout this period.

47. The claim form states that employment began on 16 February 2018. One of the claimants' complaints is that they were not paid NMW. Their calculation of the amounts they say they are owed (set out in a schedule of loss) runs from 1 March 2018 rather than 16 February 2018). AS explained above, initially the claimants received training and the respondent was present at the Hotel during this period. We have not heard any evidence about hours worked by the claimants during this initial period. Our findings below in relation to hours of work (and our conclusions in relation to pay owing) adopt the same calculation start date as the claimants, being the 1 March 2018.

Hours of Work

48. We accept the claimants' evidence that the operation of the Hotel effectively dictated their working day. We adopt the findings of fact made at the May Preliminary hearing.

49. Their working day would start at around 7.00am when they were required to start to prepare breakfasts. They would work through the morning providing the breakfasts, clearing up the dining room after guests had eaten their breakfasts, being on reception to deal with check-outs and the collection of keys, stripping beds, washing the bedding, cleaning the rooms, drying the bedding, ironing it and preparing the rooms for the next guests.

50. Check-in was between 2.30pm and 9.30pm and one of them would have to be available on reception during those hours.

51. Sometimes guests would return home to the Hotel late, sometimes drunk and rowdy; sometimes guests would forget their keys and on those occasions the claimants were required to be at work and available to assist and/or supervise guests. Whilst reception hours finished at 8pm, one of the claimants would need to be effectively on call beyond these hours.

52. There was no written working pattern or rota; no arrangement by which the claimants recorded their working hours; the respondent did not at any time ask what hours the claimants had worked. They were expected to be available at all times to ensure that the hotel functioned and to deal with all issues that arose.

53. The claimants were not busy at all times during the day. For example, being available on reception did not mean that whoever was on reception was hard at work at all times. However, when on reception, they were working – even if sometimes they read a book or played a computer game whilst undisturbed and on reception.

54. The length of the working day varied. Inevitably there were times during the year when the hotel was busy and other times when it was very quiet, and the extent to which the claimants were required to work was affected by this.

55. During the quieter times, only one of the 2 claimants may be needed at various times during the day and the other claimant would be able to take a break. This was

unstructured and was organised between the claimants themselves, subject always to the timings and demands of the activities at the Hotel.

56. The claimants gave evidence (which we accept) that during busy periods, their hours would be particularly long as their evenings and nights would often be disturbed by the late arrival of guests, guests returning from (often) drunken nights out, rowdiness and guests forgetting keys. We find that such issues would be more prevalent at weekends and during popular holiday periods and would not particularly affect the claimants at other times.

57. During these times at least one of the claimants would be required to attend to guests and incidents breaking out late into the evening and night.

58. It would generally be possible for one of the claimants to receive an uninterrupted break of at least 11 hours in every 24 hours but both claimants could not always do this as there would be disturbances during the late evening/night-time hours.

59. There was no system of relieving the claimants on a weekly or fortnightly basis. It was not possible for the claimants to have an uninterrupted rest break of at least 24 hours in a 7-day period. The exception to this was a monthly one (admitted by the claimants). The claimants accept that they did receive a day a month as a rest period. We find that was generally the pattern. The claimants worked every day except one per month. the exceptions were those months when the claimants took holiday – December 2018 and June 2019.

<u>How many working hours a day for the claimants?</u>

60. The evidence from parties is as follows:-

a. The claimants say they worked 13 hours a day, every day (other than the one day a month that the respondent provided relief cover)

b. The respondent on the other hand claims the claimants only worked between 8 am and 2pm and, even then, only when the Hotel was at full capacity. When it was quiet, according to the respondent, their working day would be much shorter.

61. When asked about the hours that followed 2pm when reception had to be covered, the respondent (and IB) provided evidence that this was done by IB. The respondent's evidence at this final hearing was that the claimants did not manage the hotel as he had discovered at an early stage that they did not have the skills to do this. Therefore, IB was called over from Bulgaria to manage the hotel and finances. According to the respondent's evidence at this final hearing, the claimants simply undertook housekeeping duties (cooking and cleaning) and were managed by IB.

