EMPLOYMENT TRIBUNALS

Claimants: **Nunes, Duarte and Da Costa Dias**

Respondent: **Neo Granite Limited**

Heard at: **Birmingham Employment Tribunal**

On: 11-13 December 2023, 16 and 17 May 2024 and 28 June 2024

Before: Employment Judge Taylor

Representation
Claimant: Lay representative Ms Braga
Respondent: Mr Brockley, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claims for unlawful deductions do not succeed and are dismissed.
2. The claims for notice pay do not succeed and are dismissed.
3. The claim for holiday pay does not succeed and is dismissed.
4. The second and third claimants claims under The Employment Act 2002 succeed and each claimant is awarded two weeks' pay.
5. The respondent's claim for costs does not succeed and is dismissed.

Introduction

1. These claims were heard on 11-13 December 2023, 16 and 17 May 2024 and 28 June 2024.

2. The first claimant, Mr Nunes, was employed by the respondent from 26 November 2018. The claimant is unsure when his employment ended. The respondent says that the employment ended on 01 April 2020. Early conciliation started on 11 June 2020 and ended on 30 June 2020. The claim form was presented on 28 July 2020.

3. The second claimant, Mr Duarte, was employed by the respondent from 18 November 2019. The claimant is unsure when his employment ended, the respondent says that the employment ended on 27 August 2020 by reason of redundancy. Early conciliation started

on 17 June 2020 and ended on 17 July 2020. The claim form was presented on 15 August 2020.

4. The third claimant, Mr Da Costa Dias was employed by the respondent from 01 July 2019 until 25 May 2020 when he resigned. Early conciliation started on 13 July 2020 and need on 13 August 2020. The claim was presented on 12 September 2020.

5. The claimants made applications on the first day of the hearing to amend their claims and to adduce further evidence. These applications were refused and dealt with in a case management order dated 14 December 2023.

6. The claimants made an application to adjourn on day three of the hearing to enable the second claimant to travel to the UK to give evidence. The second claimant was in Portugal at this time and no application to adduce evidence from abroad had been made. That application was granted. I warned the claimants that the respondent may make an application for costs in respect of the adjournment.

7. The claimant's witness statements did not deal with the issue of time limits. I heard evidence in chief in respect of this issue and the respondent being given the opportunity to cross-examine on this point.

Claims and Issues

8. The claims and issues were set out in the case management order of 02 December 2022.

9. The first claimant claims:

a. That he worked overtime which he was not paid in 2018, 2019 and 2020 and therefore there has been an unlawful deduction from his wages. The respondent says that the claimant was not entitled to be paid overtime.
b. A further claim for unlawful deductions depending on when the Tribunal determines his effective date of termination to be. The first claimant claims either additional wages or additional furlough pay. The respondent says that the claimants employment need on 01 April 2020 and that he was paid his wages until that date.
c. Outstanding holiday pay in relation to the above. the respondent says that all holiday pay owed to the first claimant has been paid.
d. Notice pay of one week. The respondent says that the claimant was paid in lieu of notice.

10. The second claimant claims:

a. That he worked overtime for which he was not paid in 2019 and 2020 and there has therefore been an unlawful deduction from his wages. The respondent says that the claimant was not entitled to be paid overtime.
b. A further claim of unlawful deductions of wages depending on when the Tribunal determines his effective date of termination to be. The second claimant determines that either additional wages or additional furlough pay depending on whether the Tribunal finds that he was put on furlough. The

respondent says that the second claimant was put on furlough on 01 April 2020 and that he was given notice of termination of his employment due to redundancy on 27 July 2020 which expired on 27 August 2020. The

respondent says that the second claimant was paid his wages until that date with furlough pay being paid from 01 April 2020.

c. The second claimant says that he was not given notice. The respondent says that the second claimant was given one month's notice and paid furlough for this period.

11. The third claimant claims:

a. He worked overtime for which he was not paid in 2019 and 2020 and therefore there has been an unlawful deduction from his wages. The respondent says that the third claimant was not entitled to be paid overtime.
b. A further claim of unlawful deduction from wages relating to April and May 2020. The third claimant says that he was only paid 80% of his wages and was told he was on furlough but he was in fact working normally. The respondent says that the claimant was put on furlough on 27 March 2020, paid in full until 31 March 2020 and paid furlough thereafter. The respondent denies that the claimant was asked to work during furlough.

