

States of Guernsey



**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**APPLICANT:** Miss Eva Lange  
**Represented by:** Self represented

**RESPONDENT:** Mr John Waters  
**Represented by:** Ms Rachel Richardson

**Tribunal Members:** Mr P Woodward (Chairman)  
Mrs J de Garis  
Ms K Tracey

**Hearing date** 24 June 2015

**Decision of the Tribunal**

Having considered all the evidence presented by the parties, whether written in this judgment or not, the Tribunal makes the following decisions:

The Tribunal dismisses the claim that the Applicant was entitled to be considered dismissed as defined in The Employment Protection (Guernsey) Law, 1998 as amended for an assertion of a statutory right bestowed by The Conditions of Employment (Guernsey) Law, 1985 to receive a monthly payslip.

The Tribunal dismisses the claim that the behaviour of the Respondent amounted to a breach of his legal duty to provide a safe and healthy work place as defined in The Employment Protection (Guernsey) Law, 1998 as amended and there was no legal justification entitling the Applicant to consider herself as dismissed on these grounds.

The Tribunal dismisses the claim that the Applicant asserted her right to be paid the Minimum Wage in such a manner that it entitled her to consider herself dismissed as a breach of The Employment Protection (Guernsey) Law, 1998 as amended.

The Tribunal dismisses the claim made under The Minimum Wage (Guernsey) Law, 2009 as amended that there was any underpayment of the prescribed Minimum Wage for the reference pay periods of January and March 2015.

The Tribunal finds there was an underpayment of Minimum Wage as prescribed under The Minimum Wage (Guernsey) Law, 2009 as amended for the reference pay period of February 2015 amounting to £459.24.

**An Award of £459.24 is therefore made.**

The Tribunal dismisses the Applicant's claim for costs.

Mr P Woodward

22 July 2015

.....

.....

Signature of Chairman

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision. The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The legislation referred to in this document is as follows:

- **The Minimum Wage (Guernsey) Law, 2009 as amended ('The MW Law')**
- **The Minimum Wage (Administrative Provisions) (Guernsey) Regulations, 2010**
- **The Minimum Wage (Prescribed Rate and Qualifications) (Guernsey) (Amendment) Regulations, 2014**
- **The Minimum Wage (Accommodation and Food Offsets) (Guernsey) (Amendment) Regulations, 2014**
- **The Employment Protection (Guernsey) Law, 1998 as amended ('The Law')**
- **The Conditions of Employment (Guernsey) Law, 1985 ('The 1985 Law')**

(The Tribunal also referred to the Commerce and Employment Statutory Minimum Wage Employment Guide issued for guidance to employers and workers)

### **Extended Reasons**

#### **1.0 Introduction**

- 1.1 The Applicant Ms Eva Lange, who represented herself, claimed that she had the right to be paid the Minimum Wage and had been paid below the Minimum Wage during the period of her employment from 5 January 2015 to 18 March 2015. The Applicant claimed this was a breach of 'The MW Law' in that the Respondent breached Section 1 of the Minimum Wage (Guernsey) Law, 2009 by allegedly failing to pay her £6.65 per hour in accordance with the Minimum Wage (Prescribed Rates and Qualifications) (Guernsey) (Amendment) Regulations, 2014.
- 1.2 The Applicant also stated that she had not received a pay-slip for any period of her employment as required by 'The 1985 Law'.
- 1.3 The Applicant claimed that she had failed to secure her contractual "time off" during her period of employment and that her employer had also breached his duty of care in relation to her health and safety whilst at her place of work, as required by 'The Law'.
- 1.4 In consequence of the above the Applicant claimed that her resignation from her employment on 18 March 2015 should be found as an automatic unfair constructive dismissal as defined in 'The Law'. The Applicant alleged that she had asserted her statutory rights in relation to the above and that the employer had failed to respond to any of these issues. Such a complaint can be brought without the requirement to have been continuously employed for a period of not less than one year, as provided for in Section 15 of 'The Law'.
- 1.5 Ms Rachel Richardson represented the Respondent, Mr John Waters. The Respondent denied that there had been any breach of the Applicant's statutory rights and that the Applicant had been in receipt of payments that exceeded the legally required level of the Minimum Wage.
- 1.6 The Applicant provided an evidence bundle EE1 and made further submissions in the course of the hearing with documents designated EE2.

