EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr E Lompech-Leneveu**
(2) Mr A J Berteloot

Respondents: **(1) Alp Technologies Ltd**
(2) Mr T Kong

Heard at: **East London Hearing Centre**

On: **31 May 2022 and 1 June 2022**

Before: **Tribunal Judge Brannan acting as an Employment Judge**

Representation

First Claimant: Mr Irani-Nayar of Counsel instructed by DLG Legal Services

Second Claimant: In person

Respondent: Ms McGee of Counsel

JUDGMENT

1. All claims against the Second Respondent are dismissed on withdrawal.

2. The First Claimant's claim for wrongful dismissal is dismissed.

3. The First Claimant's claim for unlawful deduction of wages is dismissed on withdrawal. That includes the holiday pay claim.

4. The Second Claimant's claim for unfair dismissal is dismissed.

5. The Second Claimant's claim for wrongful dismissal is dismissed.

REASONS

1. This decision is in the following sections:

   (a) Procedural Background

   (b) Factual Background

   (c) Second Claimant's Continuity of Service

   (d) Wrongful Dismissal Claims of Both Claimants

   (e) Disposal of Listed Issues

Procedural Background

2. The hearing in this appeal took place over two days on 31 May and 1 June 2022. The Claimants and advocates attended in person. Mr Kong attended over the Cloud Video Platform ("CVP"). He had made an application to do so which Employment Judge Massarella allowed on 27 May 2022.

3. From the outset I was conscious that the Second Claimant was the only person without legal representation during the hearing. I was careful to explain legal discussions to him and ensure he understood the proceedings throughout.

4. The parties produced an electronic bundle of 295 pages. There were separate witness statements from each Claimant and Mr Kong. It was agreed at the outset of the hearing I was meant to have no other documents before me. It was also confirmed that the parties were happy with the lists of issues in the bundle – the use of the word "proposed" in their titles was in error.

5. No party had been directed to provide copies of the documents for the public or for the witnesses. To allow effective witness evidence I used screens in the courtroom to display relevant documents to the witnesses during their testimony.

6. During the hearing we had an initial discussion about preliminary matters. Four of these are important to note here.

7. First, the Second Claimant objected to Mr Kong joining by video. He could not articulate why the arrangement was unfair on any party. I decided it was not in the interests of justice to interfere with the judicial decision that had already been made allowing Mr Kong to participate remotely. I subsequently found out he was doing so because he was in the USA and had had covid preventing him from travelling to the UK so requiring him to attend in person would necessitate an adjournment.

8. Second, the Claimants confirmed that Mr Kong was no longer a respondent to any claims. He had initially been named when the Second Claimant was making discrimination claims. When the Second Claimant

withdrew the discrimination claims, there were no longer claims against Mr Kong.

9. Third, I described to the parties what I called trying to have one's cake and eat it in relation to the Second Respondent's employment contract. It was an idiom that I needed to explain to the Second Claimant and was actually well illustrated by the situation in the present case. This issue was that on the Respondent's case the Second Claimant had been an employee from 12 September 2018 under a contract of the same date (pages 96 to 106 of the bundle). He had then become a contractor from July 2019 to February 2020. From February 2020 to his termination on 16 November 2020 he returned to being an employee. The Respondent nevertheless sought to rely on the terms of the employment contract dated 12 September 2018 in saying the Second Claimant committed gross misconduct. It struck me as odd that the Second Claimant did not argue that he was not bound by the contract because it had come to an end when he became a contractor.

10. However, there was a reason because, conversely, the Second Claimant claimed unfair dismissal which necessarily meant he needed to have two years of continuous service. He sought to argue that he had not breached the employment contract, not that the contract did not apply to him.

11. While I expressed my scepticism about the legal mechanism by which the contract necessarily continued, the Respondent and Second Claimant agreed as a preliminary matter that his employment contract dated 12 September 2018 applied to him at the time of dismissal.