62. The evidence provided by the respondent in relation to IB's significant involvement is at odds with:-

a. the evidence that was provided by the respondent at the preliminary hearing.

b. the claimant's own evidence

c. The "Contract for Management" which the respondent required the claimants to enter into. At page 166-172 is a contract governing the relationship from 26 December 2018 onwards (therefore entered into many months after the claimants began work at the Hotel.) We note the following agreed terms

> *" [the claimants have] the exclusive right to manage and Property for the duration of this agreement. Both parties agree that Manager will perform all duties regarding day to day operation of the hotel including bookings, check in/check out, breakfast, housekeeping, maintenance, laundry, stock, check and stock supply as well as all necessary lawful actions for running of the property, not excluding handling complaints, forwarding them to the Owner and keeping of high standards."*

Under "Collection of Payments" the contract states:

> *"Manager will collect from all guests payments on or before the due date and issue receipts. Manager will be responsible for keeping daily books of arrivals and expenses.*
>
> *Manager will be responsible for telephone bookings and owner will confirm all telephone bookings to guests by email.*
>
> *Owner will be responsible for collection of payments for pre-booked rooms paid online.*
>
> *Manager will be responsible for keeping day-to-day book for expenses of the hotel covered by the owner from the cashflow of the property.*
>
> *Manager will keep all receipts from expenses as well as invoices arriving by post for accounting department and owner in a safe place and orderly manner.*
>
> *Manager will provide a day-to-day accounting of all ingoing and outgoing guests and payments for owner's records.*
>
> *Manager assumes responsibility of any payment."*

d. The respondent's evidence at this final hearing is that IB played a central role in the operation of the Hotel. Yet there is no mention at all of him in these agreed terms.

63. We find that IB was sometimes involved in the operation of the Hotel but this was infrequent and generally limited to the times that the claimants were absent for holiday (see below) and the one day a month that the claimants had as a rest period. Otherwise it was the claimants who undertook all tasks relating to the operation of the Hotel, as required in the written contractual term quoted above.

64. We agree with the claimants that their working day would comprise 13 hours each during the busier periods (not taking in to account night-time interruptions). The Hotel accommodated up to 34 guests and with 17 or so rooms requiring servicing, laundry (bedding and towels to be washed, dried and ironed) bathrooms cleaning, tea and coffee replenishing and in addition, making and serving breakfasts, cleaning away afterwards, cleaning common areas and staffing reception area. Accounts of the payments made by guests, amounts of petty cash and so on would also be sent to the respondent on a daily basis. There would also be shopping and other errands necessary for the smooth operation of the Hotel.

65. We do not however agree with the claimants that every day throughout the year would involve both claimants working such long hours. Sometimes during quiet hours, the claimants would be provided with additional tasks (carpet cleaning is one example) but we find the hours would be less than 13 for each claimant. Some work would be needed though as the Hotel would remain open.

66. We do not accept the respondent's evidence either that little or no work would be required for large periods of the year. The respondent is in business. There is no evidence that it closed for periods of time (other than possibly during the claimant's holiday at the end of 2018). We find that the respondent would not have remained open if it had not been viable to do so (during winter months particularly). Whilst there were plenty of occasions when the Hotel was far from full or near full occupancy, the occupancy rates were high enough to warrant its opening throughout the winter.

67. The claimants have attempted to gain disclosure of the occupancy records. The respondent has not disclosed these, claiming that he destroys records once they are more than 12 months old.

68. The claimant has been able to provide some details of occupancy details for February May and June 2019. These were details previously provided by the respondent. They are not easy for us to follow. We have been unable to understand from these records exactly how many guests stayed on different days/nights. It is clear to us that the hotel was not at full capacity at any stage during February. However, there were reasonable numbers of guests staying and this supports a finding that there was an active enough hotel throughout the year for it to remain open.

69. The records of bookings in May and June 2019 (pages 102-141) show fluctuating occupancy levels with some very busy periods and some quiet days.

70. The respondent has not attempted to provide us with a calculation of hours worked by the claimants (even though he was provided with an opportunity to do so). The claimants have provided us with a calculation but it is not one which we accept in total.

71. We therefore need to make findings of fact on the hours that the claimants worked. We have decided that the sensible, proportionate approach to this (and one which is fair to both parties and therefore in the interests of justice) is to consider a year in percentage terms and to apply what we consider to be sensible averages to different percentages

72. We have decided as follows:-

a. 30% of the year comprised busy days when each claimant worked 13 hours per day (not taking into account night time disturbances)

b. 50% of the year involved more moderate levels of occupancy and work – and we have taken a working day per claimant to be 8 hours.

c. 20% of the year comprised quiet times. We have decided that each claimant would only need to work for 5 hours during these times.

