



**Eva Linda Lange and John Waters**  
Royal Court  
10<sup>th</sup> February 2016

**JUDGMENT**  
**4/2016**

Appeal from the Employment and Discrimination Tribunal

**IN THE ROYAL COURT OF GUERNSEY**  
**(ORDINARY DIVISION)**

**Appeal from the Employment and Discrimination Tribunal**

**Case No: ED007/15**

**Between:**

**EVA LINDA LANGE**

**Appellant**

**-and-**

**JOHN WATERS**

**Respondent**

**Date of hearing: 6<sup>th</sup> January 2016**

**Judgment handed down: 10<sup>th</sup> February 2016**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**The Appellant was not represented**

**Advocate for the Respondent:**

**Advocate M G A Dunster**

**Legislation, cases and materials referred to:**

The Employment Protection (Appeals and References) Order, 2006

The Employment Protection (Guernsey) Law, 1998

*Stewart v Cleveland Guest (Engineering) Ltd* [1996] ICR 535

The Minimum Wage (Guernsey) Law, 2009

Commerce and Employment Department Employment Guide, *Statutory Minimum Wage*

The Universal Declaration of Human Rights (UN, 10 December 1948)

The Minimum Wage (Prescribed Rates and Qualifications) (Guernsey) Regulations, 2012

The Minimum Wage (Prescribed Rates and Qualifications) (Guernsey) (Amendment) Regulations, 2014

The Minimum Wage (Administrative Provisions) (Guernsey) Regulations, 2010

The Minimum Wage (Accommodation and Food Offsets) (Guernsey) Regulations, 2010

The Minimum Wage (Accommodation and Food Offsets) (Guernsey) (Amendment) Regulations, 2014

The National Minimum Wage Regulations 2015 (UK)

*Walton v Independent Living Organisation Ltd* [2003] ICR 688

*Whittlestone v BJP Home Support Ltd* (unreported, 19 July 2003, EAT)

*MacCartney v Oversley House Management* [2006] ICR 510

*SIMAP* [2000] IRLR 845

*Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804

The Working Time Regulations 1998 (UK)  
The National Minimum Wage Regulations 1999 (UK)  
*City of Edinburgh Council v Lauder* (unreported, 20 March 2012)  
*Scottsbridge Construction Limited v Wright* [2003] IRLR 21  
*Anderson v Jarvis Hotels plc* (unreported, 30 May 2006)  
The Conditions of Employment (Guernsey) Law, 1985  
*Wright v North Ayrshire Council* (unreported, 27 June 2013)  
*W A Goold (Pearmak) Ltd v McConnell* (unreported, 28 April 1995)  
The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005

## Introduction

1. This is the first occasion on which this Court has heard a matter relating to Guernsey's minimum wage legislation. It arises in the context of an appeal from the Employment and Discrimination Tribunal.
2. The hearing was fixed for 6 January 2016. The Appellant, Eva Lange, is no longer resident in Guernsey. She had made arrangements to travel to the Island and stay for the hearing, but her plans were thwarted by the flight on which she was to leave Estonia on the morning of 5 January 2016 suffering technical problems. She contacted the Greffe by e-mail, indicating that she did not seek an adjournment of the proceedings, instead asking the Court “*to determine the appeal on papers in the absence of the Appellant (pursuant The Employment Protection (Appeals and References) Order, 2006 p. 8 (5))*”. I am satisfied that the Appellant had properly made arrangements to attend the hearing to present her case. Having regard to article 8(5) of the Employment Protection (Appeals and References) Order, 2006, which provides:

*“If the Royal Court is satisfied that all parties to a complaint which is the subject of an appeal or reference under Part I or II of this Order have been notified of the place, date and time of the hearing thereof, and if any of the parties fails to appear, the Royal Court may proceed to determine the appeal or reference, as the case may be, in the absence of that party”*,

I took the view that the hearing should proceed on the basis of the Appellant's full written case but that Advocate Dunster, who appears on behalf of the Respondent, John Waters, was entitled to make any oral submissions he wished in the usual way. This was particularly important, as I had a number of questions I wished to air with him. I did not consider that the non-attendance of the Appellant, albeit for genuine reasons, meant that Advocate Dunster was precluded from addressing the Court and that the only options open were to determine the appeal purely on the papers submitted or to adjourn.

3. At the conclusion of the hearing, I reserved judgment and now set out in detail my reasons for allowing the appeal in part.

## Tribunal proceedings

4. The Appellant made a claim to the Employment and Discrimination Tribunal dated 20 March 2015 in which she alleged that she had been dismissed in such a way that it was automatically unfair because of her assertion of a statutory right of because of a reason connected to health and safety. She cited non-payment of the minimum wage, not being given a payslip and not being given a weekly rest period as the rights she had asserted. She further alleged that the minimum wage had not been paid to her and claimed to be entitled to the difference between what she was paid and what she was entitled to be paid under the applicable legislation. She stated that the reason (or principal reason) for her resigning was that she had suffered a detriment or less favourable treatment as a result of exercising her rights under the minimum wage legislation and that her right to be paid the minimum wage had been infringed. In the alternative, she advanced as the reason (or principal reason) for her resignation the fact that

the Respondent had subjected her to unjustified criticism and false accusations. The Respondent denied the Appellant's claims.

5. The Tribunal convened on 24 June 2015 to hear the Appellant's complaint. By its decision dated 22 July 2015, the Tribunal dismissed the bulk of the Appellant's claim. In particular, the Tribunal rejected the Appellant's unfair dismissal claim and only found that there had been an underpayment of the minimum wage in respect of February 2015 and so dismissed the claims in respect of January and March 2015. It awarded the Appellant £459.24 and rejected her claim for costs.
6. The Tribunal's reasoned decision sets out the evidence given and the factual history in some detail. The Appellant represented herself and gave evidence, in both her witness statement and orally. The Respondent, who was represented before the Tribunal by Ms Richardson, was too unwell to attend the hearing, and so his evidence was in the form of his witness statement and his written answers to some questions posed by the Appellant. Marie Trubuil, who has cared for the Respondent since 2010 and who continued to care for him during the Appellant's employment, gave written and oral evidence on his behalf and the Respondent's neighbour, Nancy Allen, provided a witness statement.

### Appeal grounds

7. The Appellant's notice of appeal dated 7 August 2015 challenges the Tribunal's decision to dismiss her claim for unfair dismissal insofar as she relied on asserting a relevant statutory right and also how it dealt with her claims under the minimum wage legislation. In addition, she claims the Tribunal erred in reaching the costs order it made. She argues that the Tribunal misconstrued section 12 of the Employment Protection (Guernsey) Law, 1998 and that the Tribunal was bound to conclude that her dismissal had been automatically unfair. She suggests that a significant number of the findings of the Tribunal were perverse as being contrary to the evidence it considered. She contends that the Tribunal misdirected itself on the law as to how to calculate the number of hours worked.
8. The Respondent, through Advocate Dunster, contends that the appeal is really one on the facts rather than on any question of law and so should be dismissed. The approach of the Tribunal in referring to cases decided elsewhere as offering guidance as to the way to calculate the Appellant's working hours was permissible and does not disclose any error of law. It is not sufficient that the Appellant disagrees with findings of fact that the Tribunal was entitled to make. He has highlighted the passage in the decision of the United Kingdom Employment Appeal Tribunal in *Stewart v Cleveland Guest (Engineering) Ltd* [1996] ICR 535 (at page 542E):

*“Whenever an appeal is based on the perversity ground, this tribunal must be extremely cautious not to conclude that the decision of the industrial tribunal is flawed because the appeal tribunal would have reached a different conclusion on the evidence or thinks that another industrial tribunal would have reached a different conclusion on the evidence. An appeal should not be allowed on this ground simply because the appeal tribunal disagrees with the industrial tribunal as to the justice of the result, the merits of the case or the interpretations of the facts. This tribunal should only interfere with the decision of the industrial tribunal where the conclusion of that tribunal on the evidence before it is “irrational,” “offends reason,” “is certainly wrong” or “is very clearly wrong” or “must be wrong” or “is plainly wrong” or “is not a permissible option” or “is fundamentally wrong” or “is outrageous” or “makes absolutely no sense” or “flies in the face of properly informed logic.” This variety of phraseology is taken from a number of well known cases which describe the circumstances in which this tribunal, and higher courts, have characterized perversity. The result is that it is rare or exceptional for an appeal to succeed on the grounds of perversity. The reason why it is a heavy burden to discharge is that it has been recognized by those with wide experience and practical wisdom that there are many factual situations arising in the field of industrial relations, including sex discrimination, in which different conclusions may*

*be reached by different tribunals, all within the realm of reasonableness. It is an area in which there may be no “right answer.” The consequence of this approach, also approved in cases of high authority, is that it is not appropriate or fruitful to subject the language of the decision of the industrial tribunal to “meticulous criticism” or “detailed analysis” or to trawl through it with a “fine-tooth comb.” What matters is the substance of the tribunal’s decision, looked at “broadly and fairly” to see if the reasons given for the decision are sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify an error of law that may have occurred in reaching the conclusion.”*

9. Insofar as the appeal concerns the Tribunal’s findings of fact, I consider it appropriate to follow this guidance as a matter of Guernsey law. In this jurisdiction, an appellate court only interferes with factual findings subject to appeal if they are satisfied that there was no evidence on which those findings could reasonably have been arrived at or that for some other reason those findings were perverse. The Appellant has submitted that certain findings of the Tribunal were perverse.

## **Facts**

10. At section 2 of its reasoned Decision, the Tribunal set out the facts it found:

- “2.1 *In November 2014 the Respondent advertised for a full time, live-in, carer housekeeper with a salary of £1300 per month. The Applicant applied by email for the role on 26 November 2014 (ER1 page 9 refers). The job application was made via Marie Trubuil who was acting in a care support role and was also facilitator to the Respondent in hiring a suitable individual.*
- 2.2 *Upon the Applicant responding to the advertisement in The Lady magazine in November 2014, she was provided, on 26 November 2014, with what was termed ‘Details and information of live-in position’. This communication confirmed that the Applicant would be provided with a private, separate and fully fitted apartment at the Respondent’s residence together with full board; it further stated that all petrol for the employer-provided vehicle would be paid for. Other details contained in this communication are that the Applicant would have two hours per day off and one whole day off per seven-day working week. The Respondent stated that he needed the light support of a responsible mature person with initiative and strong ability to occupy themselves within their own time. However he also needed to be reassured that the candidate would remain on his property each day and evening; except on their allocated day off each week and return to the property at a given time on the evening of the day off. It was further specified that the Respondent did not wish to be disturbed by having other members of the public, the Applicant’s friends or family members upon his property at any time because he was a private person.*
- 2.3 *The Applicant would be required to clean the Respondent’s kitchen each day and to clean his bedroom/bathroom. She would also have the responsibility for cleaning his laundry items and clothing.*
- 2.4 *The Applicant responded to this information in an email dated 30 November 2014 stating that this position would be a “dream job” for her. She confirmed to the Respondent that working one-to-one was her preferred form of employment and that she had practiced “lone working” for over seven years; coming to the conclusion that this form of employment best suited her. She stated she was a very private person and was happy in her own company.*
- 2.5 *The Respondent gave further information to the Applicant in an email dated 5 December 2014. In this communication he stated that she would be part of the household and the hours would be flexible by agreement; also that she should have plenty of free time given her limited duties. The Respondent*

*stated his nutritional requirements; his breakfast was fruit, coffee and pills, lunch was a soup or sandwich and for an evening meal at 8.00 pm he usually had one course and was fond of oriental food.*

- 2.6 *On 7 December 2014 the Respondent confirmed acceptance of the Applicant and stated that her terms and conditions would be posted to her London address. Marie Trubuil sent her an offer letter and draft terms and conditions of employment on 11 December 2014. A copy of this offer letter is contained at Tab 6 ERI.*
- 2.7 *On 21 December the Applicant emailed Ms Trubuil and Mr Waters to confirm receipt of those terms and conditions and stated that they were agreeable to her. Mr Waters paid for the Applicant's flights to Guernsey and she arrived at his house on 5 January 2015 and commenced her employment.*
- 2.8 *On 5 February 2015 the Applicant signed her contract of employment which is contained at Tab 7 ERI.*
- 2.9 *The Applicant resigned with immediate effect on 18 March 2015.*
- 2.10 *The parties agreed that contractual payments of £1300 were made to the Applicant for January, February and March 2015, totalling £3,900 and that the maximum Minimum Wage regulated accommodation and food offset of £92 per week of employment could be added to this sum. There is a dispute over the levels of payment made in lieu of five "leave days" not taken; this issue is dealt with in the judgment."*

There are, however, clearly other findings of fact that the Tribunal made and which are set out in other parts of its Decision.