12. I mention this point specifically here because at the end of the hearing there was some discussion – raised by Mr Irani-Nayar – about what exactly had been agreed at the start. My notes and those of Ms McGee said it was specifically that the parties agreed the contract applied at the time of dismissal. It said nothing about it necessarily being continuous between 12 September 2018 and dismissal. I note now that had that been the agreed position, it would be difficult to see how the Respondent could argue that the Second Claimant did not have two years of continuous service. When Mr Irani-Nayar raised this at the end of the hearing, the Second Claimant appeared not necessarily to have understood the ramifications of what he had agreed at the start. However, it seems to me clear that the issue of continuity of service was always in dispute, that the Second Claimant knew this, and that the Second Claimant had ample opportunity to adduce evidence and cross-examine on this subject. Indeed, my findings on this point, which are set out below, turn on the legal consideration of the facts rather than any real dispute about what those facts are.

13. Fourth, there was no obvious order in which to hear the witnesses and submissions. I decided to hear:

    (a) Mr Kong

    (b) First Claimant

    (c) Second Claimant

(d) Ms McGee's submissions

(e) Mr Irani-Nayar's submissions

(f) The Second Claimant's submissions

with the Second Claimant cross-examining Mr Kong and the First Claimant.

14. No party objected to this approach.

15. I gave my judgment and reasons on the afternoon of the second day of the hearing. No party requested written reasons then. Before the written judgment had been sent out the Respondent requested written reasons. This document is therefore the judgment and reasons together. It is based on my *extempore* judgment and reasons, but I have tidied up and clarified it from what was delivered orally, including by providing this section on the procedural background, which was not needed for those who had just experienced the oral hearing.

Factual Background

16. It is common ground that the First Claimant was an employee of the Respondent and at the date of termination he did not have two years of continuous service. The Second Claimant was an employee of the Respondent at termination, and it is disputed about whether he had two years of continuous service to allow him to claim unfair dismissal.

17. On 17 June 2019, the Second Claimant set up a company called E-Nano Ltd. It was set up for the purposes of being able to provide services to a separate company called Blackhorse Services Limited ("Blackhorse"). Blackhorse was also controlled by Mr Kong and shares a lot of resources with it in terms of location and operations. It was to that company that the Second Claimant invoiced and from that company he was therefore paid until February 2020.

18. On 17 April 2020, E-Nano applied for a grant from UK Innovate for a project relating to Robotics. Both Claimants were involved in that application for the grant although it appears that evidence from them other people were as well.

19. The First Claimant signed a document which said that he was a co-founder of E-Nano on 15 May 2020 and that founder agreement sets out various obligations in relation to devoting time and effort to helping the E-Nano business be a success.

20. Initially, the grant application was unsuccessful but ultimately the grant was won on 2 July 2020 and the project was due to begin on 1 August 2020. The Second Claimant hired staff in order to be able to deliver that project for E-Nano. In relation to involvement with E-Nano, the First Claimant says that he agreed to help with a quarterly report in October 2020.

21. On 4 November 2020, the Respondent became aware of E-Nano winning the grant because it was published in the public domain. Immediately there were separate meetings between the First Claimant and Mr Kong's wife, Mrs Akpinar, and the Second Claimant and Mrs Akpinar.

22. Exactly what was said at those meetings is quite heavily contested. There are no notes from them, and Mrs Akpinar did not give evidence to assist. However, the Claimants accept that there was reference to E-Nano and that something wrong from the Respondent's point of view about involvement with E-Nano.

23. The evidence of Mr Kong is that there was an investigation in the intervening period and part of that investigation Mr Kong said involved finding information on the Second Claimant's laptop which caused concerns about other information being sent outside of the Respondent. I had difficulty with Mr Kong's evidence on this point and one of the major difficulties is that the document, the screenshot which has been provided showing the documents that were on the laptop of the Second Claimant at page 239 of the bundle, does not show them being sent anywhere and does not show them being accessible to anyone other than the Respondent and people authorised to use that laptop specifically. I also found it difficult to understand why that allegation and the evidence associated with it was never sent to either Claimants as part of the disciplinary process. Documents were sent on 13 November and they were basically the same documents that were in the public domain on 4 November which had prompted the original action at the beginning of the disciplinary process.

24. In any case, on 16 November, the Respondent dismissed both Claimants. The First Claimant was invited to and attended a meeting where he was asked to explain himself further. He did not really do so. Nothing further was discussed and there was a dismissal.

25. The Second Claimant refused to attend the meeting. He does not appear to have communicated "I will not attend", he just did not go. The meeting went on in his absence and the decision was taken to dismiss for gross misconduct.