12. The issues are as follows:

13. Time limits

The Tribunal must consider if each of the unlawful deduction of wages claims were presented in time within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

a. Were the claims made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made, or where there was no payment at all, the date on which the contractual obligation to the payment arose?
b. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

14. Unauthorised deductions

Did the Respondent make unauthorised deductions from the Claimants' wages and if so how much was deducted? It will be necessary to decide:

a. Were the Claimants entitled to be paid overtime?
b. If so, what overtime was worked and what payments should have been made to the Claimants in respect of such overtime?
c. Were those payments made to the Claimants?

d. What was the effective date of termination of the First and Second Claimants?
e. Were the First and Second Claimants put onto furlough and, if so, on what date?

f. Were the First and Second Claimants paid the correct wages (whether furlough pay or otherwise) up to their effective dates of termination? If not, how much are they owed?
g. Was the Third Claimant put onto furlough from 27 March 2020 until his employment ended, or did the Third Claimant work normally during that period? If the latter, are there any additional wages owing to the Third Claimant?

15. Wrongful dismissal / Notice pay – First and Second Claimants only

a. What was the notice period of the First and Second Claimants?
b. Were the Claimants paid for that notice period?
c. If not, what notice pay is owed to the Claimants.

16. Holiday Pay (Working Time Regulations 1998) – First Claimant only

a. Did the Respondent fail to pay the First Claimant for annual leave the First Claimant had accrued but not taken when his employment ended?

17. Employment Act 2002

a. When these proceedings were begun, was the Respondent in breach of its duty to give the Claimants a written statement of employment particulars or of a change to those particulars?
b. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
c. Would it be just and equitable to award four weeks' pay?

18. The respondent made a claim for costs in respect of the adjourned hearing.

Procedure, Documents and Evidence Heard

19. I had before me a bundle of 224 pages, a witness statement from each claimant, a witness statement from the respondent and a chronology. I heard evidence in chief from each claimant in respect of the issue of time limits. All parties were cross-examined. I have considered all of the documents, oral evidence and submissions, even where not explicitly referred to in this decision.

20. The burden of proof for the claims is upon the claimants on the balance of probabilities. The burden of proof in respect of the costs application is upon the respondent on the balance of probabilities.

Fact Findings

<u>Time Limits</u>

21. The first claimant gave evidence that he delayed in bringing his claims because he did not have the knowledge and he was depressed. He was on furlough for five months and not in a good place, only after that time did he get some advice. Because he Is Portuguese

22. he was completely unaware of the legislation. It took him a while to get some assistance from a friend and he only went to see a solicitor after his friend helped him. He saw a solicitor in July 2020.

23. The first claimant gave evidence that he first noticed that he was not being paid properly at the beginning of 2019, that he was scared of being dismissed if he raised the issue and that he was assured that he would be compensated for additional hours. This evidence is somewhat contradictory, in order to be assured that he would be compensated for additional hours, the first claimant must have raised the issue or had some sort of discussion about pay with the respondent.

24. He spoke to work colleagues and received the impression that if the additional hours were not worked, he would be dismissed. His son was dismissed for not working additional hours.

25. The first claimant gave evidence that he only realised that he was not going to receive any additional pay when he was assaulted at work.

26. He gave evidence that he was not aware of the existence of free legal services from organisations such as the CAB nor of solicitors. He was not aware of the Employment Tribunal until he spoke to a solicitor. He was not able to do anything about his situation without help.

27. He is aware that there are labour Tribunals in Portugal.

28. The second claimant gave evidence that he did not bring his claim sooner because he has no knowledge of British employment laws and he waiting for the respondent to do as promised and to pay him for overtime. When he was on furlough he did some research and realised that he was working too many hours and there was something he could do about it. He researched via online searches and talking to colleagues.

29. He gave evidence that he is aware of Tribunals existing in Portugal and an entity known as ACT which you can contact if you have employment issues. The second claimant described his employment as traumatising, but he tried to give the benefit of the doubt to the respondent as a fellow Portuguese national and hoped they would be paid. He did not have the money to instruct a solicitor, the money he earned was for savings, he was not gong to spend that on a solicitor. He did not know about the existence of the CAB.