73. In reaching these percentages we have taken account of:-

a. The evidence from the parties

b. That Blackpool is a busy resort and destination, with popular activities and events attracting guests throughout the year. Busy times are not just in the summer months.

c. The extent of the work required of the claimants.

74. Applying these percentages to a working year of 353 days (365 days less a day per month as rest) provides 3144 working hours per year (and a daily average of 8.9 hours). This is less than the amount claimed by each claimant of 5144 for a year. We did not accept their evidence that they worked as many hours as they say, for the reasons explained above.

75. The respondent did not keep any record of the number of hours the claimants worked. He did not want them to have employment and/or worker rights. He had received advice from an accountant about the potential liability that he would open himself up to if he did so and so he did not. He expected the claimants to be available for work every day (and during the night when required) except where alternative cover was arranged and so enable them to be off for a day.

Time away from work

76. Relevant findings regarding time away from work were made by the Judge alone in the previous judgment on worker status.

77. We have reviewed these collectively, with the benefit of any further evidence provided at the final hearing.

78. We accept the claimants' evidence that when they did want to take a day away from work together, they would ask the respondent. They did not (and could not) decide for themselves when to take a day away from the hotel. The work at the Hotel was ongoing. If a day off was required, then arrangements would need to be made to ensure that the Hotel and its guests were being looked after. The claimant would ask the respondent and the respondent would decide whether to agree and to make arrangements.

79. The claimants accept that they each had one day a month away from the Hotel. This was by prior arrangement with the respondent so that cover could be arranged.

80. Days off were either determined by the respondent or, if not, were approved by him.

Annual Leave

81. There were 2 occasions when the claimants took annual leave. The first occasion was in December 2018. The respondent has a property in the Dominican Republic which he allowed the claimants to use for a holiday for the whole of December. (The claimant's evidence, which we accept, was that they did not work for 30 days). He also paid most of their flight fares.

82. The second occasion was a visit to Bulgaria in June 2019. This was for 8 days and was, in part at least, to enable both to visit the dentist.

83. The respondent did not provide salary/pay for either holiday except that he paid £300 to KG in December 2018 as a bonus payment to both claimants.

Final Payment

84. The claimants received their monthly payment of £1550 in June 2019 (according to the terms of the contract at page 170 this payment is for a calendar month). However, they received no payment for July 2019 even though they worked for the first 8 days of July 2019.

G. Submissions

85. Ms Urquhart for the respondent provided lengthy and helpful oral submissions. We do not try to repeat all these in this judgment. Her submissions (and those from KG on behalf of both claimants) assisted us in our fact finding and conclusions as well as the law applicable.

86. We note the following highlights particularly about those claims categorised by Ms Urquhart as the money claims:-

a. That it is for the claimants to prove their claims and there is a lack of documentation on both sides

b. Sometimes the claimants were paid in cash and sometimes by bank transfers which adds to the difficulty of providing a complete picture

c. The respondent did not maintain paperwork and provide payslips as he might had he regarded himself as an employer; he had decided (wrongly) that the claimants were self employed

d. The Tribunal is required to do its best on the evidence available to reach its decision and decide whose evidence it prefers but the claimant's case, at its highest, is not believable.

e. That if we decide there was a breach of the WTR then we have to make an award that is just and equitable and when doing so, should take in to account the generosity shown towards the claimants in providing a holiday to the Dominican Republic.

H. The Law

Meaning of disability.

<u>Disability</u>

87. Section 6 Equality Act 2010 (EQA) provides as follows:-

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

88. Section 212(1) of the EQA defines "substantial" as meaning *"more than minor or trivial."*

89. We also considered:-

a. part one of schedule one to the EQA regarding the definition of disability.

b. The Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance) particularly under the heading Environmental Effects at D20

c. The EHRC Employment Code

90. We note from the materials above and from relevant case law:-

a. That we are to apply this definition at around the time that the alleged discrimination took place; **<u>Cruickshank v. VAW Motorcast Limited</u> [2002] ICR 729;** (which I have referred to as the relevant time).

b. That we should apply a sequential decision-making approach to the test (see for example **<u>J v. DLA Piper</u> [2010] WL 2131720 (J v. DLA)**, addressing the following in order

- did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')
- was the adverse condition substantial? (the 'substantial condition'), and
- was the adverse condition long term? (the 'long-term condition').

c. The term "impairment" had to be given its ordinary and natural meaning (**<u>McNicol v. Balfour Beatty Rail Maintenance Limited</u> [2002]EWCA Civ 1074**).

d. The EQA does not define what is meant by "normal day to day activities." Section D of the Guidance provides guidance on this term. The appendix to the Guidance provides "illustrative and non-exhaustive" lists of factors which it would and would not be reasonable to regard as having a substantial and adverse effect on normal day to day activities.