26. Mr Kong's oral evidence is that the Respondent also applied within the same round of funding in which E-Nano won the grant. Mr Irani-Nayar suggested in the hearing that this is not true, and he suggested that Mr Kong's evidence that the Respondent made the grant application in 2020 and that the Respondent was interested in Robotics are not true. I do not think anyone within these proceedings has sought to mislead anybody. I think they have given evidence from their best recollection. I have concerns about Mr Kong's recollection of what happened during the investigation between 4 November and 16 November, but I do not consider it to be in any way implausible that the Respondent would apply for the grant funding that was available. My understanding of how the grant funding works, which the parties confirmed as accurate, is that there is proposal for a type of competition made by Innovate UK. They invite bids. It is for the bidders to say what exactly they are proposing to do with the money should they win it. It seems quite conceivable to me that

Respondent would have applied when the opportunity arose. Neither Claimant, when asked about it, was able to say that the Respondent definitely did or definitely did not bid, but neither suggested it was unlikely that Respondent would have applied within the funding round.

27. The fact that no evidence or mention of this was made earlier is something I note but I did have difficulties with much of the evidence and more specifically the absence of much evidence in this case. As I mentioned during the hearing, there are things related to breach of confidentiality where there has been no effort to prove the case. If it was alleged at the time of the dismissal, I would expect to see it in the documents used to decide to dismiss. A year and a half later such evidence is still not available. I explained during submissions that I could not rationally uphold a claim of breach of confidentiality against the Claimants on the evidence that is before me.

28. Similarly, in relation to the claim about competition, which I will come back to but mention now in relation to weighing the evidence, an obvious point perhaps to make would be to provide the grant application that was made by E-Nano and compare it to other grant applications by the Respondent to show that there is content in it that was appropriated from the Respondent or indeed that it was all original. Neither party sought to do that although it may well have assisted the Tribunal to be able to see it. Be it as it may, I raised the issue during the hearing, and nobody objected to continuing. We continued and we are where we are. I think it proportionate in the interest of justice to have continued to act in that way.

29. So, looking at absence of documentary evidence of the bid by the Respondent to Innovate UK, I do not think it fatally undermines the evidence of any witness. I simply think people have done their best. Although people may be legally advised, that does not provide an endless supply of money in order to pay for legal services and there is only a limited amount of advice you can receive. As a result, not every possible piece of evidence that could be relevant may have come out.

30. I therefore find the facts as I set them out above.

Right not to be Unfairly Dismissed

31. I now turn to the employment status of the Second Claimant during the period when he was labelled as a contractor in the Respondent's submission.

32. Employment status is a notoriously difficult topic subject with much case law that develops frequently over time. The basic test is in paragraph 515 of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

> A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will

> be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

33. It should be noted that "a contract of service" means being an employee, which is in contrast to a contract for services, which means being self-employed. My question is whether the Second Appellant was an employee during the time when he was invoicing for his work.

34. Looking first at (i), the question is whether the Second Claimant agreed in consideration of a wage or other remuneration that he would provide his own work and skill in performance of some service for his master. I have no doubt that this was the case because in fact the Second Claimant was personally providing services to the Respondent throughout the period when he was labelled a contractor. The fact that the money flowed in a different way is immaterial. I accept the Second Claimant's evidence that the operations of Blackhorse and the Respondent are fundamentally the same and that thee Second Claimant continued in the same job while invoicing through E-nano and Blackhorse. However, I also accept that their purposes may be different because they are established to serve different companies.

35. Turning to (ii), again the Second Claimant continually did the same role. He was working under the direction of Respondent and in my view, the second criterion is satisfied in this case looking at the facts of the case.