30. The third claimant gave evidence that he was not aware that his claims should have been brought within a time limit. A colleague helped him a few months after he had been dismissed. He did not speak to a legal adviser. He tried to look things up online but had no success as he did not speak English. He has knowledge that Tribunals exist in Portugal and when he came to the UK he expected that there would be similar places to raise disputes. He did not know when he became aware that he could make a claim to the Employment Tribunal. He was aware of the CAB,, but no that they gave free legal advice. Because he did not speak English it was difficult to obtain or look for legal advice. He

knew of the existence of solicitors who gave advice on employment matters but did not have the money to pay a solicitor.

31. The first claimant's evidence was that he was aware that he was not being paid properly from January 2019. Early conciliation started on 11 June 2020 and his claim form was presented on 28 July 2020. The first claimant's position is that he was ignorant of having any right to bring a claim to the Employment Tribunal and ignorant of time limits and his ability to find out about his rights was impacted by the fact that he does not speak English and he only went to see a solicitor in July 2020 after speaking with a friend.

32. The first claimant was able to access legal advice, he did so in July 2020. He was also aware that Employment Tribunals exist in Portugal.

33. I do not accept that the first claimant not speaking English prevented him from finding out whether he could bring a claim to an Employment Tribunal in the UK. That question could be posed in a search engine in Portuguese. The first claimant was aware of the existence of Employment Tribunals in Portugal. The existence of systems to resolve employment disputes was not therefore alien to him.

34. Given his knowledge of such systems existing generally and the possibility to research whether such a system exists in the UK, which can be done in Portuguese I find that this is something which it would have been reasonable for the claimant to do. There was no evidence that the first claimant could not afford legal advice and he did seek assistance from a solicitor in July 2020. I find that it was reasonably practicable for him to bring his claims in time.

35. The second claimant gave evidence that he had no knowledge of British employment laws. He is aware of such Tribunals in Portugal. He was able to undertake research whilst he was on furlough and, whilst he had funds he chose to save these rather than seek the advice of a solicitor. The second appellant was aware that he considered there was an issue with his pay. He had the means to undertake research and the means to pay for legal advice. In those circumstances it was reasonably practicable for him to bring his claim in time.

36. The third claimant claimed ignorance of time limits and he could not look things up online because he does not speak English. The third claimant could have conducted searches in Portuguese about employment laws in the UK. The third claimant was aware of Employment Tribunals existing in Portugal and did expect to be able to raise such claims in the UK. Given that the third claimant was aware of the existence of Employment Tribunals generally and expected such systems to exist in the UK and the ability to research in his native language, I find that it was reasonably practicable to bring his claims in time.

37. The claimants did not submit that there was a series of deductions. Given my findings above the Tribunal does not have jurisdiction to consider claims of unauthorised deductions which pre-date the cut-off dates below.

38. The cut-off date for the first claimant's claims is 12 March 2020.The cut-off date for the second claimant's claims is 18 March 2020.The cut-off date for the third claimant's claims is 14 April 2020.

Effective date of termination of the first and second claimants

39. The respondent asserts that the first claimant's employment ended on 01 April 2020 by way of a letter. The first claimant was incorrectly sent a letter regarding furlough. Mr Pernes stated for the respondent in his witness statement that the first claimant was dismissed because he demonstrated behaviours which were inconsistent with the ethos of the company. The letter dated 01 April 2020 gives the reason for the dismissal as redundancy. The letter makes no reference to conduct and thanks the first respondent for his contribution to the company.

40. The first claimant's evidence is that he did not receive the letter dated 01 April 2020. He states that his wife made comments to Mr Pernes' mother on 31 March about unpaid overtime and on 01 April 2020 Mr Pernes assaulted him and physically pushed him towards the exit of the factory.

41. The first claimant raised a grievance on 05 April 2020 which stated that, in accordance with his employment contract he should have received a written warning before being dismissed and, in accordance with a letter he received dated 27 March 2020 he was on furlough.

42. The first claimant states in his witness statement that it was only when he received his wages on 01 May 2020 that he realised something was wrong and he called the office and was called back on 04 May 2020 and told that his employment had been terminated on 01 April 2020. He gave oral evidence that up until that moment he thought he was sent home because he was on furlough.

43. The first claimant's account is somewhat contradictory. It does not make sense that he thought that he was home on furlough until the conversation on 04 May 2020 when he wrote a letter dated 05 April 2020 raising a grievance about his dismissal on 01 April 2020.