11. In section 3 of its Decision, the Tribunal set out the evidence of the Appellant. In section 4, it set out the evidence derived from the Respondent's witness statement. In section 5, it set out the evidence of Ms Trubuil. Section 6 of the Decision sets out the evidence derived from the witness statement provided by Mrs Allen. Although not recorded as findings of fact, I infer from reading the Tribunal's Decision that it largely accepted the evidence it has recorded save to the extent that it has made findings later in its Decision that imply differently.
12. As regards the background to the Respondent employing the Appellant, the Tribunal refers first to the Appellant's evidence:

- “3.4 *On taking up her duties the Applicant stated that the Respondent needed more support than she had been led to believe in the pre-engagement emails from him. He needed "shadowing" due to problems with his mobility and personal care. The Respondent was afraid of falls as he had previously fallen, broken his shoulder, and had lain on the floor for 22 hours before contractual cleaners had found him. Also he required some night-time assistance and Ms Trubuil bought a baby monitoring system connecting the Applicant's apartment with the main house so she could hear if the Respondent was in distress or needed help and could monitor him 24 hours per day."*

The evidence of the Respondent was set out as follows:

- “4.2 *Mr Waters has always lived on his own and has only needed care assistance for the past five years after suffering a bad fall and being hospitalised in 2010. He stated that Marie Trubuil had helped him with shopping assistance since this time and it was with her help that he employed the Applicant, Miss Eva Lange, as a live-in carer.*
- 4.3 *Mr Waters stated that between 5 January 2015 and 19 January 2015 there were no issues, the appointment was going well. The Applicant seemed*

*happy with her accommodation and her duties. He stated that during this period the Applicant's working hours were approximately 8.00 am to 8.00 pm with a two-hour break in between. He needed her to fix his fruit and coffee for breakfast at 8.00 am, soup for lunch at 12.00 pm and serve a cooked dinner at 7.00 pm. In the intervening periods the Applicant would clean the kitchen and go food shopping. Every now and again she would tidy his bedroom/bathroom and do some washing; all other cleaning was performed by contractual cleaners on a weekly basis.*

4.4 *Mr Waters stated that other than the kitchen, cleaning was not really part of the Applicant's job. He did not know what she did during the day when she wasn't preparing his meals; she spent a lot of time in her room. In his witness statement Mr Waters assessed her working hours as between 8.00 am to 8.00 pm with a two hour break; however he indicated for many of these daily hours that the Applicant was in her room, given her limited duties."*

There is little else said about what the Appellant did or was expected to do. Ms Trubuil had collected the Appellant from the airport on 5 January 2015 and taken her to the Respondent's house and "*spent a lot of time with the Applicant getting her settled in*" (para. 5.6). Ms Trubuil also attended on 12, 13, 14 and 16 January 2015 for two hours at a time to cover the Appellant's breaks.

13. It was common ground that the Respondent had been hospitalised from 19 January 2015 until his discharge home on 29 January 2015. Thereafter, the Appellant's position was as follows:

"3.8 *On 1 February 2015 the Applicant agreed to work continuously without her contractual days off until the Respondent was better. The Applicant stated that she gave Mr Waters every possible attention; she did the housekeeping, shopping, laundry, ironing, nursing care, personal care, massage, arranged medical attention and it was her routine to check him at night. Her nightly routine was to check whether he was okay at midnight before she retired to bed and then at 4.00 am, normally occasioned by her own regular need to visit the toilet, she would check all was well with the Respondent. On occasion, when the Respondent fell poorly, she would stay the night in the guest bedroom next to the Respondent's bedroom."*

The Respondent's position was similar:

"4.6 *On 29 January 2015 Mr Waters was discharged from the hospital and needed significant care and support during the following weeks. Mr Waters stated that the Applicant looked after him very well during this time; he could find no fault with her support. The Applicant forwent her one day off per week during the whole of February and the first week of March. It was Mr Waters' recollection that he paid her £60 cash for each untaken day off and that this amounted to 5 x £60 (£300) in total. Mr Waters could not provide any receipts or bank statements in relation to this money; he took it from cash savings that he had in the house."*

As regards Ms Trubuil's involvement, the Tribunal recorded:

"5.10 *On 29 January 2015 Mr Waters came out of hospital and the Applicant texted her the same day to inform her. Ms Trubuil went to the house the following day as she was due to relieve the Applicant for her scheduled day off. The Applicant was reluctant to be relieved. ...*

5.12 *Ms Trubuil saw little of the Applicant during the month of February, however in the opinion of the witness they had a good and close working relationship as evidenced by the text messages contained at tab 10 ERI of the Respondent's bundle."*

14. The only detailed reference to the Appellant’s contract of employment arose from the Appellant’s evidence:

“3.9 *On 5 February 2015 the Applicant signed a contract of employment; it defined her role as Nurse/Housekeeper/Cook to which she agreed. This was a change from the advertised role; however there was no change in the salary of £1300 per month and the Tribunal notes there was no request by the Applicant to change her remuneration. Under the heading ‘Normal Hours’ the contract stated:*

**“Paragraph 5 Normal Hours**

5.1 You will be employed to work 6(six) days of the week. You are entitled to one day off a week which shall be determined between the parties from time to time.

5.2 You are entitled to a rest break of 2 hours per day between the hours of 2-4 pm or as agreed between the parties”.

3.10 *The Tribunal notes that the Employment Contract makes no reference as to how either the day time or the night-time hours were to be treated. The Applicant’s notice entitlement was extended from one month to three months at her request.”*

15. In recording the evidence of the parties about the Appellant’s allegation that she complained to the Respondent about not being paid adequately, there appears to be a dispute about what was said. The Appellant has asserted that in early February 2015 she discussed the disparity between what she was being paid with Ms Trubuil by reference to the latter’s rate of pay (para. 3.12). There is no indication in the Decision that Ms Trubuil gave any evidence about such a discussion. The Appellant also asserted that she had spoken to Mrs Allen and so realised she was not being paid appropriately, both by reference to the going rate in Guernsey for nursing care and the minimum wage. Again, the Tribunal fails to records whether Mrs Allen commented on such an alleged discussion. Against that background, the Tribunal records that:

“3.13 *The Applicant alleged that she had spoken twice to the Respondent on this issue. His response was that she had a flat, free food and heating, besides her salary.”*

In contrast:

“4.8 *Mr Waters stated that at no time during March 2015, or before, did the Applicant complain to him about her salary; the only debate about money was when he asked her if £120 would be enough for food shopping per week; she said no and that she needed £600 per month. Mr Waters thought that £600 was “a bit steep” and so did not give her the extra money for this expenditure.”*

16. There was, however, an acknowledgement by the Respondent that the Appellant complained about him shouting:

“4.9 *The Respondent confirmed that the Applicant did complain that he shouted at her from time to time but he stated that he was quite deaf and naturally loud. He remembered getting cross and raising his voice with the Applicant on one occasion in relation to the new bed in his room because it looked to him as though it was twisted. Once the Applicant showed him that it was not twisted he accepted this and apologised to her.*

4.10 *From time to time he stated that he would complain to the Applicant because she was always moving things around and opening windows but he liked things in their places and he got cold when the windows were always open.”*

The Appellant's evidence is again recorded slightly differently:

“3.15 *The Respondent's mobility improved in March 2015 and the Applicant again brought the issue of pay and her need to have a day off per week; the Respondent became very angry and shouted at her saying all she wanted was money and that he was the boss. There was no resolution to either issue.*”

17. The Appellant also contacted Ms Trubuil about matters at this time:

“3.16 *The Applicant texted Ms Trubuil in early March and asked for a meeting to discuss these issues, however Ms Trubuil claimed she was unwell and no meeting took place. The Tribunal notes that the Applicant did not indicate in this text message any of the issues she wished to discuss.*”

A fuller version is also given as a result of Ms Trubuil's evidence:

“5.13 *On 9 March 2015 the witness received a text message from the Applicant asking her if she would like to go for a drink with her. Ms Trubuil said she was pleased to have heard from the Applicant and replied to say that a drink would be lovely, but the Applicant did not respond. Ms Trubuil texted again on 17 March 2015 to say that she would be visiting Mr Waters the next day at 2.00 pm, having spoken to him on the phone. The Applicant responded to this text saying “Fine. I shall see you then. All the best”.*”

18. The next significant event is that the Appellant sent the Respondent an e-mail:

“3.18 *The Applicant decided to put her grievances in writing and sent an email to Mr Waters on 10 March 2015 (EE1 Page 40 refers); there was no response to this email; however after she had sent this communication the Respondent became noticeably angrier, verbally abusive and was sarcastic even when he was sober. He used the expressions “Latvian invasion” and “bloody Latvians”.*”

Although this grievance letter was dated 11 March 2015, it was sent at 19.55 the previous evening. The full text of the letter was as follows:

*“I am lodging a grievance letter, due to a reasonable belief that you have breached your statutory duties’ germanes to national minimum wages and health and safety within the working environment.*

*I contend that you as my Employer have failed to provide my person with a safe place and safe system of work. These omissions are outlined in the following paragraphs.*

- 1. Breach of Minimum Wage Regulations, namely, failing to pay me Guernsey Minimum Wage - £6.65 p/hour;*
- 2. Breach of Working Time Regulations by failing to secure contractual time off – 1 day off p/week.*
- 3. Breach of Duty of Care – Harassment*

*I feel I have needlessly been subjected to harassment by you shouting and using abusive and racially offensive language. Furthermore, this omission has created an ‘oppressive and intimidating’ working environment for my person.*

- 4. Breach of Duty of Care – Workplace Danger*

*It is my contention that Your unpredictable behaviour (especially when intoxicated) poses a palpable danger to myself within the working environment. As such, a foreseeable risk of harm exists to both my mental and physical health.*

*I am asking you to observe the implied term of mutual trust and confidence, and not act in a manner which would likely destroy, or further seriously damage that trust and confidence. I trust therefore, that you will observe the good faith performance, and take reasonable and practicable steps to remedy the following breaches with immediate effect.”*

19. The Tribunal records that the Respondent did not see this letter at this time:

“4.16 On 27 March 2015 Mr Waters received a letter from Commerce and Employment advising him that the Applicant had brought several claims against him. He passed the letter to his legal advisers and some weeks later, on 23 April, he was provided with a copy of the Applicant’s grievance letter by Collas Crill; this was the first time he had seen this grievance letter.”

It similarly records, in relation to Ms Trubuil’s evidence, that:

“5.15 The witness confirmed that 23 April 2015 was the first time that she saw the grievance letter referred to in the Applicant’s letter of resignation; the Applicant had not communicated any of the issues in the letter to her during her period of employment. The witness was extremely surprised that these issues had not been brought to her attention given her role as agent, liaison and qualified nurse; and given the regularly friendly interactions with the Applicant right up until the day she left.”

20. The final stages of the Appellant’s employment are dealt with in the Tribunal’s assessment of her evidence in the following way:

“3.18 On 17 March 2015 the Applicant overheard the Respondent on the phone, presumably talking to Ms Trubuil, he said “she is moody, wants to run the bloody show; frankly she has a miserable face, has got a thing about money now that she knows how much you get I have a feeling she has done nothing with her income tax business she has written a letter to me asking what will happen to her when I die; she does not want today off now because I paid her £60; she does not go away because she gets £60; question of money all the time; just looks at the money; goes frequently around to the neighbours; I wouldn’t say too much what I said to you because I have to live with her”.

3.19 On the evening of 17 March 2015 the Applicant said to the Respondent that she wished to take a day off on 18 March 2015. The Respondent agreed to this and told the Applicant that Ms Trubuil would visit him at 2.00 pm on 18 March 2015 and that she wanted to speak to the Applicant at the same time. The Applicant said that she was supposed to have a whole day off, not only the morning. The Respondent replied that she normally had Monday; the Applicant responded that this day was supposed to be flexible and told him she was not happy being treated like a slave. The Respondent started to shout at her and the Applicant left the room.

3.20 On the morning of 18 March 2015 the Applicant overheard the Respondent on the telephone complaining that she had not come to work and that he did not know where she was; he seemed to have forgotten that the Applicant was supposed to have a day off.

3.21 The Applicant decided to resign immediately and emailed her resignation letter at 10.38 am. The Respondent accepted this resignation at 11.32 am the same morning. The Respondent made phone calls to Collas Crill, Kleinwort Benson, Mrs Allen and Ms Trubuil, informing them of her resignation; the Applicant left the house at 1.00 pm.”