- 1.7 The Respondent provided a separate bundle ER1 and made further submissions in the course of the hearing with documents designated ER2.
- 1.8 The Tribunal notes that on medical advice the Respondent was too medically frail to make a personal appearance (ER1 Tab 1 refers). He did however provide a witness statement (ER1 Tab 2 refers) and responded to questions put by the Applicant in writing prior to this hearing (EE2 Pages 18 to 25 refer).
- 1.9 Evidence on behalf of the Respondent was given in person by Ms Marie Trubuil, a witness statement was provided. Mrs Nancy Allen, the Respondent's neighbour, also provided a witness statement.
- 1.10 The Applicant made a submission for travel costs as she is no longer resident in Guernsey.

## **2.0 Facts found by the Tribunal**

- 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 ER1.
- 2.7 On 21 December the Applicant emailed Ms Trubuil and Mr Waters to confirm receipt of those terms and conditions and stated 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 ER1.
- 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 was a dispute over the levels of payment made in lieu of five "leave days" not taken; this issue is dealt with in the judgment.

### **3.0 Ms Eva Lange**

- 3.1 A witness statement was provided. (Pages 49 to 57 ER1 refer).
- 3.2 The Applicant described herself in her CV (EE1 Pages 32 to 36) as a Home Cook/Diet Chef Nutritionist & Therapist/Nurse/Health Manager. She had obtained formal qualifications in all of these disciplines and had practiced as a 'Live in Chef/Private PA/Nurse/Nutritional Therapist' for private individuals for over 10 years prior to her employment with the Respondent.
- 3.3 The Applicant noted that prior to taking up her appointment the role was variously described by the Respondent as 'Live in home help', 'Live in helper', and 'Live in carer'.
- 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.

- 3.5 The Applicant's health deteriorated and a home visit by a doctor was arranged on 16 January 2015. A list of symptoms can be found on page 23 EE1; he was evidently in a serious condition. He was dehydrated, had a very high heart rate, he was drinking a litre of whisky per week and did not consume any water at all. He was very unsteady on his feet and was in constant fear of losing his balance. He was taking sleeping tablets but to no effect and he was confused. He fell twice and was admitted to Hospital on 19 January 2015. He remained there until 29 January 2015 when he was discharged.
- 3.6 The Applicant stated that on discharge he was bed-ridden, on oxygen and in need of 24/7 nursing care, assistance with personal care, toileting, medication, pressure point care, hydration, nutrition and the Applicant needed to implement a nutritional care plan.
- 3.7 A medical discharge document was issued by the Princess Elizabeth Hospital which specified the medicines he should continue to take and that he would also require 'home oxygen'. The discharge letter noted that the 'carer/nurse' felt she could manage but was silent on the issue of night-time care.
- 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 felt poorly, she would stay the night in the guest bedroom next to the Respondent's bedroom.
- 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.
- 3.11 The Applicant stated that in early February the Respondent dispensed with the services of Ms Trubuil as she had been charging for hours of personal support, at £20 per hour that did not seem to be justified. Ms Trubuil visited the Applicant during

the first week of February and, after a review of the hours charged for January 2015, the invoice submitted by Ms Trubuil was reduced. During this meeting with Ms Trubuil the Applicant claimed that she had a conversation with her as to the difference in her own hourly rate, which she computed at £1.95 per hour, with the £20 per hour paid to Ms Trubuil.

- 3.12 The Applicant also stated that she had spoken to Mrs Allen, a neighbour, who had informed her that the nursing care pay rate in Guernsey is around £500 per day. It was at this point that the Applicant considered that she was being paid less than the statutory Minimum Wage.
- 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.
- 3.14 At the end of February the Applicant complained to the Respondent that she was getting very tired after 53 days of continuous work and needed time off; the Respondent stated that he could not understand how a young person such as herself could become tired.
- 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.
- 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.
- 3.17 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".
- 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 that 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 by email 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.