44. Given that the first claimant was aware on 05 April 2020 that he had been dismissed, it cannot be the case that he thought he was on furlough until 04 May and it also indicates that he did receive the letter of 01 April. I am satisfied that the first claimant did receive the letter terminating his employment and that his employment was terminated on 01 April 2020 and he was not on furlough.

45. In respect of the second claimant, the respondent says that his employment ended on 27 August 2020 by reason of redundancy following a four month period of being on furlough.

46. There is a letter to the second claimant in the bundle stating that he will be on furlough from 01 April 2020. There is also a letter dated 27 July 2020 which confirms termination of the second claimant's employment due to redundancy with one months' notice. The second claimant has not denied receiving this correspondence. I find that his employment ended on 27 August 2020. I also find that the second claimant was on furlough from 01 April 2020 as recorded in the letter from the respondent in the bundle.

Unauthorised deductions

47. In respect of the claims for unauthorised deductions which were in time I must first determine whether the claimants were entitled to be paid overtime.

48. In respect of the first claimant, there is a contract in the bundle dated 22 November 2018 and signed by the claimant and the respondent. This contract provides for working hours of 7am-7pm Monday to Friday and 8am to 1pm on Saturday. The contract states, "in addition to your normal hours of work, you are required to work any necessary additional hours for the proper performance of your duties."

49. The first claimant's witness statement states that he was never given a copy of his contract and he was told that he had to work overtime for which he would be paid at a later date. The first claimant refers in his witness statement and his grievance letter dated 05 April 2020 that, according to his employment contract, he should be given a written warning before being dismissed. This indicates that the claimant was aware of the terms of his contract. Given this awareness of the terms of his contract I find that it is more likely than not that he had a copy of his contract.

50. In his oral evidence the first claimant stated that he was aware of his working hours and salary but he was not aware of the clause in respect of additional hours because he was not given a copy of his contract and he was verbally promised that he would be compensated for overtime later on. After talking to colleagues he got the impression that those who did not work the additional hours would be dismissed. He had these conversations with colleagues around January – February 2019. Despite these conversations he thought that he would eventually be paid, perhaps at the end of the year, and only realised that he would not be paid when he was assaulted -which he claims occurred on 01 April 2020.

51. The first claimant's witness statement states that he did complain to Mr Pernes about the working conditions and was then subjected to bullying and harassment. The first claimant's witness statements also states that he would never have accepted to work overtime without pay. He would not neglect his children and wife, nor miss out on family time in exchange for unpaid work.

52. The first claimant's evidence is contradictory, he states both that he thought he would be paid for overtime worked, only realising that he would not be paid for overtime in April 2020 and that Mr Pernes always threatened him with dismissal if he complained about working overtime. This indicates that the first claimant had knowledge that he was not going to be paid for overtime before 01 April 2020.

53. It would be unusual both that the respondent threatened, harassed and bullied the first claimant for complaining about working overtime whilst also reassuring him that he would be paid.

54. It is the broad case of the first claimant that he worked significant extra hours on most days. I am not satisfied that the first claimant continued to work significant additional hours for 16 months, without additional pay, whilst also believing that he would at some point be paid, particularly when, he states that when he complained, he was threatened and bullied.

55. There is an email dated 11 May 2020 at page 185 of the bundle from the first claimant to the respondent in respect of his dismissal. This email asks that the respondent provide

the first claimant with his P45, final salary pay slip and a letter explaining the reason for his dismissal. This email makes no reference to any payment for overtime worked being owed which further indicates that the first claimant was aware that he was not entitled to be paid for overtime.

56. There is a further email from the first claimant to the respondent fated 26 August 2020 chasing his P45, P60 and pay slips. This email makes no mention of unpaid overtime or unpaid wages due to working whilst on furlough.

57. I am satisfied that given the signed contract and emails described above and the fact that the first claimant continued to work overtime for 16 months without pay, he was aware of the additional hours provision within the contract and there is no reason that he should not be held to it. On the basis of that term, the first claimant was not entitled to be paid for overtime and I also find that he was correctly paid whilst on furlough.

58. The second claimant's evidence was that he did not receive a copy of his contract. There is a contact signed by him from p188 in the bundle. This contact contains the same clauses in respect of working hours as referred above in respect of the first claimant.