The Tribunal records the Respondent’s position about the resignation as being:

- “4.13 On 18 March 2015 he checked his emails and saw that the Applicant had sent him a letter of resignation stating that he had failed to respond to a grievance letter, but he stated he had not received a grievance letter. He did not understand why she had resigned. He stated that the Applicant had not seemed very happy of late but they had been in the kitchen the day before her resignation talking about his medication and she said nothing about her pay or his alleged shouting or anything else; it seemed to be “a nice chat”.
- 4.14 Mr Waters stated that he was upset but accepted the resignation; it was evidence from her email that she no longer wanted to work for him. He responded in simple terms that he accepted her resignation writing “I accept your resignation”. He then went back to bed and when he got up at about 11.00 am the Applicant had packed her suitcases and was about to walk out the door to her taxi.
- 4.15 Once the Applicant had left he became concerned he had been left alone and so tried to call Mrs Allen, who lives next door, but there was no answer. Then he called Marie Trubuil and asked her to come over, which she did. He stated that she said she was surprised by Eva’s departure as Eva had said nothing to her about being unhappy or wanting to leave.”

The evidence given by Ms Trubuil and Mrs Allen about the day of the resignation is similar:

- “5.13 ... the next morning, 18 March 2015, the witness received a call from Mr Waters saying that the Applicant had resigned and left him alone in the house. This surprised the witness given that neither she nor Mr Waters had been given any prior warning; it further surprised Ms Trubuil that an experienced nurse left a vulnerable adult alone with no notice.
- 5.14 Ms Trubuil tried to call the Applicant on her Guernsey mobile phone the same day but there was no answer; the Applicant did not call her back. ...
- 6.7 Mr Waters telephoned Mrs Allen late in the afternoon on 18 March and told her that Miss Lange had resigned and walked out. It seemed very sudden. Miss Lange had not told her that she was about to leave although a few days prior to this date the Applicant had told Mrs Allen that she was unhappy; the Applicant told her that Mr Waters would sometimes shout at her, she said she did not believe she was paid enough for what she did and she said “nothing I do for Mr Waters is ever right”.”

21. The Appellant’s resignation e-mail stated:

*“I am writing to inform you that I am resigning with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract.*

*I feel that I am left with no choice but to resign in light of the following:*

1. *Fundamental breach of implied and expressed terms of employment contract:*
  - 1.1 *Failure to pay the Minimum Wage*
  - 1.2 *Failure to reply to my 11 March 2015 grievance letter (email)*
    3. *Failure to secure my contractual day off*
    4. *Failure to provide payslips.*
  2. *Breach of trust and confidence.*

*On 16 March 15 I overheard you on the phone accusing me of numerous things that are not true and are completely unfounded, which I can prove. You also said: “Truth is that she has a miserable face.” This kind of remarks are unprofessional and very damaging.*

*In the evening you shouted at me without any reason whilst being heavily intoxicated.*

*Consequently I suffered a psychiatric injury as a result of your conduct and could not sleep at night.*

*This was “a last straw” – I am not willing to tolerate such abusive treatment (which has happened on numerous occasions in the past: 26/2; 4/3; 9/3; 16/3) any more.*

*You have acted in a manner that has destroyed the trust and confidence.*

*In presenting my resignation letter I have accepted your repudiation of my contract of employment and am therefore constructively dismissed.”*

### **Tribunal’s Decision**

22. Having set out the law and the parties contentions on the minimum wage aspect of the Appellant’s claim, the conclusions reached by the Tribunal are set out in section 10 of its reasons.
23. In relation to the non-provision of a wage slip, the Tribunal found as being incontestable that the Appellant had established that no wage slip had been provided to her. However, it also found that she did not raise this issue until her resignation letter. Accordingly, there had been no assertion of a statutory right by her in this regard during her employment for the purposes of the 1998 Law.
24. In respect of the Appellant's allegation that the Respondent had not provided a safe place of work within the meaning of section 11 of the 1998 Law, the Tribunal concluded that the Appellant had willingly forfeited her contractual days off in order to receive additional pay, which it found to have been at the rate of £60 each day and not the amount of £42.75 the Appellant alleged she had received on a pro rata basis. (The Appellant’s monthly salary of £1,300 equates to a daily rate over a calendar year of £42.74.) Consequently, there had been no mental duress applied to her to forgo those weekly leave days. Further, the Tribunal accepted Ms Trubuil's evidence that the Respondent is somewhat cantankerous and used a loud voice because of being hard of hearing. It held (at para. 10.2 of its Decision):

*“The Tribunal also notes that for much of February 2015 the Respondent was bedbound. It would seem to the Tribunal that his behaviour was not inconsistent with many people of advancing years who have to deal with the indignities of multiple infirmities and the frustrations which ensue; it would not be surprising if he would raise his voice or shout or be demanding from time to time. The Tribunal also notes that he may have made very occasional derogatory remarks about foreign workers and that these were unpleasant for the Applicant to hear. Although the Tribunal would in no way condone racial or national intolerance, it is not uncommon for people of this generation to be less aware of the impact of such statements. Due to the context of these alleged statements, their nature and frequency, the Tribunal concludes that on the basis of the evidence offered no qualified carer or nursing assistant or nurse could reasonably claim any psychiatric injury on the basis of this behaviour.”*

In respect of whether there had been a fundamental breach of contract, it referred to a previous Tribunal decision in which it was stated that the Tribunal would be looking for examples of “*overbearing insolence; personal intimidations; petty tyranny*” as demonstrating that the threshold had been crossed entitling an employee to resign and claim constructive dismissal. As a result, the Tribunal dismissed the Appellant's allegation that she had been subjected to intimidating behaviour by the Respondent of such a degree that she could regard it as a fundamental breach of her employment contract.

25. On the basis of its finding that the Respondent had not seen the grievance letter of the Appellant prior to the Appellant resigning, noting that the Appellant had made no attempt to check with the Respondent that he had received her communication, the Tribunal concluded that she had not established that she had asserted a statutory right thereby entitling her to treat herself as having been dismissed.

26. The fourth element of the Appellant's claim was related to the underpayment of the minimum wage. The Tribunal has set out its calculations of what she was paid and what she should have been paid as a minimum for each monthly pay reference period. In general, it concluded that the Appellant had failed to establish that her resignation should be regarded as entitling her to treat herself as dismissed. In doing so it noted (at para. 10.4) that:

*“... the issues to be decided were complicated by poor drafting of the employment contract, in that it did not specify the number of hours per day, per week or per month that were required to be worked by the Applicant. Neither was there any reference to how the night-time hours were to be regarded. Thus the Tribunal’s conclusions on this issue are based on what could be reasonably deducted from the evidence of both parties and guidance from decisions by other jurisdictions.”*

27. In relation to working hours, the Tribunal summarised the parties’ positions in the following way:

*“10.7 The Applicant claimed in her hourly computations (EE1 pages 58 to 60 refer) that she should have been paid for 70.2 ‘24 hour’ days, that is **1685 hours**. The Respondent in his hourly computations (Tab 15 ER1 refers) claimed that the Applicant should have been paid for **729 hours**; a difference of **956 hours**; the Tribunal disagrees with both of these claims.*

*10.8 The Tribunal does note that neither party recorded the hours worked each day; ‘The MW Law’ requires the employer to keep such records; this added to the complexity of the issues to be determined.”*

The Tribunal took the view that the Appellant's standard working day comprised 10 hours, being 8 am to 8 pm with a two-hour break. It believed it *“fair and equitable to judge that 10 hours per day should be paid; even though the Applicant’s duties were evidently light and the Applicant did not deny the Respondent’s allegation that she spent many of these hours in her room”* (para. 10.11). Because of the pattern of night-time checks undertaken by the Appellant, the Tribunal concluded that a further small allowance should be regarded as *“eligible hours”*. In doing so, it expressly rejected the Appellant’s contention that all her sleeping hours should have been included, concluding that *“the Applicant was not continuously working for 24 hours per day”* (para. 10.13). In respect of January, it regarded 10 additional hours as appropriate; in February, this was 20 hours, and, in respect of March, *“There was no evidence as to any worked night-time hours”* (para. 10.16). In respect of the first working month, because the Respondent was hospitalised from 19 to 29 January, the Tribunal assessed the Appellant's working hours for 19 to 28 January as three hours a day, being the time Appellant spent visiting the Respondent in the hospital. In February, the Tribunal found that the Appellant worked through her two-hour break, and so the day-time working hours rose to 12 because *“it would be just and equitable to consider that the Applicant was entitled to 12 eligible paid hours per day”* (para. 10.15). Because the Appellant left on 18 March 2015, the Tribunal believed *“it just and equitable to confirm that there were three eligible hours worked”* on that morning (para. 10.16). What all this meant was that in January, the Tribunal found that the Appellant worked 190 hours; in February, she worked 356 hours; and in March, she worked 173 hours. This aggregates to 719 hours, which is a little lower than the hours the Respondent had been prepared to accept had been worked.

28. It was common ground that in each month the Appellant was paid her contractual salary of £1,300. It was also common ground that the accommodation and meals provided by the Respondent meant an additional £92 each week should be regarded as pay. The Tribunal found that the Respondent made five payments of £60 in respect of the four weekly leave days not taken in February and the one not taken in March. It calculated, therefore, that the rate of pay for the January hours was £8.71; for February, it was £5.36; and for March, it was £9.15. As a result, the only pay reference period in which the Respondent did not pay the Appellant the required minimum wage of £6.65 per hour was in February, which is why the Tribunal awarded her £459.24. The Tribunal also simply dismissed the Appellants claim for costs (para. 11.7).

### Minimum wage

29. Although the first limb of the Appellant's complaint was to allege that she had been constructively dismissed, the Appellant's written submissions in her Skeleton Argument deals initially with her appeal grounds relating to the minimum wage, so I will similarly deal with that question first. This necessarily involves detailed consideration of the legislative framework.
30. The Appellant suggests that the main question of law raised by her appeal is whether a worker, who is provided with tied accommodation at her workplace and is required to be available on site to answer calls throughout a period of 22 hours, but otherwise can sleep during the night or take recreation in her own home, is working for the whole 24 hours for the purposes of the Minimum Wage (Guernsey) Law, 2009. In addition to referring to the clauses of her contract of employment covering salary and normal hours (clauses 4 and 5), the Appellant has drawn attention to the information she was provided with about the position prior to being offered the job, being the "details and information of live in position" document referred to in para. 2.2 of the Tribunal's Decision, and, in particular:

- "7) *The Candidate will be able to have two hours off per day, and one whole day off per seven day working week. ...*
- 9) *I need to be reassured that the candidate will remain on my property each day and evening, accept [sic] their allocated day off each week, and however return to property at a given time each evening. ...*
- 12) *I require assistance for ... nightly respite and someone on property should I need assistance 24 hours per day."*

(The numbering of the final two items has, it seems been added by the Appellant and she has slightly re-cast item 12, but without changing the substance of it.) The Appellant has also highlighted additional clauses of her contract of employment:

- "... 9.4.1 *You shall occupy the premises as a licensee and that no relationship of landlord and tenant is created between the Employer and You by this Agreement*
10. *Employee's obligations*
- The Employee agrees with the Employer*
- 10.1 *to reside at the Property while you are employed under this Agreement;*
- 10.2 *to use the Property only as a private residence for occupation for You only"*.

31. Against that background, the Appellant contends that she should have been regarded by the Tribunal as performing "salaried hours work". She has referred to the Employment Guide issued by the Commerce and Employment Department entitled *Statutory Minimum Wage*, referring to the new minimum wage rates applicable from 1 October 2014. She has also dealt with the various cases from the United Kingdom and the European Court of Justice mentioned in her grounds of appeal to support her contention that the Tribunal erred in law in its approach to what needed to be regarded as the hours of her work. I will touch on these principles when I come to analyse the main issue raised by this part of the appeal, and will similarly address the cases to which Advocate Dunster has referred. However, before describing the legislative framework against which this appeal needs to be determined, I can briefly deal with one element of the Appellant's grounds of appeal.
32. The Appellant submits that the Tribunal was wrong on the question of whether she was paid the minimum wage as a matter of law because "it is in contravention with the principles of the United Nations Declaration of Human Rights article 23(3) to conclude that the Appellant was not entitled to the remuneration for the night hours she was required to be at her workplace working, by monitoring the Respondent via a baby monitor, responding to his calls and

*dealing with emergencies in the capacity of a nurse*". Article 23(3) provides that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection". As an international law measure, the Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on 10 December 1948 does not form part of Guernsey's domestic law. Instead, Guernsey has legislated for a minimum wage and that wage gives effect to what would otherwise be required as being the minimum representing "just and favourable remuneration". There is, therefore, nothing additional to be gained through reference to Article 23(3) and it has not influenced the decision I have reached.