91. Various provisions in the EQA provide that an employer is not subject to the relevant duties/liabilities if it did not know and could not reasonably be expected to know that a claimant is disabled or is likely to be placed at a particular disadvantage because of the disability. Schedule 8 EQA at para 20(1) is relevant to this case (the complaint that the respondent failed in its duty to make reasonable adjustments).

Protection of Wages

92. Part II of the Employment Rights Act 1996 (ERA) provides considerable protection for the wages payable to workers. Section 13(1) ERA provides that *"An* employer *shall not make a deduction of wages of a worker employed by him."* The exceptions are where the deduction is authorised by contract or statute or where the worker has signified his agreement in writing.

National Minimum Wage legislation

93. This is in the National Minimum Wages Act 1998 and the National Minimum Wage Regulations 2015.

94. The NMW comprises various rates which are set annually. We need to consider whether these rates were applied. We also need to take in to account that the claimants were provided with accommodation at the Hotel. The NMW legislation provides that account should be taken for this, but at set rates.

95. As for as this case is concerned,

a. the relevant minimum wage rates are as follows:-

i. Up to 31 March 2018 - £7.38 per hour (both claimants being under 25 years old).

ii. April 2018 onwards - £7.70 per hour.

b. The relevant Accommodation offset rate

i. Upto 31 March 2018 - 6.40 per day (or £44.80 per week)

ii. April 2018 onwards -£7.00 per day (or £49 per week).

96. A worker who has not been paid the NMW is deemed to be contractually entitled to the difference and can bring a claim under the legislation which protects wages (Part II ERA, noted above) in order to recover the difference and therefore individually enforce the right to NMW.

Working Time Regulations 1998 (WTR)

97. Section 4 of the WTR provides for a maximum working week of 48 hours, but subject to some exceptions. Ms Urquhart rightly noted that the WTR do not provide any rights of individuals to present a complaint to the employment tribunals as far as this section is concerned. Regulation 30 lists those complaints under the WTR which come within the Tribunal's jurisdiction and breach of section 4 is not one of them.

98. Daily rest. Section 10 (1) WTR provides as follows:-

> *"A worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer……"*

99. Weekly rest. Section 11 WTR provides as follows:-

> *"11 (1) subject to paragraph 2 a worker is entitled to an interrupted rest period of not less than 24 hours in each 7-day period during which he works for his employer.*
>
> (2) *If his employer so determines a worker shall be entitled to either-*
>
> *a. Two interrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or*
>
> *b. One uninterrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph 1.*

100. There are exceptions which apply to these entitlements to rest periods. Potentially relevant ones here are:-

a. Regulation 21(d) – foreseeable surge in activity in relation to tourism

b. Regulation 21(e)(i) where workers activities are affected by an occurrence due to unusual and unforeseen circumstances beyond the employer's control

c. Regulation 21(e)(ii) where workers activities are affected by exceptional events the consequences of which could not have been avoided despite the exercise of all due care by the employer.

101. The time limits applicable for complaints about a failure to provide rest periods, are set out at Regulation 30 WTR. Claims have to be brought within 3 months of the date on which it was alleged that the exercise of the right should have been permitted, subject to extensions to take in to account ACAS Early conciliation requirements. Unlike provisions in other legislation (for example unlawful deductions of wages, where time limits recognise that there may have been a series of deductions) there is no reference in regulation 30 to time limits taking in to account the possibility of a series of refusals or a continuing course of conduct on the part of an employer.

102. The exception is at regulation 30(2) of the WTR – where an employment Tribunal can consider a complaint which is presented within such further period that is considers reasonable, in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented in time. We note here that we did not hear any arguments (from either party) about this provision.

103. Where a Tribunal decides that a complaint is well founded, it shall make a declaration to that effect and may also make an award of compensation of such amount as it considers to be just and equitable (Regulations 30(3) and (4) WTR).