36. It is the third criterion which is the difficult one. There has been a recent case in the Court of Appeal about this which is a case called *The Commissioners For Her Majesty's Revenue and Customs v Atholl House Productions Limited* [2022] EWCA Civ 501. It did not relate to the Employment Tribunal, it related to tax and the question there was whether somebody was an employee because they needed to decide that for a tax dispute. Whatever its purpose, the test is the same and it provides some useful guidance on situations where the situation is complex, as well as summarising the case law in considerable detail. Of particular relevance in the present case is 122 to 124. Paragraph 122 looks at the fact that *Ready Mixed Concrete* (RMC) remains the right legal test. It then says that the first two conditions have to be satisfied and then it looks at the third condition as follows:

> …A strict reading of the third condition in the RMC test might exclude consideration of any factor beyond the express and implied terms of the contract, and this is certainly the way that it has been interpreted in some of the authorities. There are, however, many other authorities in which a wider range of factors was taken into consideration and indeed, as recently as 2012, HMRC were successfully inviting the Upper Tribunal to do just that: Matthews v HMRC.
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> 123. The more difficult question, in my view, is not whether other factors can be taken into consideration but what limit there is on the choice of such factors. For this, there must be a return to first principles. The relationship of employment is created by the

> employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [21]).
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> 124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms.

37. There are factors that point in both directions in the present case.

38. First, those suggesting a contract of service are:

    (a) The Second Appellant continued to do the same thing during his period as a contractor, to such an extent that he continued to get paid holiday despite there being no legal obligation on the Respondent to provide it. It was an unusual term for a contract for services and a normal on for a contract of service.

    (b) There are no documents about why the Second Claimant moved to the new contractual arrangement. There is no contract setting out what he was obliged to or what he was obliged not to do.

39. On the other hand, pointing towards a contract for services are:

    (a) E-Nano became a vehicle for the Second Claimant's business, not just any old business but the business which he is now Chief Technical Officer and for which he obtained funding and recruited staff while still employed by the Respondent. Although that was not necessarily what he did at the time when he was labelled as a contractor, it does show that E-Nano was more than merely a corporate veneer over an employment relationship. It is not definitive but a factor I take into account in the overall balance.

    (b) The Second Appellant did in fact invoice Blackhorse. He set up his own company in order to do that. He was aware of what he was doing.

(c) The arrangements were not the same for everybody. The First Claimant requested to remain an employee and he did. The Second Appellant did have bargaining power in this situation, and chose what to do. This points towards a genuine commercial rather than employment relationship.

40. *Ready Mixed Concrete* said look at the contract for the contractual terms. There is not a contract in writing. But there was clearly an agreement that the Second Appellant would invoice through E-Nano Ltd. I cannot ignore that that was what was clearly agreed and was performed.

41. Similarly, I have no doubt that there would be absolutely no claim for breach of contract by the Respondent against the Second Claimant if he had proceeded as an independent contractor through E-Nano to do what he subsequently did. This is because they had no contract preventing him doing it. The employment contract relied on now simply was not binding him at the time. The fact it may not have been clear to him that he almost won a "get out of jail free card" to be able to do what he liked with E-Nano at that time is not necessarily the point. The point is the Respondent also could not rely on what was contained in that contract at the time when the Second Claimant was called a contractor.

42. Looking at these factors together, my finding on that point is that the Second Claimant was not an employee while he was labelled as a contractor. As a result, he did not have two years' continuous service as an employee. That prevents him being able to bring a claim for unfair dismissal.

Wrongful Dismissal

43. I turn therefore wrongful dismissal, which is claimed by both Claimants. In order for the dismissals to be wrongful the Claimants must have been dismissed in breach of their contract. The breach they both rely on was the failure to give notice.

44. The Respondent claims it was entitled to dismiss without notice because the Claimants had committed gross misconduct. The material terms of the contracts of both Claimants were the same. Looking at the contract, the relevant clauses are 29 to 32. I am going to look at each in turn.

45. Clause 29 states:

> 29. The Employee agree to devote full-time efforts, as an employee of the Employer, to the employment duties and obligations described in this Agreement.

46. It is not pleaded that there is a breach of clause 29 specifically but in my view, it frames the other clauses to which I will refer. My focus on it consequently led to some argument about what exactly it means. Mr Irani-Nayar submitted it simply meant that the employees were full time. However, the evidence from his own client was that he accepted that even when he was not in his working time he was still bound by his terms and conditions of the contract. I find this to be closer to the meaning of clause 29. The clause effectively means that the employee cannot do things in

breach of the subsequent clauses just because he does them outside his working hours.