#### *Legislative framework*

33. Section 1(1) of the 2009 Law provides:

*"A worker who qualifies for the minimum wage in any pay reference period shall be remunerated by his employer in respect of his work at a rate which is not less than the minimum wage."*

By section 32(1), a "worker" is "an individual who has entered into or works under (or, where the employment has ceased, worked under) ... a contract of employment". It is accepted on behalf of the Respondent that the Appellant is a worker for the purposes of the 2009 Law. By virtue of section 1(3), the minimum wage is the single hourly rate prescribed by regulations made by the Commerce and Employment Department. At the start of 2015, the hourly rate prescribed for an adult such as the Appellant was £6.65, as set out in the schedule to the Minimum Wage (Prescribed Rates and Qualifications) (Guernsey) Regulations, 2012, as substituted by the Minimum Wage (Prescribed Rates and Qualifications) (Guernsey) (Amendment) Regulations, 2014.

34. By section 1(4) of the 2009 Law, a "pay reference period" is also to be prescribed by departmental regulations. Regulation 1 of the Minimum Wage (Administrative Provisions) (Guernsey) Regulations, 2010 ("the 2010 Regulations") provides that:

*"The pay reference period for determining the hourly rate of remuneration of a worker is -*

- (a) where the worker is paid by reference to a period shorter than one calendar month, that shorter period, and*
- (b) in any other case, one calendar month."*

The Appellant's contract of employment provided for her to be paid £1,300 each month. The Tribunal found that she was paid that sum in respect of each of the three calendar months during which she was employed by the Respondent. Accordingly, the Appellant's contention that the Tribunal erred when it used the calendar months as the pay reference periods and that it should have used 5 January to 4 February, 5 February to 4 March, and 5 to 18 March instead (see para. 7 of her notice of appeal) has to be rejected. The Tribunal applied the correct pay reference periods as directed by the statutory framework.

35. Section 2(1) of the 2009 Law next provides that:

*"The Department may by regulations make provision for determining what is the hourly rate at which a person is to be regarded for the purposes of this Law as remunerated by his employer in respect of his work in any pay reference period."*

Such assistance as there is on the meaning of "work" is found in section 32(2) of the Law:

*"Any reference in this Law to doing work includes a reference to performing services; and "work" and other related expressions shall be construed accordingly."*

This subsection clarifies that performing services is to be regarded as work, but it does not provide that a person is only working when performing services.

36. There are two measures made pursuant to section 2 of the Law that affect how the Appellant is to be treated. The first is the Minimum Wage (Accommodation and Food Offsets) (Guernsey) Regulations, 2010, the schedule to which, as substituted by the Minimum Wage (Accommodation and Food Offsets) (Guernsey) (Amendment) Regulations, 2014, provides that the maximum accommodation and meals offsets "*where a worker is provided with both accommodation and three daily meals by his employer in a pay reference period as part of his employment contract*" is £92 per week, or its equivalent prorated for the relevant pay reference period. The parties accepted before the Tribunal that this maximum rate is applicable to the Appellant's employment. In regulation 3(1), "*accommodation*" is defined as "*living accommodation that is available to the worker from midnight to midnight on each day on which the worker is employed*". The second applicable measure is the 2010 Regulations.

37. Regulation 2 of the 2010 Regulations provides that:

*"For the purposes of the Law, the hourly rate at which a person is to be regarded as remunerated by his employer in respect of his work in a pay reference period shall be determined by dividing A by B, where –*

- (a) "A" is the worker's total remuneration in that period calculated in accordance with regulation 3, and*
- (b) "B" is the total number of hours the worker works for his employer in that period."*

It is, therefore, necessary to ascertain a worker's total remuneration and the total number of hours the worker works by reference to each pay reference period. This was, quite properly, the approach taken by the Tribunal. Regulations 3 to 6 make provision for the calculation of the total remuneration. However, the Department has chosen to make no provision for how to ascertain the total number of hours the worker works. In other words, it has not exercised its powers as set out in section 2(3) of the 2009 Law:

*"The regulations may make provision with respect to -*

- (a) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated, and*
- (b) the treatment of periods of paid and unpaid absence from, or lack of, work and of remuneration in respect of such periods."*

Section 2(4) of the Law provides further that:

*"Any regulations made under subsection (3)(a) may include provision in connection with -*

- (a) treating a person as, or as not, working for a maximum or minimum time, or for a proportion of the time, in any period, and*
- (b) determining any matter to which that paragraph relates by reference to the terms of an agreement."*

The absence of any such regulations, whether they be similar to those in the United Kingdom or unique to Guernsey, means that there is arguably a lacuna in our domestic legislative framework.

38. In relation to total remuneration, the Appellant contends that the Tribunal reached factual decisions that were perverse. However, I consider that it was open to the Tribunal to accept the evidence advanced on behalf of the Respondent in preference to that given by the

Appellant about what was paid to her. In the absence of any documentation showing the amounts paid to the Appellant for working the days she was entitled to take as non-working days in the weeks of February and one week in March, the Tribunal had a simple choice as to who it believed, taking into account, of course, where the burden of proof lay. It was not, therefore, bound to accept the Appellant's evidence as she suggests it was.

39. In that regard, the provisions of the 2010 Regulations assist. Regulation 3 provides:

*"(1) Subject to regulations 4, 5, and 6, the total remuneration of a worker in a pay reference period shall be calculated by adding the total of payments specified in paragraph (2) to the amount (if any) forming part of the worker's remuneration under the Minimum Wage (Accommodation and Food Offsets) (Guernsey) Regulations, 2010.*

*(2) The following payments, where made by an employer to a worker in his capacity as a worker, are to be treated as forming part of the worker's remuneration in a pay reference period ("Pay Reference Period A") -*

*(a) any payment made in Pay Reference Period A,*

*(b) any payment made in the following pay reference period ("Pay Reference Period B"), in respect of Pay Reference Period A (whether in respect of work or not), and*

*(c) any payment made later than the end of Pay Reference Period B, in respect of work done in Pay Reference Period A, if -*

*(i) the worker is obliged to complete a record of the amount of work done,*

*(ii) the worker is not entitled to payment until the completed record has been submitted to the employer,*

*(iii) the worker has failed to submit this record earlier than the fourth business day before the end of Pay Reference Period B, and*

*(iv) the payment is made in the pay reference period in which the record is submitted or in the pay reference period following that."*

40. Regulation 4 clarifies that no benefits in kind other than the accommodation and food offset is to be treated as a worker's remuneration. Regulation 5 lists the types of payment not to be treated as remuneration and regulation 6 sets out the deductions to be made when calculating total remuneration. None of regulations 4 to 6 impacts on the Appellant's situation. Her contractual salary was £1,300 each calendar month. This was paid in full in respect of each month in accordance with regulation 3. In addition, as the Tribunal found, payments were made to the Appellant in respect of each day off worked at a day rate of £60. The Tribunal's assessment of the days for which an accommodation and food offset needed to be added to the Appellant's remuneration has also been largely correctly applied. In January, 27 days were counted. February accounted for four weeks of offset. In March, however, the Tribunal allowed just two weeks and three days. In doing so, it appears that it has disallowed the day the Appellant resigned. However, I take the view that the Respondent actually provided to the Appellant accommodation for 18 March as well. I reach that conclusion because of the definition of "accommodation" as "living accommodation that is available to the worker from midnight to midnight on each day on which the worker is employed". The accommodation was available to her at the start of the day and, in accordance with her employment contract, on the termination of her employment by either party and for any reason, she was obliged pursuant to clause 9.5 to vacate her accommodation "within 2 weeks or at the end of [her] notice period, which ever of the two is sooner". I take the view, consistent with the Tribunal's findings, that 18 March falls to be treated as the Appellant's final day of her employment. Although she left during the course of the day, for the purposes of calculating her total remuneration, I am satisfied that the accommodation and food offset should also apply to that

day because it had to be made available to her on what the Tribunal found to be a day of some work. In respect of January, the Tribunal has correctly included the day on which the Appellant arrived in Guernsey even though she was not physically present in the Island from midnight to midnight because it is the availability of the accommodation that matters, not its actual occupation.

41. The consequence is that the Tribunal correctly found that the Appellant's total remuneration for the pay reference period of January was £1,654.86 and for the pay reference period of February it was £1,908. However, in respect of the pay reference period of March, I take the view that the total remuneration should have been £1,596.57 rather than the figure of £13.14 less that has been used by the Tribunal. I note that the Respondent had suggested that the accommodation and for offset for March should be 2.5 weeks, making total pay for that month of £1,590 but, as I have indicated, under the 2010 Regulations prorating really should be by reference to whole days and not by some other fraction of a week.

#### *Hours of work*

42. The main issue, though, raised by the Appellant's appeal is how to ascertain the total number of hours worked by the Appellant in each of those three pay reference periods. As I have stated, the Department has chosen not to make provision by regulations clarifying when a person is, or is not, to be treated as working. The Tribunal was referred by Ms Richardson to the National Minimum Wage Regulations 2015. Part 5 of those UK Regulations makes the type of provision that the Department is empowered to make for Guernsey. Those Regulations draw a distinction between different types of work. Part 5 makes provision for calculating the hours worked for the purposes of the national minimum wage. Regulation 17 identifies that there is a distinction between "*salaried hours work*", "*time work*", "*output work*" and "*unmeasured work*".
43. The definition of "*salaried hours work*" in reg. 21 is:

"(1) "*Salaried hours work*" is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.

(2) *The first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus.*

(3) *The second condition is that the worker is entitled under their contract to be paid that salary or salary and performance bonus in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours").*

(4) *The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than an annual salary and performance bonus.*

(5) *The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month-*

(a) *in equal weekly or monthly instalments, or*

(b) *in monthly instalments that vary but have the result that the worker is entitled to be paid an equal amount in each quarter."*

Further clarification is offered in reg. 21(7):

"*Work may be salaried hours work whether or not-*

(a) *all the basic hours are working hours;*

- (b) *the worker works hours in excess of the basic hours (whether the worker is entitled to be paid for those additional working hours or not);*
- (c) *the annual salary may be reduced due to an absence from work."*

44. The definition of "time work" in reg. 30 is:

*"Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid-*

- (a) *by reference to the time worked by the worker,*
- (b) *by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or*
- (c) *for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level."*

It is apparent from this definition that, if a worker is carrying out salaried hours work, that is an end to the consideration as to whether that worker might be performing time work in relation to those hours which are performed as salaried hours work.

45. Similarly, the definition of "output work" in reg. 36 shows that it is something that can be found to apply in place of time work:

*"Output work is work, other than time work, in respect of which a worker is entitled under their contract to be paid by reference to a measure of output by the worker, including a number of pieces made or processed, or a number of tasks performed."*

Further, reg. 44 provides that *"Unmeasured work is any other work that is not time work, salaried hours work or output work."*

46. None of these definitions applies strictly as a matter of Guernsey law because none has been incorporated into the legislative framework as it might have been. I have referred to them in this detail because it assists in understanding the cases to which the parties have referred and also because of the approach taken by the Tribunal. In any event, there has been no suggestion in the Appellant's case that she was undertaking output work.

47. Terms similar to those contained in the English Regulations have also been used in the Department's Guide, *Statutory Minimum Wage*. Under the heading "Establishing the Hours Worked for the MW Calculation (Time Work vs. Salary)", this Guide explains:

*"Workers paid according to the number of hours they are at work, so that pay goes up or down depending on the actual hours they work are likely to be doing time work.*

*Time workers must be paid the MW for hours spent:*

- *at work and required to be working or on standby near the workplace (but not on rest breaks)*
- *when kept at the workplace but unable to work because of machine breakdown*
- *travelling on business during normal working hours*
- *training or travelling to training during normal working hours*
- *awake and working during 'sleeping time' (sleeping time means any time when they are allowed to sleep if the employer arranges for them to sleep at or near the place of work and provides suitable facilities for doing so)*

*Time workers don't need to be paid the MW for hours spent:*

- *travelling between home and work*
- *away from work on rest breaks, holidays, sick leave or maternity leave*
- *away from work because of industrial action*
- *asleep, or awake but not working, during 'sleeping time'*

*Workers paid for a set basic number of hours a year, who receive an annual salary paid in equal weekly or monthly instalments are salaried workers. Your contract does not have to state your hours as an annual figure (e.g. 2,000 hours a year), but it must be possible to work out from the contract what your basic annual hours are.*

*Salaried hours workers must be paid the MW for hours spent:*

- *at work and required to be working*
- *on standby, or on call, at or near the place of work*
- *when kept at the workplace but unable to work because of machine breakdown*
- *travelling on business during normal working hours*
- *training or travelling to training during normal working hours*
- *away from work on rest breaks, lunch breaks, holidays, sick leave or maternity leave, where these form part of the minimum hours under the contract*
- *awake and working during 'sleeping time' (see 'time work' above)*

*Salaried workers don't need to be paid the MW for hours spent:*

- *when paid less than the normal pay rate, for instance if receiving half-pay while on sick leave*
- *on any unpaid leave which the employer allows them to take*
- *away from work because of industrial action*
- *asleep, or awake but not working, during 'sleeping time' where the contract clearly sets out the period when the employee is permitted to sleep.*

*Note: A worker required to be on duty for 24 hours and not specifically provided with sleeping time between set hours may have to be paid the MW for the full 24 hours."*

It is quite apparent from the terminology used that the statutory definitions in the UK Regulations have been looked at before this Guide was published. However, in the absence of any equivalent subordinate legislation in Guernsey, this Guide cannot and does not have the same force of law as if the Department had also made the type of regulations it is empowered to make pursuant to section 2(1) of the 2009 Law and it remains only guidance. Indeed, it does not even have the same standing as a Code of Practice issued under section 31 of the 1998 Law would have. Indeed, because of the absence of subordinate legislation, this guidance is not completely accurate.