#### **4.0 Mr John Waters by witness statement**

- 4.1 Mr Waters is a retired businessman, aged 89; he retired some 34 years ago.
- 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.
- 4.5 On 19 January 2015 Mr Waters was taken ill and was admitted to hospital for 10 days. During this time the Applicant would visit him most days for up to three hours each time. Mr Waters stated that he did not know what she did during the rest of those days.
- 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.

- 4.7 The Applicant was paid for the whole of March 2015 even though she did not work a full month in March.
- 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.
- 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.
- 4.11 Mr Waters stated that his primary concern during the Applicant's time with him was that she refused to drive anywhere; he had said at the start of her employment that she would need to be able to drive and she had said that she could. When he asked her to use his car she said that she couldn't drive a manual car and so he offered to buy an automatic car for her. The Applicant went to Jacksons and saw a Suzuki car there that she liked, but she never followed this up. Mr Waters offered to pay for driving lessons for her and she said she would take some but that she did not want him to pay. Mr Waters believed she took a couple of lessons at the beginning but she did not continue and he did not understand why; it was a particular concern as he needed her to be able to drive.
- 4.12 The Applicant claimed that Mr Waters drank too much, but he stated he only had one whisky each night before dinner; the Applicant knew this because she poured the drink for him each evening.
- 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 evident 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.
- 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.
- 4.17 Mr Waters stated that at no time prior to her resignation did the Applicant tell him that she had a problem in relation to her salary or pay-slips. The Applicant did ask for extra money when she worked on her days off and he paid her £60 a time for these.
- 4.18 The Respondent believed that he had treated the Applicant fairly and respectfully throughout her short time with him. In his opinion the only real issues were in relation to the Applicant not being willing or able to drive a car and the disagreement they had had in relation to the bed seeming twisted, as noted above. He stated that he did not change his attitude towards the Applicant at any time. Mr Waters acknowledged that he was a very private person and could probably be demanding at times, but he was always the same from start to finish.
- 4.19 As for the allegation that the Applicant felt bullied by him it seemed to him that the converse was true and the Applicant bullied him. He found that she was not a very caring person. Mr Waters stated that he had limited mobility and was hard of hearing; he felt he was under her control a lot of the time.
- 4.20 Mr Waters believed the Applicant was under no illusions in relation to the work she would be doing and the pay she would be receiving. She was supposed to have been his carer and helper but she left him abruptly without good reason and had now brought claims against him; he found this most distressing.

## **5.0 Ms Marie Trubuil**

- 5.1 Ms Trubuil is a private respite provider, trading under the name 'Being There' which she founded in January 2010. Ms Trubuil acts as care coordinator for the Parkinsons Society Guernsey, who sub contract to her to provide respite care to its members.
- 5.2 Prior to January 2010 Ms Trubuil was carrying out private nursing through an agency; she is a registered Mental Health Nurse and a Staff Nurse.
- 5.3 Ms Trubuil first met John Waters in 2010 who asked if she might be able to provide respite care for him for two hours twice a week and to help with food shopping etc. Ms Trubuil accepted this request and had been assisting him in this way ever since.
- 5.4 Ms Trubuil first had contact with the Applicant in November 2014 after Mr Waters advertised the role in The Lady magazine. Ms Trubuil sent her a job description to give her more of an idea of the role. The Applicant seemed very keen to accept the

role and she did not have a job at the time. The Applicant responded to the job description to say "I am delighted to accept". See Tab 5 page 7 of the Respondent's bundle.