59. The second claimant gave evidence that he was called to the office during a working day to sign the contract and he only had a few minutes to consider it. He asked for a copy of the contract but was always refused. He was aware of the working hours in the contract and had had a conversation with Mr Pernes about pay. Mr Pernes told him verbally that all overtime would be remunerated. His plan was to work as long as possible, despite the working conditions, save as much money as possible, and then go back to Portugal to buy a house with his girlfriend.

60. The second claimant raised a grievance on 02 July 2020 about extra hours he has worked from 18 September 2020 without being paid and asking when he would be called back to work from furlough. I accept that the claimant was not working during furlough, if he was, there would be no need for him to ask when he would be called back rom furlough. There is a summary of the grievance meeting at page 199 of the bundle. This summary refers to the second claimant not having a copy of his contract.

61. The second claimant replied to the summary of the grievance meeting on 13 July 2020 and attached a note of overtime which he had compiled from text messages he sent to his girlfriend when he was leaving work. The second claimant also attached an email to the respondent dated 26 May 2020 within which he asked for a copy of his contract. The reply from the respondent was that the contract was in the office and could it wait until they were back in the office, being on furlough at the time.

62. The second claimant has been consistent that he did not receive a copy of his contract, this position is supported by his email requesting a copy of the contract on 26 May 2020 and the summary of the grievance meeting. I accept that the second claimant was not provided with a copy of his contract.

63. I do not accept that the second claimant was not aware of the requirement to work additional hours as required because he made no contemporaneous note of the hours worked. Without such a note it is unclear how the second claimant would be able to verify he was being paid correctly. He commenced work in November 2019 and raised no issue

with being underpaid until July 2020. I do not accept that if the second claimant had an expectation to be paid overtime, particularly given his position that he was saving to buy a house in Portugal, that he would wait 8 months to ask about monies owed to him.

64. The third claimant's evidence was that he was employed on 01 July 2019 to work 40 hours per week. His witness statements states that he was never given a contract to sign. The third claimant's ET1 states that he was asked to sign a contract to work 60 hours per week, but was not given a copy of the contract. There is no signed contract in respect of this claimant within the bundle. The respondent accepts that a contract was not signed due to illness of the Director responsible for this.

65. The respondent's position is that the third claimant was employed to work the same hours as the other claimants with the same provision that additional hours necessary for the performance of duties did not attract additional remuneration.

66. The conduct of the parties and documentary evidence within the bundle supports the respondent's position which I accept. The third claimant's written evidence is that he worked more than 40 hours per week for which he was not paid which contradicts his position in his ET1 that he was contracted to work 60 hours per week. The third claimant stated in his witness statement that he queried this situation and was assured that he would be paid overtime, however it became apparent to him that he would not be paid. The third claimant nevertheless continued to work the additional hours, without payment for 11 months.

67. The third claimant resigned on 26 May 2020 by email. That email makes no mention of being owed wages for unpaid overtime. At this point in time the third claimant was resigning, he had no intention of continuing his working relationship with the respondent, there was therefore no reason for him not to raise that funds were owed to him if he indeed felt that was the case. There would not be fear of repercussions nor a desire to continue the working relationship at the point of resigning. The email simply asks how much notice the third claimant is required to work. I do not accept that, if the claimant thought that he was owed significant sums in unpaid overtime he would be asking how much notice he had to work.

68. The third claimant raised a grievance on 13 July 2020 which states that he resigned because he was asked to work whilst on furlough. There was no mention of this in his resignation email. The third claimant asked in this email to be paid for all the extra hours he had worked during his employment. There was no particularisation of the hours worked and there is no documentary evidence before me that the third claimant kept a note of any additional hours worked. I am satisfied that the third claimant was not asked to work whilst on furlough as made no mention of this in his resignation email.

69. Further the schedule of loss produced on behalf of the third claimant states that his standard working hours were the same as for the other claimants, there was no mention of a 40 hour working week. This undermines the third claimant's assertion that this is what was agreed. The third claimant's explanation for this in cross-examination was that it was an error. I do not accept that explanation given that the ET1 made no reference to working 40 hours a week either.

<u>Notice pay – first and second claimants</u>

70. The first claimant was dismissed on 01 April 2020. His dismissal letter states that he will be paid in lieu of notice. The first claimant's final pay-slip dated 30 April 2020 is at page 184 of the bundle. This payslip shows payment in lieu of notice. On the basis of this document I find that the first claimant was paid in lieu of notice and no further sums are due to him in respect of his notice period.