48. It is clear from the States Report that led to the 2009 Law that it was expected that provision would be made dealing with hours of work. In the Department's Report found in Billet d'État No. XXII of 2007 at page 2058, para. 9.3 explains:

*“In addition, there are often occasions where workers may not be paid e.g. rest breaks, holidays, sick pay, maternity leave or perhaps when involved in industrial action. An example is ‘sleeping time’, which for some care assistants in a residential home is a period during which they may not be paid. The legislation should ensure that these arrangements are considered in the calculation of ‘hours that count’ towards the minimum wage calculations.”*

The 2009 Law contains the enabling powers to deal with these matters but the Department has chosen not to exercise them. In the absence of legislation, a Guide is not able to fill this gap and does not create provisions that can be applied if the legislation that the Guide’s contents underpins does not deal with the matters that are covered in the Guide.

*Case law “assistance”*

49. At para. 7.7 of its decision, the Tribunal noted the finding of the Court of Appeal in England and Wales in Walton v Independent Living Organisation Ltd [2003] ICR 688, to which its attention was drawn by Ms Richardson and on which Advocate Dunster continues to rely. This case concerned a carer who looked after an epileptic for three days at a time. She then had the following three-day period off work. When on duty she was required to be continually in residence. Her remuneration was agreed at "£31.40 per day". An assessment had been undertaken by an officer on behalf of the national minimum wage team at the Inland Revenue, in which the time required for the tasks carried out caring for the charge was recorded as being a daily average of 6 hours and 50 minutes. The appellant had countersigned this assessment. The passage to which the Tribunal referred is at para. 41 in the judgment of Arden LJ:

*"... When not performing her specified tasks, Miss Walton was not required to give Miss Jones her full attention ... it cannot be said that Miss Walton was continuously performing her contractual duties for 24 hours each day".*

The issue in that case, though, was whether the appellant was performing time work (as defined) as she contended, or unmeasured work. There was no suggestion, as the Appellant makes in the instant case, that there was any salaried hours work. Further, in that case the Court of Appeal concluded that the employment tribunal had been entitled to have regard to the written agreement that the period of 6 hours and 50 minutes was a realistic assessment of the time taken to carry out the tasks, which is also different to the instant case where there has been no such independent assessment, save perhaps for that undertaken by the Tribunal in accordance with its stated approach of looking for what it considered to be "*just and equitable*". In those circumstances, I do not regard the *Walton* case as being particularly helpful in working out the correct legal approach to the Appellant's position.

50. The Appellant, on the other hand, relies on Whittlestone v BJP Home Support Ltd (unreported, 19 July 2003, EAT) and goes so far as to suggest that MacCartney v Oversley House Management [2006] ICR 510 is on "all fours". In the first of those cases, the worker was employed to provide care services to clients of her employer, known as "service users" and she was paid an hourly rate calculated on the basis of time spent from the moment of arrival at the home of a service user to that of departure, this total time being referred to as a shift. The concept of shifts was mentioned in her contract: "*You are employed on shift working. Each working week comprises of 50 shifts of hours from 7:00 am to 10:00 pm in accordance with the weekly rota prepared by your supervisor.*" The reference to each shift was to the time spent with each service user. There were a number of visits each day and time spent travelling between the homes of service user was not counted under the terms of her contract. There was also provision in the contract under the heading "Hours of work" stating that:

*"In addition to your normal working hours you will be expected to cover some "on call" shifts. You're (sic) on call days will be identified on your weekly schedule. Failure to be available for you're (sic) on call days will result in disciplinary action. You may also be required to undertake additional shift work from time to time and if so, reasonable notice of such shift working will be given to you."*

It was common ground in that case that there were no fixed hours. It is clear, therefore, that the facts of the Whittlestone case are quite different from the present case. However, the Appellant refers to some passages from the judgment of Langstaff J as guidance as to the applicable principles:

"57. *Work is to be determined upon a realistic appraisal of the circumstances in the light of the contract and the context within which it is made. So viewed, the distinctions which I drew earlier in this judgment may be helpful. But I emphasise they are intended to be helpful, and not words which should incline a Tribunal to repeat the error into which in my view this Tribunal fell in concentrating upon the question of core hours or the opposite when what mattered was asking whether what was done was work.*

58. *In the circumstances of this particular case there could, in my view, have been no answer other than that it was work, and this, being a time work contract, was time work. That is because the evidence was that there had been agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout that period of time; she could not for instance slip out for a late night movie or for fish and chips.*

59. *The fact that her physical services were not called upon during the night were on the basis I have expressed irrelevant since her job was to be there. This is a case which in principle is on all fours with that of Rossiter. The case of Anderson v Jarvis demonstrates the same approach in a different factual context; that was of a care manager in the employment of a hotel company who was required to sleep over in the hotel several nights each week. The primary reason for his having been required to do so was to cover emergencies such as fire or flood. The Tribunal found that he was not entitled to be paid, but the Appeal Tribunal reversed that decision: it was plainly wrong to say that he was not at the Respondent's disposal during sleepovers given that the Respondents required him to be in their premises during those periods for a stated purpose; he was clearly working. The same reasoning applies here."*

The Appellant submits that this case explains that, even if her physical services might not have been called for during this night, that factor is irrelevant as to whether she was working because her job required her to be present, during which time she was just as much at the Respondent's disposal as during the day. In this regard, the Tribunal erred in disregarding the sleepovers in the manner it did.

51. The MacCartney case (*supra*) related to a resident manager at a development containing 56 privately owned homes. The appellant's contract succinctly provided: "*Hours: 4 days per week of 24 hours on site cover*". There was a second manager who was on duty for the other three days. A flat for each was provided within the building. Their schedules were such that they enjoyed alternate weekends off. There were other arrangements to cover sickness and holidays. The responsibilities included visiting the residents on a rota basis, liaising with residents' carers and doctors, organising the communal facilities and taking bookings for the guest suite, letting contractors in and out and organising social activities. The Tribunal found that she was able to do most of her duties between 8 am and 6 pm and could largely arrange them to suit her own convenience. However, she was on call for the whole 24 hours and was required to be no more than three minutes away from the building, so that she could not socialise in the town or visit her family, but she was able to receive visitors, listen to music, eat, undertake other activities at home and sleep in her own bed. When on call she had to answer both emergency and non-emergency calls, which were logged at the frequency of approximately one every other day between 6 pm and 8 am. Apart from such calls, the Tribunal found that she was not at the beck and call of residents between those hours.

52. The Employment Appeal Tribunal's decision deals primarily with the UK's working time legislation, which gives effect to EU law requirements. It applied two European Court of Justice decisions (SIMAP [2000] IRLR 845 and Landeshauptstadt Kiel v Jaeger [2003] IRLR 804) concluding (at para. 47):

*"... that the whole period when she was on call constituted working time. She was required to remain at or within a very short distance of her home, which was located within her place of work and contained her office. She was never off duty. She was always liable to answer calls directly from residents. She had to remain available at the place determined by her employer with a view to performing services if need be or when requested to intervene."*

In respect of the minimum wage, the Employment Appeal Tribunal found that Mrs MacCartney did salaried hours work, where she was at work throughout the period when she was providing on site cover. The judgment commenced by identifying the issue for determination as follows:

*"If a worker who is provided with tied accommodation at her workplace is required to be available on site to answer calls throughout a period of 24 hours, but otherwise can sleep during the night or take recreation in her own home, is she working for the whole 24 hours for the purposes of the Working Time Regulations 1998?"*

Its conclusion demonstrates that it took the view that she was. The Appellant submits that this applies directly to her own case, albeit that she substitutes in the issue for determination a reference to the 2009 Law for the Working Time Regulations 1998.

53. The Appellant's written submissions deal extensively with the two European cases relied in the *MacCartney* case, but I will pass over those because the EU law principles in the Working Time Regulations have no equivalent in Guernsey. The EU's requirements under that regime play no part domestically because they are matters that fall outside of Guernsey's relationship with the European Union. Accordingly, I do not consider that these cases offer any additional assistance to me over and above the way they were applied, by extension, to the position in respect of the minimum wage. For example, there is no Guernsey legislation that requires workers to be afforded minimum breaks in the working day, meaning that decisions about how to deal with rest periods during on-call duty are inapplicable.
54. Advocate Dunster has referred me to a number of other decisions relating to workers sleeping over, which point away from the conclusions reached in the *MacCartney* case. They are all similarly Employment Appeal Tribunal cases.
55. In *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254, the housekeeper and deputy housekeeper at sheltered accommodation were the claimants. By way of example, the housekeeper worked 8.30 am to 2 pm and 4 pm to 6 pm on Sundays to Thursdays, but was required to be on-call in the flat provided for her from 9 pm to 8 am during her working week. She was found to be employed on salaried hours work. The deputy housekeeper worked under a time work arrangement. This case involved construing specific provisions in the National Minimum Wage Regulations 1999 (which preceded the 2015 Regulations) dealing with sleeping arrangements. At para. 12, reg. 15 (on time work) was set out, with para. 13 noting that reg. 16 on salaried working hours contained the same provisions mutatis mutandis:

*"(1) Subject to paragraph (1A), time work includes time when a worker is available at or near a place of work for the purpose of doing time work and is required to be available for such work except where - (a) the worker's home is at or near the place of work; and (b) the time is time the worker is entitled to spend at home.*

*(1A) In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours he is permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working."*

56. The Employment Appeal Tribunal concluded (at para. 38):

*"We take the view that, for national minimum wage purposes, the cases show a clear dichotomy between those cases where an employee is working merely by being*

*present at the employer's premises (e.g. a night watchman), whether or not provided with sleeping accommodation, and those where the employee is provided with sleeping accommodation and is simply on-call. In the latter class of case the employee may be able to call the Working Time Regulations 1998 into issue to assert that all the hours on-call are working hours within the Regulations, a breach of those Regulations and a claim arising from the breach. However, in the latter class of case the employee cannot bring into account all the hours spent on-call for the purposes of a national minimum wage claim. He can only do so (because of the terms of regulations 15(1A) and 16(1A) of the National Minimum Wage Regulations 1999) for such hours as he is awake for the purpose of working."*

57. A similar explanation of the authorities was given in *City of Edinburgh Council v Lauder* (unreported, 20 March 2012), in which the position of sheltered housing wardens was considered. They had contracts stating their normal working hours each week to be 36 hours. Those hours were worked in periods between 8.30 am and 5.30 pm Monday to Friday. They were required to be resident at their tied houses during their working week and to be "on call" at times outside normal working hours. There was an alarm system in the sheltered accommodation. It did not, however, sound in a warden's accommodation between 5.30 pm and midnight on weekdays and at weekends. The arrangement, however, was for the alarm to be capable of being heard in their accommodation on four nights of each week. There was also a routine for such a warden on call to "take back" the alarm connection in readiness for those on call nights. This activity usually occurred between 10 pm and midnight. If a warden was called out during the night, the warden could claim time off in lieu or overtime payments. The issue in the case was whether the post-midnight hours and the time taken up taking back the alarm connection amounted to salaried hours work. Having conducted a review of the cases, including the *South Manchester* case just mentioned, the Employment Appeal Tribunal stated (at para. 33):

*"These authorities are not, in my view, conflicting but, rather, demonstrate that there are two different types of case, one where the job in question is a 'sleepover' job like that in Scottsbridge and one where it is not but the worker sleeps at or near the workplace and may be called on to work during the period of what would otherwise be sleep, in addition to, his normal work. Regs 15 and 16 apply in the latter case, as an anti-avoidance provision -the sleepover period is not to be ignored - but with the amelioration that it is only when the worker is actually awake for the purposes of working that he is entitled to the NMW."*

58. The distinction drawn with a typical 'sleepover' case is exemplified by *Scottsbridge Construction Limited v Wright* [2003] IRLR 21. In that case, a night watchman was required to be in attendance for 14 hours per day seven days per week. However, he was only required to be awake for the purposes of working for four hours per night, and for the remainder of each shift was entitled to sleep or watch television. The Employment Appeal Tribunal found (at para. 11):