47. Clauses 30 and 31 say, under the heading “Conflict of Interest”:

> 30. During the term of the Employee's active employment with the Employer, it is understood and agreed that any business opportunity relating to or similar to the Employer's actual or reasonably anticipated business opportunities (with the exception of personal investments in less than 5% of the equity of a business, investments in established family businesses, real estate, or investments in stocks and bonds traded on public stock exchanges) coming to the attention of the Employee, is an opportunity belonging to the Employer. Therefore, the Employee will advise the Employer of the opportunity and cannot pursue the opportunity, directly or indirectly, without the written consent of the Employer.
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> 31. During the term of the Employee's active employment with the Employer, the Employee will not, directly or indirectly, engage or participate in any other business activities that the Employer, in its reasonable discretion, determines to be in conflict with the best interests of the Employer without the written consent of the Employer.

48. Clause 32 then says under the heading “Non-Competition”:

> 32. The Employee agrees that during the Employee's term of active employment with the Employer and for a period of one (1) year after the end of that term, the Employee will not, directly or indirectly, as employee, owner, sole proprietor, partner, director, member, consultant, agent, founder, co-venture or otherwise, solely or jointly with others engage in any business that is in competition with the business of the Employer within any geographic area in which the Employer conducts its business, or give advice or lend credit, money or the Employee's reputation to any natural person or business entity engaged in a competing business in any geographic area in which the Employer conducts its business.

49. The Respondent claims the Claimants were in breach of all of clauses 30 to 32 because of their conduct. The Respondent argues that breach was gross misconduct. For that to be the case, it needs to have gone to the heart of the contract so that the Respondent was entitled to terminate without giving notice in response to the breach. I will first look at whether the clauses were breached and then, if they were, whether the breach or breaches amount to gross misconduct.

50. Looking at clause 30, the question is whether the business opportunity that the Claimants pursued through E-nano was a business opportunity relating to or similar to the Respondent’s actual or reasonably anticipated business opportunities. It is not argued that either Claimant was unaware of these opportunities. It is also not argued that either Claimant brought them to the attention of the Respondent.

51. The Claimants argue that what E-nano did was not a business opportunity relating to or similar to the employer's actual or reasonably anticipated business opportunity because it was relating to a different type of technology, namely robotics. I do not accept this. I reject the argument for these reasons. The First and Second Claimant were employed by the Respondent to bring their skills to the Respondent. Their skills, talent, expertise was being bought in by the Respondent. That is why they are paid a wage to do their work. When they saw an opportunity to set up a different business, they had a duty under this clause to bring that to the attention of the Respondent. It may not have been the same as the Respondent was currently doing but it was a business opportunity, and it is one that might reasonably have been of interest to the Respondent. The First and Second Claimant are clearly good at what they do, and the Respondent employed them for that purpose. It strikes me as the obvious intention of the contract that if they have good business ideas, the contract intends for these to have been brought to the Respondent's attention.

52. I draw an analogy with lawyers. If I imagined a firm of solicitors which only dealt with real estate property transaction and a group of those solicitors were to say: we have got a good idea, we think we will do really well if we were to do intellectual property. If they were to start setting up that alternative firm in intellectual property without suggesting it to the employer first, they are clearly taking their skills as a lawyer and doing something else. If they had a term like clause 30 in their contracts, I would say that that is a clear breach because they are denying their employer the opportunity to be able to further expand its business. Instead, they are taking up the opportunity for their own private gain.

53. Moving on to clause 31, there are two points about this I would make. The first is it is not in the best interest of an employer in general terms for people to be setting up other businesses while they are working for it. The second point, which I will come back in relation to clause 32, is it is not in the best interest of the employer for an employee to be setting up a business that is competing for the same pot of money. I therefore find clause 31 to have been breached by the Claimants.

54. This brings me on to clause 32. The question which was raised throughout this hearing is whether E-Nano and the Respondent were competing businesses. I have no doubt that they are not competing businesses now in any literal sense. They could still be going after similar funding (there is no current evidence), but they are not head-to-head competitors in any market and that is accepted within the evidence. But the question in the case is what happened earlier. As I said already, I have not found anyone to be lying to this Tribunal, so I do accept as a matter of fact that the Respondent and E-Nano applied within the same round of grant funding.