71. The second claimant was dismissed because of redundancy on 27 July 2020 and paid in respect of his notice period on 31August 2020, the payslip reflecting this is at page 209 of the bundle. Based on this document I do not accept that the second claimant is entitled to any further ums in respect of his notice period.

Holiday pay – first claimant

72. The first claimant claims that he is owed 20 days of holiday pay. The respondent asserts that the first claimant has been paid all accrued holiday pay due to him.

73. The first claimant's schedule of loss shows that he is seeking holiday pay which he claims he is owed from 2018-.2020. There is no provision in the first claimant's contract to carry holidays forward and the cut-off date for his claims is 12 March 2020.

74. The schedule states that 9 days of leave were accrued in 2020 and that 3 days were paid in April 2020. The first claimant's schedule of loss makes reference to annual leave being taken, this schedule was prepared for the purposes of the hearing. I do not know the basis for this information in the schedule. I do not have any other documentary evidence, such as pay slips for 2020 which record the amount of holidays taken and paid. The first claimant's email of 11 May 2020 makes no reference to holiday pay being owed. In those circumstance I find it more likely than not that the claimant was owed three days of holiday pay at his date of termination. Payment was made for this in April 2020.

Costs

75. The first issue is whether the Tribunal has jurisdiction to make a costs order. The hearing on listed on 11-13 December 2022 was adjourned part-heard to enable the second claimant to come to the UK to give evidence. The Tribunal's time during this hearing was used as effectively as possible by hearing the claimant's evidence out of order with the third claimant giving evidence on the second and third day.

76. However, several hours of the third hearing day could not be used, that would not have been the case had Mr Duarte been present in the UK and able to give evidence. The loss of that time and the adjournment sought was caused by the conduct of the claimants and I am satisfied that that gives the Tribunal jurisdiction to make a costs award under Rule 76 (2) of the Employment Tribunal Procedure Rules even though I make no finding that the claimants acted vexatiously, abusively, disruptively or otherwise unreasonably.

77. The final days of the hearing were listed on 16 and 17 May 2024, with a further day being required on 28 June 2024. This further hearing day was required simply to hear all of the evidence and finalise the submissions. This additional day was not attributable to the claimants.

78. Being satisfied that the Tribunal has jurisdiction I have a discretion as to whether to make a costs order or not. Costs awards do not operate by precedent but are fact specific.

79. In terms of the facts leading to the postponement of the afternoon of 13 December 2023, the second claimant was in Portugal at the time of the hearing. This issue and the requirement to seek permission to give evidence from abroad were discussed at the case

management hearing. The case management order referred to and provided a link to the relevant Presidential Guidance on this point. The order also records that the claimants were encouraged to make this application as soon as possible as it can take many months to obtain the appropriate permission.

80. This application was not made prior to the hearing. It seems that the requirement for permission was not, despite the discussion in the case management hearing and the subsequent record in the order, attended to by the claimant's lay representative.

81. Costs order in the employment tribunal are the exception rather than the rule. I am permitted to have regard to ability to pay but am not obliged to do so. The claimants made no submissions on their ability to pay.

82. The claimant's instructed a lay representative. The threshold tests governing the making of a costs order apply irrespective of lay representation, however, I cannot judge a lay representative by the standards of a professional representative.

83. Whilst the claimant's representative has not provided medical evidence of the health issues she raised in submissions, there is correspondence within the bundle (p147) dated 30 January 2023 which refers to the claimant's representative being unwell and in and out of hospital for the last three months. The case management hearing took place on 23 November 2022. I am prepared to accept that the claimant's representative had health issues and was hospitalised around the time of the case management hearing. I accept that this would have had an impact upon her ability to conduct the claims.

84. I also take a step back and consider the conduct of the claimants and their representative in the round. All of the required documents have been filed and served, albeit not always in accordance with the timetable set down by the Tribunal. I have no doubt that the claimant's believe in the genuineness of their claims. The claimant's representative has clearly put much time end effort into the preparation of the schedules of loss and in preparing her cross-examination and submissions and she sensibly did not pursue holiday pay claims in respect of the second and third claimant.

85. Considering that conduct, the appellant's representative being a lay person and her health issues I have decided not to exercise my discretion to make a costs order.