*"The terms on which the respondent was engaged in the employment of the appellants ... make it clear that in return for remuneration at the rate of £210 per week the respondent was required to attend at their premises between 5 pm and 7 am seven days per week as a night watchman. The work which was paid for under his contract by reference to the time for which he worked was, for the purposes of reg 3, his attendance as a night watchman for the whole of these hours. The fact that the activities of a night watchman were not spelt out in the letter is neither here nor there. More importantly the fact that the respondent had little or nothing to do during certain hours when he was permitted to sleep does not take away from the fact that he was throughout in attendance as a night watchman and required at any time to answer the telephone or deal with alarms. The employment tribunal, in our view, confused their estimate of the hours during which the respondent was generally active with the overall consideration of what was required of him as a night watchman at any time. ... On the facts before it, the whole 14 hours period fell to be regarded as 'time work' for the purposes of the Regulations."*

59. The final case in this line of authority is *Anderson v Jarvis Hotels plc* (unreported, 30 May 2006), which concerned a hotel night porter, who became a general assistant with guest care manager responsibilities, and who was regularly required to sleep-over in the hotel. This requirement was primary to deal with emergencies such as fire and flood. It was acknowledged that it was necessary to have two employees in the hotel at night for health and safety and fire regulations reasons. Ordinarily, the claimant lived only a walk of 10 or 15 minutes away from the hotel. The Employment Appeal Tribunal stated (at para. 21):

*"What is also plain from a review of the authorities is that the employee can be regarded as working even though he is asleep and will be so regarded if the place that he is sleeping is his employer's premises and the reason he is sleeping there is that his employer requires him to be in those premises for the employer's purposes. In those circumstances the employee cannot properly be regarded as enjoying a rest period, that being a concept which, properly interpreted, involves a break from being subject to employer requirement during which the employee is able to lead his normal life."*

It continued (at para. 23):

*"In the present case, the claimant was clearly subject to employer requirement throughout the sleep-over periods. The reason that he slept over in the hotel was that the respondents were under an obligation to have at least two employees present there overnight for health and safety and fire regulation purposes. The requirement that the claimant remain in the respondents' hotel premises during sleep-over periods was of such significance that he was liable to and indeed had been disciplined in the event of his leaving the hotel at any time during such a period. That was in circumstances where the claimant's own home was not far away. It was, however, clearly not sufficient for the respondents' purposes that the claimant be at home and on call. He had to be in the hotel. The fact that he was there met a need of the respondents. He met that need throughout each sleep-over period. Being present in the premises was, primarily, what he was employed to do during sleep-over periods. That was, accordingly, his "work". I am readily satisfied that the Tribunal were in error in taking the view, as they did, that he could only be regarded as working if he was carrying out some specific activity during a sleep-over period. That approach simply misses the point."*

60. As a result of these cases, Advocate Dunster submits that the Tribunal reached a factual finding with which this Court should not interfere. These authorities support the proposition that where a worker's place of work is also his home, only the hours spent awake for the purpose of carrying out duties can attract the minimum wage. The Tribunal analysed what the Appellant did properly. It made a small allowance for the time she stated she spent checking on the Respondent during the night, but disallowed all the other hours when she was sleeping or doing other things outside of the working day hours it had also assessed as being her working hours. The Tribunal was permitted to do so because the place where the Appellant was at these times was her home. She had no other home from which she was being kept whilst doing her work for her employer. The cases of *Scottsbridge* and *Anderson* dealt with a different situation and could effectively be distinguished (insofar as that concept needed to be applied) on that basis.

#### *Discussion*

61. However illuminating these cases might be if my task was to apply the UK statutory regime, the starting point must, in my judgment, be how "work" is dealt with in Guernsey's legislation. I do not regard section 32(2) of the 2009 Law as being of any particular assistance. A person can be working even if not required by his or her employer to do anything, so the actual performance of services is not, of itself, a requirement before a person can be found to be working for the purposes of the minimum wage.
62. Section 20(2) of the 2009 Law, dealing with evidential burdens, provides:

*“Where in any civil proceedings a person seeks to recover the amount described in section 10(2), it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the individual in question was remunerated at a rate less than the minimum wage unless the contrary is established.”*

Section 10(2) relates to the additional remuneration to be paid to a worker qualifying for the minimum wage who is found not to have been remunerated at the minimum wage. Further, section 7 of the 2009 Law provides:

*“(1) The employer of a worker who qualifies for the minimum wage shall keep in respect of that worker records sufficient to establish that he is remunerating the worker at a rate at least equal to the minimum wage.*

*(2) The records required to be kept under subsection (1) –*

*(a) shall be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document,*

*(b) shall be kept by the employer for a period of three years beginning with the day upon which the pay reference period immediately following that to which they relates ends, and*

*(c) may be kept by means of a computer.”*

The Respondent (or someone else on his behalf) did not keep the records required by section 7. If it was to be asserted on his behalf that the hours worked differed from those implicit from the contract of employment, the absence of records is a factor that can properly be factored in when applying the burden of disproving underpayment by reference to the minimum wage. At para. 10.8 of its Decision, the Tribunal referred to the employer’s obligation to keep records, but also in the context of neither party recording the hours worked each day, perhaps implying that the Appellant was also at fault, when there is no obligation on an employee to do anything in this regard, commenting that *“this added to the complexity of the issues to be determined”*.

63. The combined effect of these provisions is to place the onus on an employer to establish, ideally through records kept, that the minimum wage has been paid, as required under the 2009 Law. (This burden is also mentioned on page 7 of the Department’s Guide.) When the Tribunal proceeded to assess the parties’ evidence and reached its conclusion on the times spent working in each pay reference period, I think that it overlooked the impact on the evidential burden placed on the Respondent. The principal material before it was the contract of employment. The Tribunal failed to explain why it chose to disregard what I regard as being the unambiguous wording of that contract in relation to the hours of work. Therefore, I have concluded that the Tribunal erred in its approach.

64. It is apparent from the UK authorities to which I have referred that a worker’s contract is a key document to analyse when deciding what work is required to be done under it by that person. There is, in my view, support for that principle in Guernsey’s legislation and the Department’s Guide. For example, section 10(1) of the 2009 Law provides that a worker paid less than the minimum wage *“shall be taken to be entitled under his contract to be paid, as an additional remuneration in respect of that period, the amount described in subsection (2)”* and, of course, section 32(1) defines a worker as *“an individual who has entered into or works under (or, where the employment has ceased, worked under) ... a contract of employment”*. As I have previously noted, in respect of salaried hours workers, the Guide states *“Your contract does not have to state your hours as an annual figure (e.g. 2,000 hours a year), but it must be possible to work out from the contract what your basic annual hours are.”* Accordingly, even though there are no regulations in Guernsey along the lines of the UK’s 2015 Regulations, where the definitions of each of salaried hours work, time work and output work make express reference to the worker’s contract, I am satisfied that the only sensible starting point is to look at a complainant’s contract of employment and construe it.

65. The approach of the Tribunal appears to have overlooked this requirement. It had regard to the Appellant's evidence (see para. 10.10 of its Decision) that at the commencement of her employment she was working for 12 hours per day less a two-hour rest break. Having quoted clause 5 of the Appellant's contract at para. 3.9, the Tribunal did not mention this when calculating what it described as "*eligible hours*", a term appearing on page 3 of the Department's Guide but not featuring, as far as I can tell, in the statutory framework. Had the Tribunal started with the Appellant's contractual terms, I am satisfied it would have reached a different decision on the facts it found.
66. The Tribunal quoted clause 5 of the Appellant's contract at para. 3.9 of its Decision. It provides:
- “5.1 *You will be employed to work 6(six) days of the week. You are entitled to one day off a week which shall be determined between the parties from time to time.*
- 5.2 *You are entitled to a rest break of 2 hours per day between the hours of 2-4 pm or as agreed between the parties”.*

There is, of course, no explicit reference to the actual hours of work. For example, the contract does not spell out that there are “core hours” during which certain duties have to be performed, whatever they might have been and nor does it specify that the hours of work on each work day were 24 hours. Indeed, there were no tasks specified in the contract that were required to be performed. Equally, there is no reference to any sleeping arrangements or anything indicating that the Appellant was to be “on call”. The background to these terms of the contract is consistent with what the Appellant had been informed about in relation to the post before accepting employment. The job details sent on 26 November 2014 were set out by the Tribunal at para. 8.2. In those circumstances, I take the view that each working day, of which there were six in each week, comprised of 22 hours. That is the proper construction to be given to the contract of employment. The rest break of two hours each day cannot, in my opinion, be treated as part of the working hours, as the Appellant has contended. In making her submission, I think the Appellant has sought to rely on principles from working time legislation, which, as I have said, do not apply in Guernsey. Accordingly, construing clause 5 as a whole, and in the context of the entire employment contract, I am satisfied that the Appellant's contractual working hours were 22 hours each day, making a total each week of 132 hours.

67. In the absence of any domestic regulations made under section 2 of the 2009 Law, dealing, in particular, with the times at which, or the time for which, a person is to be treated as, or as not, working, I take the view that it would be wrong for this Court, and also at first instance for the Tribunal, to seek to make good this gap by importing into Guernsey's legislative framework the very detailed provisions that have been made in the United Kingdom. It is apparent that the distinction of being available in one's home nearby to the place of work, which Advocate Dunster emphasised, is very much a creature of the amendment made in the UK regime as an “*amelioration*” of what had previously been the position. The function of supplementing the bare words in the primary legislation is a function of the Department, ie, something for the executive, rather than the judiciary. For example, reg. 27 of the 2015 Regulations, which in para. (2) clarifies that the hours that would normally be treated as worked where “*a worker is available at or near a place of work for the purposes of working, unless the worker is at home*” include only those “*when a worker is awake for the purposes of working, even if a worker is required to sleep at or near a place of work and the employer provides suitable facilities for working*”. This approach might or might not be included in any Guernsey provisions if the Department were to exercise its powers to make regulations. Until such time as the Department makes whatever regulations it considers appropriate, the Tribunal (and the Court) should not, in my view, be considering the statutory regime in another jurisdiction and proceeding as if those provisions were part of Guernsey law. In any event, reg. 27 is not a standalone provision. It supplements when the “*basic hours*” of a worker (which is another concept not dealt with in Guernsey legislative framework) are to be increased. Regulation 22(5) provides that “*The basic hours are to be ascertained in*

*accordance with the worker’s contract on the first day of the pay reference period in question unless paragraphs (6) or (7) apply*”. In relation *inter alia* to reg. 27, para. (6) refers to the situation where the worker works “*additional hours in excess of the basic hours*” and “*is not entitled to be paid more than annual salary and a performance bonus for those additional hours*”. From these provisions, it can be seen that the starting point is the worker’s contract and that if the contract is, as in the present case, as open-ended over hours as the Appellant’s is, the basic hours themselves, as I have stated, will be very extensive, even if it is inevitable that the worker will be sleeping during some of them. Because reg. 27 deals with additional hours and not basic hours, even if the framework of the 2015 Regulations were to be considered applicable, I do not think they are capable of assisting the Respondent in this case to the extent that the Tribunal found.

68. My conclusion that the contractual hours were 22 on every working day is also generally supported by the content of the Department’s Guide. On page 1, it states that “*The calculations to check if the MW is being paid are based on the gross basic pay received by a worker and the number of hours actually worked.*” The inclusion of the word “*actually*” might be capable of being read as meaning those hours when performing some service, which was the interpretation, it seems, used by the Tribunal, or it could mean the hours during which a worker is required to be available to work under the terms of his or her contract. Because there is nothing in the applicable legislation limiting working hours to those where the worker is actually active, I think the Tribunal fell into error in reading into the framework such a limitation. This is similar to the error referred to in the Scottsbridge case. There was no attempt in its decision to determine whether the Appellant was engaged on time work or whether she should be treated as a salaried worker. In the Guide, this is the only distinction drawn in relation to the issue of establishing the hours worked for the minimum wage calculation. It is quite clear that the Tribunal accepted that the Appellant was not engaged on time work. There is a strong inference, therefore, that using the Guide would mean that she should have been considered by the Tribunal to be a salaried worker. There was a specified monthly salary plus the provision of accommodation and meals in return for the Appellant’s services. There is reference in the Guide to “*sleeping time*”. The guidance is that a salaried worker does not have to be paid the minimum wage for hours spent “*asleep, or awake but not working, during ‘sleeping time’ where the contract clearly sets out the period when the worker is permitted to sleep*”. However, the Appellant’s contract did not deal with sleeping time in this manner. The Guide also explains that the minimum wage must be paid for hours spent “*awake and working during ‘sleeping time’*”, which appears to be the approach taken by the Tribunal to the Appellant’s night-time checking of the Respondent, but, reading this part of the Guide as a whole, it is clear that, if there is no reference to “*sleeping time*” in the contract, these aspects are not even engaged in the consideration of the hours worked.
69. Adopting the language of the MacCartney case (*supra*), the Appellant here was at “*the beck and call*” of the Respondent throughout her contractual working hours. This expectation had been clarified in the details provided to her beforehand, which included:

*“At present I feel I need the light support of a responsible mature person with initiative, and strong ability to live and occupy themselves within their own time. However also I need to be reassured that the candidate will remain on my property each day and evening, accept [sic] on their allocated day off each week, and however return to property at a given time each evening.”*

The hours of work required to give effect to these expectations could have been dealt with in the Appellant’s contract of employment differently. There could, as demonstrated by some of the UK cases mentioned, have been a clear distinction drawn between day-time work and night-time “on call” or something explicit said about the sleeping arrangements. However, the Appellant’s contract is silent on those matters. As the Tribunal noted, the contract was poorly drafted, but that is not sufficient reason for ignoring it. Whilst I quite understand that the Tribunal might well have viewed the outcome that the Appellant was employed for 132 hours each week as flying in the face of reason, and so sought instead to find a solution it regarded as “*just and equitable*”, I am satisfied that its approach was wrong in law. Adopting the language of some of the cases to which I have referred, the Appellant was subject to an

employer requirement (*Jarvis*) every working day, save during her two-hour rest period, and so she can be regarded as working even when asleep, because it was her job to be where she was at that time (*Whittlestone*) at the beck and call of the Respondent.