55. The description of the way the funding worked was that there was a pot of £10million, everyone would put in their bids, the cap on the amount you can get was £50,000 so potentially there could be 200 winners. Only 200 winners and on a literal interpretation of the contract that did put E-Nano and Respondent in competition with each other. It has been suggested that that is a trivial point because the level of competition is very light. Both of them could have won. But triviality is not the question relating to breach

of contract. I find there was a breach of clause 32. Triviality goes to whether it was sufficient to be gross misconduct.

56. It is worth noting that clause 33 was briefly alluded to in relation to solicitation of employees. Clause 33 seems to be very specific about offers of employment and solicitation, there is very little evidence actually about it. On the evidence before me I cannot find that there are any breaches of clause 33.

57. That brings me to the question of whether the breaches of clauses 30, 31 and 32 amounts to a fundamental breach of contract and therefore gross misconduct.

58. It is not what was intended for employees of the Respondent to do what the Claimants did. The Respondent was entirely within its right to try and protect its business by not allowing this kind of situation to arise. While I sympathise with both parties for basically being in a creative space where they want to develop good things in the world, businesses still have a legitimate right to try and protect their business in order to stop unfair practices. The Respondent is fortunate they have contracts with clear terms prohibiting the activity that the Claimants undertook. It is entitled to rely on these contracts.

59. In relation to the First Claimant, there was advice to a third party on how to best win money that was in competition with the Respondent. He also became a founder of E-nano which required him to give it his attention. He assisted E-Nano with its quarterly report.

60. In relation to the Second Claimant, he was delivering work for E-nano, not personally but hiring staff in order to do it. He was, by being a director, responsible for its activities.

61. Both Claimants are now employees of E-nano which bears out the truth of where their interests lay while acting in breach of contract.

62. It is clear that while they were acting in breach of contract the Claimants' interest was taken away from the Respondent. This overall effect is why it is so important for businesses that there are these can be treated as fundamental breaches. To hold otherwise would licence conflicts of interest between people and their employer. As a result, I do find these to be fundamental breaches of contract.

63. The Respondent was therefore entitled to terminate both contracts of employment summarily.

Disposal of Listed Issues

64. I said I would return to the list of issues and that is what I now do. It does not take long to deal with it. They appear in the bundle at page 75. It is labelled in the bundle the Second Claimant's "proposed" list of issues but in the index, it is the Second Claimant's agreed list of issues and I confirmed at the start of the hearing it is agreed.

65. It starts with wrongful dismissal; the first question did the Second Claimant commit a repudiatory breach of his contract of employment with the First Respondent? The answer is yes, he did, and I have given my reasons why. The second question, did the Second Claimant breach an expressed term of the employment contract? Yes. And therefore, there is no compensation, and the next three questions does not arise.

66. In relation to unfair dismissal, is the Second Claimant eligible to bring a claim of unfair dismissal? I have explained my reasons why he is not and therefore 7 and 8 do not arise. Questions about failure to follow the ACAS Code only arise if there is any award and there can be no award because no claim is being upheld so 9 to 13 do not arise.

67. Turning to the First Claimant's agreed list of issues, which is also wrongly labelled as "proposed" in the bundle. The answers are effectively the same, but I will restate them for the sake of the record. In relation to the first question, did the Claimant commit a repudiatory breach of the employment contract, the answer is yes. Did the Claimant breach an express term of the employment contract? Yes, it was an express term and therefore the other questions do not need to be answered. As a result, no compensation is due so the failure to follow the ACAS Code while interesting in an academic sense is not relevant to this case. The unlawful deduction of wages case and the holiday pay and the breach of the Working Time Regulations 1998 was withdrawn at the hearing so do not need to be resolved.

68. I made the following final comments to both parties at the hearing and think it only fair to include them in my published judgment as well. They are all now business people doing exciting work in exciting spaces and I hope that their businesses are successful. I also hope they still have goodwill for each other in future. From what I heard E-Nano did not actually gain any unfair advantage by the conduct of the Claimants. All allegations of breach of confidentiality were not made out in this case. The Respondent had its opportunity to prove these allegations and it failed to. It is from such breaches of contract that any unfair advantage would really stem. What has been made out is the Claimants working for the wrong company when contractually bound to work for another. The Claimants are now running a business. They should reflect on how they would want their employees to treat that business when reflecting on how they were treated by the Respondent.

Tribunal Judge Brannan acting as an Employment Judge
Date: 4 July 2022