104. Annual Leave. Regulation 13 WTR provides that a worker is entitled to 4 weeks annual leave in each leave year.

105. Regulation 13A provides for additional annual leave of 1.6 weeks.

106. Regulation 13A(3) limits total annual leave entitlement under WTR to 28 days.

107. A leave year, for the purposes of calculating annual leave, begins on the date on which the worker's employment began and each subsequent anniversary of that date.

108. One issue that we were required to determine was whether paid holiday entitlement should include the entitlement for the previous holiday year or limited to the holiday year in which the claimants' employment terminated. Applying regulation 13(3) WTR (and in the absence of agreement to the contrary) the year, for the purposes of calculating entitlement to annual leave, begins on the anniversary of the start of employment. The most recent holiday year would have started at the end of February 2019 and ended on the dismissal date (7 July 2019). .

109. The recent judgment in **Pimlico Plumbers v Smith [2021] IRLR 678** (Pimlico Plumbers) and particularly the appendix to the judgment sets out the amended parts of the reinterpreted regulation 13 of the Working Time Regulations. Having regard to the added paragraph 13(16), we need to consider whether the claimants were unable or unwilling to take some or all of the entitlement to paid leave in the previous holiday year because of the employer's refusal to remunerate the worker in respect of that leave.

I. Conclusions

Disability

Was the first claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times because of a skin condition?

110. We do not find on the evidence provided, that the claimant KG was disabled.

111. Applying the sequential decision-making process set out in J v. DLA Piper

a. The claimant had an impairment – the Condition.

b. That impairment did not impact KGs ability to carry out normal day to day activities or, if it did, that impact was not substantial.

112. We took account of the fact that by the time of the incident involving the carpet cleaning product, she had already worked in her full-time role at the Hotel and engaged in significant amounts of cleaning on a daily basis. She had been able to do this without complaint and without the need for medical intervention. It was only following the use

of a particular carpet cleaning product that her hands became blistered by reason of the underlying condition.

113. Based on the extent of the evidence available we did not find that the condition had any substantial impairment on KGs ability to carry out day to day activities. The particular activity of cleaning the carpet with a specialist carpet cleaning product by hand, without gloved protection, did not amount to a day to day activity. Cleaning certainly is a day to day activity and her ability to carry out cleaning was generally not impaired.

114. Further, we do not find that the respondent had knowledge of the claimant's impairment prior to the incident.

115. As such we do not need to go on to consider the issues under the heading "reasonable adjustments."

Unauthorised Deductions

Did the respondent make unauthorised deductions from the claimants' wages in accordance with section 13 Employment Rights Act 1996 ("ERA") by failing to pay the claimants for the final 13 days that they undertook work for the respondent?

116. We find that they did. Our findings are in 2 parts:-

Part One. Failure to pay National Minimum Wage in accordance with implied contractual term.

117. Our calculations are as follows

a. 12-month period 1 March 2018- 28 February 2019.

324 days were worked in this period (less 30 days holiday and less 11 days rest days – I per month other than December 2018). We have applied a daily average percentage of 8.9 hours = 2883.60 hours.

The minimum wage for this period was £7.38. Therefore, pay of £21280.96 was due.

Subtract from this the accommodation amount of £7 per day. 7 x 365 = £2555

Then subtract amount paid (no pay during holiday in December 2018 other than £300 bonus - £150 per claimant) 11 x 775 + 150 = £8675

Total therefore 21280.96 – 2555 – 8675 **= £10,050.**

b. One month – March 2019.

Each claimant worked on average 8.9 hours per day during this period.

The amount owing therefore is as follows:-

31-1 day rest = 30 days worked.

30 x 8.9= 267 hours worked.

Amount owing as wages. 267 x 7.38 = £1970.46

Subtract £7 per day accommodation 31 x 7 = £217.

Subtract amount paid £775.

Amount owing therefore = **£978.**

c. 1 April 2019 – 7 July 2019

Each claimant worked on average 8.9 hours per day during this period. There are 98 days.

The claimant had 1 day per month rest period and in addition 8 days holiday (22-29 June 2019). Total days worked therefore = 98-11 = 87 days.

8.9 x 87 = 774.30 hours worked.