70. In my judgment, the Tribunal has misdirected itself as to the legal test to be applied in assessing the Appellant's work in each of the applicable pay reference periods because it has failed to have proper regard to the terms of the contract of employment under which she worked and has, instead, taken into account principles derived from legislation in the United Kingdom where there is no equivalent legislation in Guernsey. In any event, even if this case had been dealt with in the United Kingdom rather than Guernsey, I suspect that the outcome would not have been that found by the Tribunal. Put another way, the Tribunal even misapplied the guidance from the UK position from which it sought to draw assistance. For this reason, the Appellant's appeal in respect of the minimum wage is allowed.
71. As a brief aside, even if I had found that the Tribunal was correct to regard the Appellant's working hours as being 10 each day, I would have concluded that the Tribunal could not reduce those hours to just three each day for the period in January 2015 when the Respondent was hospitalised. The Appellant was still employed on exactly the same basis throughout this period, even if her duties changed because the Respondent was away from the usual workplace. Accordingly, even if I had not allowed the appeal in respect of the minimum wage in the general manner I have for the reasons I have given, I would still have been allowing it to a lesser degree because of this error.

### Unfair dismissal

72. The other aspect of the Appellant's grounds of appeal relates to her original complaint that she had been unfairly dismissed for an automatically unfair reason because she had asserted one or more of her statutory rights. The rights to which she referred, and those dealt with by the Tribunal, were her right to be paid the minimum wage, her right to be given a statement of pay and her right to have a weekly rest period. Before the Tribunal, she also complained that the Respondent had breached his legal duty to provide her with a safe and healthy workplace, but the dismissal of that complaint is not pursued on this appeal. The Appellant's first ground of appeal is that the Tribunal applied the wrong legal test and misunderstood section 12 of the 1998 Law. Her further grounds of appeal in this respect allege that the Tribunal's findings on a number of issues were perverse. She argues that the Tribunal was bound to find that her complaint was a good one and should have found she had been unfairly dismissed.
73. Section 12 of the 1998 Law provides:
- “(1) The dismissal of an employee by an employer shall be regarded for the purpose of this Part of this Law as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee –*
- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
- (b) alleged that the employer had infringed a right of his which was a relevant statutory right.*
- (2) It is immaterial for the purposes of subsection (1) whether the employee has the right or not and whether it has been infringed or not, but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
- (3) It shall be sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.”*

The relevant statutory rights referred to in subsection (4) include a right conferred by or under the 1998 Law, the Conditions of Employment (Guernsey) Law, 1985 and the 2009 Law.

74. Although the issue appears to have been glossed over in the Tribunal’s Decision, it is clear from the Respondent’s response to the Appellant’s complaints that whether the Appellant had been dismissed was contested. From the facts, there is no dispute that the Appellant resigned, meaning the termination of her employment was not carried out by the Respondent. In those circumstances, section 5(2)(c) of the 1998 Law applies: “*Subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if ... the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer’s conduct.*” Subsection (3) is inapplicable to the Appellant’s situation.
75. The Appellant’s case was that she resigned for the reasons she gave in her letter dated 18 March 2015. In it she referred to the overheard conversation the previous day being the “*last straw*”, highlighting the alleged abusive treatment of her, which she claimed had been meted out on four previous occasions (and she has produced the four diary entries in support). She wrote that the Respondent’s conduct was a breach of the implied term of trust and confidence. She also referred to the Respondent’s failure to pay the minimum wage and to respond to her grievance letter dated 11 March 2015, as well as raising the failure to secure her contractual day off and to provide payslips. Whilst I appreciate that the Tribunal has had the benefit of seeing the Appellant give her evidence, as well as Ms Trubuil who gave oral evidence, which this Court has not, I find myself wondering why it is that the Tribunal appears to have accepted that the Appellant (on whom the burden lay) demonstrated that she should be regarded as having been dismissed in accordance with section 5(2)(c).
76. In her written submissions, the Appellant has referred to a repudiatory breach being one that is sufficiently serious to justify termination. She has cited Wright v North Ayrshire Council (unreported, 27 June 2013) in which Langstaff J stated (at para. 10):

*“In Nottinghamshire County Council v Meikle [2005] ICR 1 the principles of constructive dismissal are comprehensively discussed. It is now perhaps the leading authority at Court of Appeal level in respect of constructive dismissal, though mention might also be made of the case of Bournemouth University Higher Education Corporation v Buckland [2010] EWCA Civ 121, [2010] ICR 908 CA, in which the Court of Appeal re-emphasised that the approach to be taken in a case of alleged constructive unfair dismissal is the common law contractual approach and not an approach which more generally looks at the fairness of the case. The common law approach looks at the conduct of the parties objectively. Thus in Meikle in the judgment of Keene LJ at paragraph 33 this was said:*

*“It has been held by the EAT in Jones v Sirl & Son (Furnishers) Ltd that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee’s resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both of those breaches and another factor such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the ‘effective cause’ of the resignation. I see the attractions of that approach but there are dangers of getting drawn too far into questions about the employee’s motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the Western Excavating case. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of a contract would not vitiate the acceptance by repudiation ...”.*

I consider that this statement of principle accurately reflects the approach to be taken under Guernsey law when a former employee alleges that he or she has been constructively dismissed. The Tribunal should properly ask itself whether the applicant before it has established that the former employer was in such serious breach of its obligations under the contract of employment that the employee applicant was entitled to resign without giving any notice. Only if the Tribunal is so satisfied could it conclude that the resignation amounts to a dismissal.

77. The Appellant also relies on *W A Goold (Pearmak) Ltd v McConnell* (unreported, 28 April 1995) to demonstrate that there is implied into a contract of employment a term that an employer will reasonably and promptly afford a reasonable opportunity to an employee to obtain redress in respect of any grievance he or she may have. However, the ability of an employer to respond to a grievance raised depends upon it being notified to that employer. The finding of the Tribunal was that the Respondent had not seen the Appellant's grievance letter dated 11 March 2015 until after she resigned. Whilst the Appellant submits that such a finding is perverse, I disagree. In my judgment, it was open to the Tribunal to conclude on the evidence before it that the Respondent had not seen the grievance letter before the Appellant resigned. The letter to which the Respondent was referring during the overheard conversation was, on the Appellant's evidence, "a letter ... asking about what will happen to her" when the Respondent dies. The grievance letter makes no reference to this issue, so the Respondent was clearly referring during that conversation to some other piece of correspondence from the Appellant. The fact that he also referred to the Appellant's interest in money and her feeling aggrieved that Ms Trubuil was paid on a different basis to her does not mean that the Respondent must have seen the grievance letter, because this disparity in pay rates, although not by reference to the minimum wage had been mentioned by the Appellant to the Respondent. Accordingly, I am satisfied that the Tribunal could properly reject the Appellant's contention, repeated in her appeal, that this amounted to a reference to her grievance letter, because it is apparent that it was not. In that situation, the Appellant could not treat the Respondent's apparent failure to address the concerns she raised in her grievance letter as a breach of the implied term to respond reasonably and in any event promptly to a grievance in response to which she could elect to resign and treat herself as constructively dismissed. Put another way, on the facts as found, there is, in my mind, a real question as to whether this aspect of the Appellant's complaint amounted to any breach of the contract of employment at all and, even if it was, whether it could be viewed with the degree of seriousness required, especially in circumstances where the Appellant did not revert to the Respondent and request a response, which entitled her to accept it and treat herself as having been dismissed.
78. Looked at more broadly, had the Tribunal asked itself whether the Respondent was in such serious breach of his obligations under the Appellant's contract of employment on the bases she advanced that the Appellant was entitled to resign without giving notice, I strongly suspect that the Tribunal would have concluded that she had not been dismissed. Such a conclusion would have sufficed to dismiss that element of her complaint. The Tribunal might also have focused more explicitly on what it found to be the reason for the resignation, or, if more than one reason, what the principal reason was. However, the Tribunal has approached the Appellant's complaint differently, so for the purposes of this appeal I will have to consider whether its conclusions on section 12 of the 1998 Law, that the Appellant had been dismissed but not for one of the reasons she suggested, are sustainable.
79. As the Tribunal noted (at para. 10.1 of its Decision), it was "*incontestable from the evidence that the Applicant did not receive a pay-slip as required by the Conditions of Employment (Guernsey) Law, 1985 during her period of employment*". Section 3A of the 1985 Law provides:

"(1) An employer who, pursuant to a contract of employment, is obliged to pay remuneration to an employee shall, on or before the day on which, pursuant to the contract, the remuneration is payable, give the employee a statement (a "**statement of pay**") which conforms with subsections (2) and (3).

- (2) *The statement of pay shall specify -*
- (a) *the gross amount of remuneration which, pursuant to the contract, is payable to the employee on that day,*
  - (b) *the amount of each deduction made therefrom,*
  - (c) *the matters in respect of which each deduction is made,*
  - (d) *the aggregate amount of all deductions,*
  - (e) *the net amount of remuneration payable (being the difference between the amounts referred to in paragraphs (a) and (d)), and*
  - (f) *the date on which the amount of net remuneration is to be paid.*
- (3) *The statement of pay shall be written and legible."*

No such statement of pay was provided to the Appellant during her employment, as required. It was, therefore, the type of statutory right that she was able to assert for the purposes of section 12 of the 1998 Law.

80. There has been no suggestion that the Appellant brought proceedings against her employer to enforce this statutory right, so section 12(1)(a) of the 1998 Law is not engaged. The Tribunal found, as I consider it was entitled to, that the first occasion on which the Appellant raised the question of the failure to provide a payslip was in her resignation letter on 18 March 2015. Accordingly, the Tribunal referred to the terms of section 12(3) ("*It shall be sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*") and concluded that the right in section 12 required the employee to have actually asserted the right in question prior to the termination of employment rather than only at the same time.
81. In my judgment, this is the correct approach in law. The reason (or, if there is more than one reason, the principal reason) for a dismissal must be operative at the time of the dismissal. For the purposes of this appeal, the reason must have been operative prior to the termination of employment. The wording of section 12 clarifies that the dismissal flows whether from the bringing of proceedings or the making of the allegation of a breach of a relevant statutory right to the employer. The reason for the dismissal cannot be something about which the employer is unaware. Section 12(3) enables this automatically unfair reason to apply where the employee does not articulate his or her right explicitly in terms of the provision being relied upon, but with sufficient clarity that the employer knows what is being alleged. However, it does not go so far as to provide that the employer must take into account something that has not been drawn to his attention. Similarly, subsection (2) refers to "*the claim to the right and that it has been infringed [being] made in good faith*". Accordingly, it is necessary before section 12 applies that the employee had actually raised with the employer the issue that then becomes the reason (or principal reason) for the dismissal. On the facts as found by the Tribunal, which includes its rejection of her evidence that she had raised this question about not receiving a statement of pay with the Respondent verbally, the first occasion that the failure to comply with section 3A of the 1985 Law was raised by the Appellant was when she sent her resignation letter. The Tribunal's conclusion that the Appellant had failed on this issue to bring herself within section 12 was, therefore, justified.
82. The Appellant has also complained that the Tribunal's finding in para. 10.1 of its Decision that the Respondent was totally unaware that his legal advisers were not providing the appropriate paperwork to the Appellant is perverse because there was no evidence to support this finding. In fairness to the Tribunal, it prefaced this part of its Decision with the words "*It would appear that*". The answers of the Respondent to the Appellant's written questions could legitimately have led to the inference that the Respondent had been relying on his legal advisers for assistance in employment-related matters. As such, reading the decision as a whole, I am not inclined to regard this sentence as being a perverse finding against the weight of the evidence. However, even if it were, it would not affect my conclusion on this element

of the Appellant's case. Section 12, as I have just indicated, requires proof that a matter was raised with the employer before the dismissal, so as to be an operative reason for the dismissal. Whether or not the Respondent was aware that payslips were not being given, until this was raised by the Appellant, it could not be the assertion by her of a relevant statutory right. She had not made any claim about this to her employer. Accordingly, this finding, technically perverse or not, has no bearing on the issue that needed to be resolved by the Tribunal. Her ground of appeal in this regard is without merit.