Submissions

<u>The respondent's submissions</u>

86. As to time limits the respondent made reference to relevant caselaw principles, essentially: whether there is just cause or excuse for the complaint not being presented in time, the substantial cause of the failure to present the claim in time, and the manner and reason for dismissal and whether the employer's appeal machinery has been used. The respondent submitted that the test setting a high hurdle

87. In respect of the claims for unauthorised deductions, the respondent submitted that the documentation shows that the claimant's employment ended as contended for by the respondent and that the claimants were all aware that they were not entitled to be paid

overtime. The oral evidence is contradictory and the overarching claim, that the claimant's thought they were entitled to be paid overtime but, even when of the claimant's sons was dismissed did nothing to raise their complaints is incredible.

88. The respondent submitted on the issue of costs that the adjournment was required because of the actions of the claimant. Reference was made to the provisions in the rules. The respondent referenced the principles from relevant caselaw, that costs are the exception, that the nature, gravity and effect of unreasonable conduct should be taken into account, that the proper statutory tests should be applied, that a costs order could be made without a deposit order having been made and where a claimant could not, in their financial circumstances, afford a costs order.

The claimant's submissions

89. The claimant's submitted that they are before the Tribunal seeking compensation regarding overtime and pay. During their employment the claimants all worked more than their contracted hours and the respondent had on method of recording working hours which reinforces the credibility of the oral evidence. The evidence shows that the claimants worked hours with the reasonable expectation of being paid. There has been a personal and emotional impact on the claimants who were all committed to the respondent.

90. The dismissal of Mr Nunes was a retaliation for complaint of unpaid overtime. Mr Duarte also suffered unfair treatment and retaliation connected to his complaint about working overtime for no remuneration. He only received a copy of his employment contract after his grievance meeting and was not informed in writing about the expectations of working unpaid overtime.

91. The third claimant was also a victim of unfair treatment and retaliation by the respondent and was dismissed because he refuse to work throughout furlough.

92. An employer has a legal and moral duty to pay employees for the hours worked. As to inconsistencies in the schedules, these were updated as new evidence was found and the claimants were not aware that this evidence could be sent to the Tribunal.

93. As to time limits, the explanation is simple, the claimants believed that the respondent would pay them.

94. As to costs, the representative faced health problems and was quite often in hospital.

Law

Pay (deductions from wages)

95. Section 13 of the Employment Rights Act 1996 says that an employer must not make a deduction from the wages of a worker employed by him. There are some circumstances

in which a deduction can be made, this includes where deductions are required by law, authorised in the worker's written contract, or made with the written consent of the worker.

96. Section 13 says: "Right not to suffer unauthorised deductions. (1) An employer shall not make a deduction from wages of a worker employed by him unless—

> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Holiday pay

97. The Working Time Regulations 1998 give workers a minimum entitlement to paid holiday. The minimum entitlement is to 20 days (4 weeks) paid holiday each year, plus an additional 8 days (1.6 weeks) per year, which can include bank holidays (regulations 13 and 13A).

98. Pay for holiday is calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996. For workers who do not have normal working hours, a week's pay is calculated by reference to an average of hours and remuneration over a 52 week period (or to the total period of employment if that is less than 52 weeks).

99. On termination of employment, a worker is entitled to receive pay in lieu of any unused annual leave (regulation 14).

Notice Pay

100. Section 86 ERA 1996 provides that an employee shall be entitled to a weeks notice per year of service up to a maximum of 12 weeks.

Failure to provide written terms of employment.

101. Section 38 of the Employment Act 2002 applies to this claim. It provides:

38 Failure to give statement of employment particulars etc.
…
(2)If in the case of proceedings to which this section applies—
(a)the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and
(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or (in the case of a claim by an [worker) under section
Case Number: 3307974/2020

41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),
the tribunal must, subject to subsection (5), make an award of the minimum

amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

102. Rule 76 (2) of the Employment Tribunal Procedure Rules 2013 states:

> A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Conclusions

103. None of the in-time claims for unauthorised deductions succeed because of contractual provisions, whether expressly written or implied, which required the working of additional hours necessary for the proper performance of duties without remuneration. Those claims are dismissed.

104. The claims for notice pay do not succeed and are dismissed.

105. I have found that the second and third claimants did not receive, before the proceedings began, a written statement of employment particulars. There are no exceptional circumstances which would make it unjust or inequitable to make the minimum award of two weeks' pay.

106. The first claimant's claim for holiday pay does not succeed and is dismissed.

107. The respondent's claim for costs is dismissed.

Employment Judge **Taylor**

26 September 2024