Amount owing as wages 774.30 x. 7.70 = £5962.11

Subtract 7.55 per day accommodation = 98x 7.55 = 739.90

Subtract amount paid 3 x 775 = 2325

Amount owing therefore 5962.11 – 739.90 – 2325 = **£2897.21**

Adding the amounts at a,b and c; each claimant is therefore owed (by way of unpaid wages) **£13,925.21**

Part 2. Unpaid wages for the period 1-7 July 2019.

8 days pay @ 8.9 hours per day @ 7.70 per hour = **£548.24**

WTR- Weekly Working Time

Did the claimants' working time exceed an average of 48 hours for each seven days, contrary to regulation 4 Working Time Regulations?

118. We agree with Ms Urquhart's submissions. This is not a complaint that falls within the jurisdiction of Employment Tribunals.

WTR - Daily Rest

Did the claimants receive a rest period of not less than 11 consecutive hours in each 24-hour period in accordance with regulation 10 Working Time Regulations?

119. We are satisfied, on the facts that the claimants were able to manage their working days so that at least one of them could be provided with a rest period and, unless there was a disturbance from a hotel guest after 8pm, both could. Such disturbances may well fall within one of the exceptions noted above and that claimant who had been disturbed could gain some compensatory rest over the following few days.

WTR - Weekly Rest Period

Did the claimants receive an uninterrupted rest period of not less than 24 hours in each seven-day period during which they worked for the respondent in accordance with regulation 11 Working Time Regulations?

120. They did not. The respondent had not put in place any mechanism to provide the claimants with an uninterrupted 24 hours break every 7 days (or the alternative of an uninterrupted 48 hour break every 14 days.) The claimants only received one day off per month. This was a breach of the WTR.

121. As noted above, whilst the claimants did not receive regular weekly rest breaks at any stage of their employment with the respondent, the time limits applicable mean that a remedy can only be provided for a limited period. Further, that period includes June 2019, when the claimants had a period of unpaid annual leave.

122. Taking all this in to account we make an award of compensation under regulation 30 (3) WTR and (4) of **£300** per claimant.

WTR - Entitlement to Annual Leave

Did the claimants receive annual leave in accordance with regulations 13 and 13A Working Time Regulations?

123. Whilst the claimants did have time off in December 2018 and June 2019, it was not paid time off.

124. The claimants received a bonus payment of £300 in December 2018. This was paid into the account of KG and in respect of which account has already been made in the calculation of unlawful deductions. We decided that was the appropriate stage to factor in the calculation as it was classified as a bonus – indicating that it was a payment, a reward, for work already done.

125. The claimants were provided with time off but the respondent did not pay for the time off. We are satisfied that their circumstances are such that they should receive the amount of paid time off for the whole of the period they spent working for the respondent. A total of 38 days holiday accrued during this period.

126. We are satisfied that the claimants' circumstances do fall within regulation 13(16) as written in to the WTR by the EAT in Pimlico Plumbers. They were unable to

take paid leave because the respondent did not recognise their entitlement to be paid during leave. They were required therefore to take unpaid leave. On that basis, the claimants are entitled to receive payment for accrued untaken holidays for the period from end February 2018 to the date of termination, being 7 July 2019.

127. The claimants worked on average 8.9 hours per day. Of these 38 days 30.33 accrued when NMW was £7.38 per hour. = £1992.13

128. The remaining 7.66 days accrued when NMW was £7.70 per hour = £525

129. A total amount owing therefore to each claimant of **£2517.03**

National Minimum Wage Act 1998 ("NMWA")

Did the claimants receive pay in accordance with the terms of the NMWA and National Minimum Wage Regulations 2015? The claimants' claim they were each paid £775 - £825 per month. They claim they worked 15 hours a day, every day except for one day a month. Assuming a 30-day month therefore they claim they worked for 435 hours per month. Assuming a monthly pay of £800, they claim they were paid £1.84 per hour.

For the period April 2019 until date of termination the NMW was £7.70 per hour (where the worker is aged 21-24) and £8.21 per hour (25 years and over)

For the period April 2018 to April 2019 the NMW was £7.38 per hour (where the worker is aged 21-24) and £7.83 per hour (25 years and over)

130. The claimants were not paid in accordance with NMW Legislation. See our findings under unlawful deductions.

Employment Judge Leach
Date: 10 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 10 JUNE 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case numbers: **2411497/2019 & 2411498/2019**

Name of cases: **Miss K Gyumisheva** v **Iliyan Petkov**
Mr A Arsenov

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 10 June 2022

"the calculation day" is: 11 June 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.