83. The primary basis on which the Appellant put her claim, though, was in relation to her assertion of her right to be paid the minimum wage. At para. 10.3, the Tribunal rejected this part of the complaint because the Appellant did not attempt to check with the Respondent that he had received her grievance letter and that it found that the Respondent was unaware of her grievance letter until 23 April 2015. In doing so, it has rejected, as it is entitled to, that the Appellant raised the issue of the minimum wage with the Respondent verbally. Anything that was said to the Respondent by the Appellant was by comparison to what Ms Trubuil was paid and not by reference to the minimum wage. The Appellant further submits that the Respondent accepted her resignation without making any effort to look into the issues she had raised in her resignation letter. In my opinion, an employer is not obliged to respond to such a resignation letter. As may have been the case here, albeit that the Respondent was upset at the Appellant leaving him, an employer may be relieved that the employment relationship is being terminated by the employee and it would only be of consequence to an employer in those circumstances if the employee can demonstrate that this is in law a dismissal and the reason for it is one of those that makes the dismissal unfair and so entitles the employee to bring a claim before the Tribunal in respect of it. Where the period of employment is as short as it was in this case, the grounds for doing so are only those where the dismissal is treated as automatically unfair. The fact that there was no response by the Respondent to the substance of what the Appellant had set out in her resignation does not support her contention that he had ignored her complaints and grievances. The Tribunal's factual findings are, in my view, not perverse and are not findings with which I can interfere on this appeal. Accordingly, in the light of those findings, it cannot be said that the reason found for the dismissal of the Appellant was that she had asserted any of the relevant statutory rights so as to bring herself within section 12 of the 1998 Law.
84. In those circumstances, the appeal against the Tribunal's dismissal of her claim for unfair dismissal fails. It is important to remember that there is a difference between seeking a remedy for infringement of a right, which is what has happened in relation to the Respondent's failure to pay the Appellant the minimum wage, and the assertion of that right forming the basis of an automatically unfair dismissal under section 12 of the 1998 Law. Further, there is also a difference between the right not to suffer a detriment, as it is dealt with in sections 17 and 18 of the 2009 Law and seeking a remedy for non-compliance with the obligation to pay the minimum wage by making a complaint pursuant to section 16(1)(d) of the 1998 Law (as referred to in section 10 of the 2009 Law). The scheme of section 16(1) of the 1998 Law shows that the types of complaint mentioned therein are distinct. Paragraph (a) deals with complaints of unfair dismissal, para. (c) deals with complaints about suffering a detriment, including in contravention of section 17 of the 2009 Law, and para. (d) deals with complaining that the minimum wage has not been paid and seeking the additional remuneration to which the worker claims to be entitled. The Appellant appears to have attempted to conflate certain elements of these distinct complaints so as to argue that, just because she has not been paid the minimum wage, she must also be treated as having been unfairly constructively dismissed because she has suffered a detriment. This does not follow, because section 12 of the 1998 Law is not about suffering a detriment, but about having asserted a relevant statutory right by raising it with the employer, whether or not through bringing proceedings, although that would be the clearest example of how the commencement of proceedings caused the dismissal, and that being the reason (or main reason) for the subsequent dismissal. The findings of the Tribunal show that the chronology of events does not support a claim pursuant to section 12. Accordingly, I am satisfied that the Tribunal did not err in law in reaching its decision to dismiss that element of the Appellant's complaint.

## Costs in Tribunal

85. The final ground advanced by the Appellant in her appeal is that the Tribunal should have ordered a proportional amount of the costs of the Appellant to have been paid to her. This aspect is not developed any further in her written submissions.
86. The discretion of the Tribunal in respect of costs is conferred in para. 6 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, as amended. The Tribunal has a wide discretion in this regard. I see no reason to interfere with the Tribunal's decision to make no order as to costs. The Tribunal found that the Appellant had failed in her unfair dismissal claim and had only been partially successful in respect of her complaint about not being paid the minimum wage. Although I have differed from the Tribunal on the second aspect, the position is that the Appellant would still have only been successful on one element of her complaint to the Tribunal and so it would have been within the band of responses available to the Tribunal to have concluded that both parties should bear their own costs. This aspect of the Appellant's appeal is, therefore, also dismissed.

### **Conclusions and disposal of appeal**

87. For the reasons I have given, I am satisfied that the Tribunal's decision on the Appellant's unfair dismissal complaint was correct in law. The Appellant was not unfairly dismissed. Putting to one side the possibility that she had failed to demonstrate that she had been dismissed for the purposes of section 5(2)(c) of the 1998 Law, her appeal that the Tribunal erred in its application of section 12, both in its construction of the provision and its factual findings in relation thereto, is, in my view, without merit. Similarly, her appeal against the costs decision made by the Tribunal does not appear to have been pursued actively, but is still without merit. The only element of the Tribunal's decision where I consider it fell into error is the minimum wage complaint. As I have explained, the Tribunal should not have moved away from the legislative framework and chosen to assess what it regarded as "*just and equitable*" in relation to the Appellant's working hours and should instead have paid greater attention to the terms of the Appellant's contract of employment. As a result, this element of her appeal is successful.
88. Section 25 of the 1998 Law does not specify what this Court should do where it allows an appeal. The 2006 Rules are also silent. Because this is not a matter where the Tribunal needs to consider further facts, I am satisfied that there is no point in remitting that part of the Appellant's complaint to the Tribunal for it to reach a fresh decision. Accordingly, I will substitute the decision of the Tribunal so as to make an award on what I consider to be the correct basis under the terms of the 2009 Law in place of the award of £459.24 it made.
89. The position is that each of the first three calendar months of 2015 are the applicable pay reference periods. The total remuneration the Appellant received in each of those pay reference periods was, as I have previously stated, the amounts found by the Tribunal, subject only to a minor modification to the amount received by her in respect of March 2015. The amounts to be used to calculate her entitlement to the minimum wage are, therefore, £1,654.86, £1,908 and £1,596.57 respectively. In relation to the work for which these amounts have been paid, the Appellant worked in January from 5 January, which means she completed 24 days, each of 22 hours, ie, 528 hours in total. In February, there were 24 days worked pursuant to the Appellant's contract of employment, again each of 22 hours. In addition, she performed further work for the Respondent on each of her four days off. There was nothing on the face of her contract dealing with additional hours. I am satisfied, therefore, that the Tribunal's finding that the hours of work on those days were 12 only should apply and is a factual finding with which I should not interfere. This means that the Appellant should only be paid for her hours of work, rather than equating each of those days to a 22-hour day as if they were pursuant to the contract. I recognise that, across the whole month, the Tribunal also allowed 20 hours of night-time work and that a small amount of these may have been attributable to the days off where the Appellant worked. However, I do not consider it necessary under the Guernsey legislative framework to make any further adjustment because, from the material before the Tribunal, I am satisfied that the Appellant can be regarded on these extra days worked as doing additional work outside her contract and that the Tribunal's assessment of a working day of 12 actual hours can properly be used. The

consequence is that, in February, the Appellant worked 576 hours. In March, the Appellant worked up to and including 18 March. There were, therefore, 15 days of contractual work (even though on the day of departure she left the Respondent's premises before the end of that day), again each of 22 hours. In addition, she worked one of her days off, which will attract the same additional 12 hours as in respect of the days worked in February for the same reason that I have just explained. (I note that the Tribunal's Decision refers to the Appellant having worked for 17 days in March 2015 plus just the 3 hours on the Appellant's final day, but the reference to 17 days must be wrong because the Tribunal found that the Appellant had only worked for one of her days off.) The total hours worked by the Appellant in March were, therefore, 342. The mathematics of the Appellant's position is that in January she was paid £1,654.86 for 506 hours of work, which equates to only £3.27 per hour; in February, she was paid £1,908 for 576 hours of work, which equates to £3.31 per hour; and in March, she was paid £1,596.57 for 342 hours of work, which equates to £4.67 per hour. In each of the pay reference periods, the Appellant was not paid at a rate which is not less than the minimum wage as required by section 1 of the 2009 Law.

90. For each pay reference period, the Appellant was entitled to be paid at the minimum wage rate for an adult of £6.65 per hour. Under section 10 of the 2009 Law, she is entitled to additional remuneration, which is the difference between what she should have been paid in each pay reference period and what she was paid. The amounts she should have been paid are £3,264.90 for January, £3,730.40 for February and £2,274.30 for March. Accordingly, the additional payments to which the Appellant is entitled are £1,610.04, £1,822.40 and £677.73 respectively, which aggregate to £4,110.17. The appeal is, therefore, allowed to the extent of substituting that amount for the award made by the Tribunal. Because Advocate Dunster informed me that the Respondent has already paid the amount awarded by the Tribunal, the net effect is that the Appellant is entitled under the 2009 Law to be paid a further £3,650.93.

## Costs

91. Because the Appellant has been partially successful in her appeal, I consider that the starting point for the costs of the appeal should be that they will follow the event. However, I do not consider that it would be just to award the Appellant her costs without in some way reflecting that the Respondent has also been successful in resisting her appeal against the Tribunal's rejection of her claim for unfair dismissal (and, although it is really *de minimis*, that I have upheld the Tribunal's decision in respect of costs). I have estimated that the bulk of the work involved in this appeal related to the issue of the minimum wage and that a smaller proportion of the time needed to be spent on the unfair dismissal element of the case. In order properly to reflect that difference, I consider that the minimum wage aspect took up three times as much time and effort as the unfair dismissal aspect of the overall appeal process. Accordingly, the approach I take to the costs is that the one-quarter portion where the Respondent has been successful should be discounted from the three-quarters attributed to the minimum wage aspect, with the result that I award the Appellant half of her costs to be paid by the Respondent on the standard recoverable basis, to be taxed if the amount to be paid cannot be agreed.
92. On 30 December 2015, I set out my reasons for acceding to the Appellant's paper application that the Court fees associated with her appeal be remitted pursuant to rule 1(6) of the Royal Court (Costs and Fees) Rules, 2012. I ordered that the total fees payable by her would be limited to £500. That position remains unchanged insofar as the half costs ordered to be paid by the Respondent to the Appellant do not bring the total costs payable by her for the pursuit of her appeal below that amount. In other words, if the fees to which she would ordinarily be subject exceed £1,000, her 50% of them will be capped at £500.

## Afterword

93. As the length of this judgment demonstrates, the issues relating to the minimum wage with which the Tribunal had to grapple are far from easy to work through. I recognise that this is particularly difficult for a lay tribunal. I suspect that many people will think that the Tribunal's approach achieved an outcome they regard as fair. At first blush, the monthly

salary of £1,300 plus accommodation and meals provided to the Appellant by the Respondent looks generous enough. The Appellant's overall package is certainly not what I imagine people would regard as exploitation. Right-minded people may well wonder why it is that the Appellant is now found to be entitled to even more money than she has already received. However, my analysis of the legislation shows how vitally important it is for employers to spell out as clearly as possible in a contract of employment the hours to be worked and for which the minimum wage must be then paid. In this case, the poorly drafted contract, in which the night-time arrangements were not dealt with in such a way as to avoid the necessity of paying the minimum wage in respect of all of them, is what has caused problems for the Respondent. In that regard, if he was acting on advice, I think he was given poor advice. The Department's Guide includes a warning that a worker may need to be paid the minimum wage for 24-hour working. It makes it clear that the contract can deal with sleeping time. The Appellant's contract, though, was silent on these issues. The Department could by regulations provide greater clarity in relation to working hours, whether by replicating the UK's 2015 Regulations, or making some modification to them or making some other provisions regarded as suitable for Guernsey, but the solution lies in the Department's hands rather than through the Tribunal filling what may be perceived as gaps. In that respect, I have some sympathy with the difficult position in which the Tribunal found itself and appreciate that it endeavoured to adopt an approach that the members regarded as being fair to both sides but, for the reasons given, and with considerable reluctance, I find myself agreeing that the majority of the Appellant's contentions on the legal approach that must be taken to the minimum wage in her case are correct.