- 5.5 Ms Trubuil collected the Applicant from the airport in Guernsey at lunchtime on 5 January 2015. She seemed a bit nervous but generally in good spirits. Ms Trubuil informed her that she would be a contact for her if she had any questions in relation to Mr Waters or the house or Guernsey. The Applicant expressed concerns to her that the roads were narrow and that there were lots of cars; she was worried that she could not cope with these driving conditions.
- 5.6 During the following week the witness spent a lot of time with the Applicant at the house getting her settled in. Her diary entries show that she stayed with her at the house on 5 January until 5.30 pm; also on Tuesday 6 January she was with her for over four hours and over three hours on Wednesday 7 January.
- 5.7 Ms Trubuil provided the Applicant with her contact mobile telephone number and spent two hours at the house on 12, 13, 14 and 16 January whilst the Applicant took her breaks.
- 5.8 On 18 January the Applicant took Mr Waters to A&E with breathing problems but he was not admitted. On 19 January Ms Trubuil went with the Applicant to take Mr Waters back to A&E and he was admitted with a chest infection; Ms Trubuil stayed at the hospital for several hours that day.
- 5.9 Over the next few days Ms Trubuil went to the hospital on a number of occasions to visit Mr Waters and became aware that the driving issue was potentially a big problem for both Mr Waters and the Applicant. The Applicant was not prepared to drive in Guernsey. Mr Waters had suggested that she take up driving lessons whilst he was in hospital; the Applicant reacted very badly to this suggestion. She started crying and had thought that she was getting the sack. It seemed to Ms Trubuil that this was a very strange reaction; it was a completely irrational response and Ms Trubuil and Mr Waters had to reassure her that she was not getting the sack.
- 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.
- 5.11 According to the discharge notes for Mr Waters he would have to stay in bed for the following two weeks so together with the Applicant she went to St John Ambulance's healthcare shop to buy special equipment to help him rehabilitate at home; this included a specialist bed and other healthcare aids. Once these items were obtained it seemed to the witness that the Applicant had really settled into the role and was providing the required nursing care so she took a back seat in terms of the care provision for Mr Waters.
- 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 ER1 of the Respondent's bundle.

- 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". However 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.
- 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 regular friendly interactions with the Applicant right up until the day she left.
- 5.16 In Ms Trubuil's opinion Mr Waters was a gentle, kind and funny man. She stated he was 89 years old and had been in declining health for some time. He could be cantankerous and eccentric. He was loud but that this was largely due to his poor hearing and the frustrations of not being as independent as he would like.

## **6.0 Mrs Nancy Allen by Witness Statement**

- 6.1 A Witness statement was provided and ER1 Tab 4 refers.
- 6.2 Mrs Allen had lived next door to Mr Waters for 16 years. Mrs Allen was also a key holder for Mr Waters' house and regularly telephoned or visited him to check that all was well.
- 6.3 The witness stated that Mr Waters was a good neighbour and that she had a good relationship with him based on trust; never once had Mr Waters raised his voice to either her or her husband.
- 6.4 Mrs Allen stated that Mr Waters had always been a very private man and was very independent until about three years ago when he fell and broke his shoulder. It was a bad fall and Mrs Allen found him the following morning; he had been on the floor all night. Since that fall Mr Waters' health had deteriorated. For some time he had struggled to walk even with a stick.
- 6.5 Mrs Allen first met Miss Eva Lange on or around the 7th January 2015, a couple of days after she started working for Mr Waters, when she went over to the house to introduce herself to the Applicant.

- 6.6 The witness saw the Applicant on many occasions whenever she visited Mr Waters; it seemed to her and her husband that the Applicant was a capable carer although their understanding from her was that she had been employed as a housekeeper.
- 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".

## **7.0 The Law & The Employment Guide: Statutory Minimum Wage**

- 7.1 Section 10 of The Minimum Wage (Guernsey) Law, 2009 as amended states:  
*"Non Compliance: worker entitled to additional remuneration*
- (1) *If a worker who qualifies for the minimum wage is remunerated by his employer at a rate which is less than the minimum wage, the worker shall be taken to be entitled under his contract to be paid, as a additional remuneration in respect of that period, the amount described in subsection (2)*
- (2) *The amount is the difference between*
- (a) *the relevant remuneration received by the work for the pay reference period, and*
- (b) *The relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the rate of minimum wage which was payable in respect of the work during that period".*
- 7.2 Section 20 of this Law describes the evidential burden as follows:
- (1) *"Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the minimum wage, it shall be presumed that the individual qualifies, or, as the case may be, qualified at that time for the minimum wage unless the contrary is established*
- (2) *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".*
- 7.3 Section 32 (2) of this Law states:  
*"Any reference in this law to doing work includes a reference to performing service: and "work" and other related expressions shall be construed accordingly"*
- 7.4 The Tribunal notes there have been no appeals to the Royal Court on Minimum Wage judgments since the inception of this legislation in 2009.
- 7.5 The Employment Guide: Statutory Minimum Wage gives guidance on the issue of waking versus sleeping work for 'Salaried' workers in the section:

*“Establishing the hours worked for MW Calculation  
 ...Salaried workers must be paid for MW hours spent.....  
 ..awake and working during sleeping time...  
 ....Salaried workers don’t need to be paid for MW 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  
 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”*

7.6 Both parties provided English authorities on Minimum Wage judgments from the Employment Appeal Tribunal and High Courts. Whilst not binding on the Tribunal they may give guidance on the issues of law being addressed by the Tribunal. The Tribunal notes that the Applicant left the Tribunal prior to its formal closure and gave no explanation as to what points of English law she specifically wished to bring to the Tribunal’s attention from the authorities she had included in her bundle.

7.7 The Tribunal does note, however, that in *Walton v The Independent Living Organisation* [2003] Civ. (ER1 Tab 21 refers) the following was found by the England and Wales Court of Appeal (Civil Division):

A carer who was required to remain on her client's premises 24 hours a day in case she needed assistance (which sometimes she did during sleeping hours - for epileptic fits etc.) but whose physical duties took up an average of 6 hours and 50 minutes per day was held only to be working for the time that she was carrying out these physical duties. Walton argued that at those times she was not engaged in physical work she was ‘supervising’ her client. She argued that she had to be ‘mentally alert’ and ‘ready to meet her client’s needs’ and that this too was ‘work’ for the purposes of the Minimum Wage Regulations, 1999. These arguments were all rejected by the Tribunal at first instance and then the EAT. The Court held that:

*"when not performing her specified tasks, Miss Walton was not required to give Miss Jones her full attention ... in view of this finding ... it cannot be said that Miss Walton was continuously performing her contractual duties for 24 hours each day."* (Tab 21, at paragraph 41 ER1 refers).

7.8 The Conditions of Employment (Guernsey) Law, 1985 requires in Section 3A (1) I *“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 of pay”*.

7.9 The Employment Protection (Guernsey) Law, 1998 as amended states in Section 11 (1) Dismissal in health and safety cases. *“The dismissal of an employee by an employer shall be regarded for the purposes 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.....1c (2) brought to his employers attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety”*.

7.10 The Employment Protection (Guernsey) Law, 1998 as amended states in Section 12 (1) Dismissal on grounds of assertion of a statutory right *“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 (or, if more than one, the principal reason) was that the employee .....alleged that the employer had infringed a right of his which is a relevant statutory right. ....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.....12.4 for the purposes of this section a relevant statutory right is any right conferred by or under-*  
*(a) this Law*  
*(b) the Conditions of Employment (Guernsey) Law 1985*  
*(e) the Minimum Wage (Guernsey) Law, 2009”*

## **8.0 Summary of Submissions by the Applicant on Minimum Wage Complaint**

- 8.1 The Applicant submits that she was paid less than the Minimum Wage, which she was entitled to, being regarded as a salaried hours worker.
- 8.2 In the employment contract under the description ‘normal hours’ it appears that the Applicant was required to work 22 hours per day and was given a two-hour break each day. The Respondent had clearly indicated the role required such coverage given the requirements set out in the ‘Job Details’ sent to the Applicant on 26 November 2014 as follows:

*“I need to be reassured that the candidate will remain on my property each day and evening, except their allocated day off each week and however return to property at a given time each evening”*

*“I require assistance for...nightly respite and someone on property should I need assistance 24 hours per day”*

(EE2 Page 3 Paragraph 10 refers)

Accordingly the Applicant was at work during the day and at night. She was required to remain on the Respondent’s property each night of the week. Even when she was permitted to be asleep she was still required to be on call, answer the phone and to deal with anything untoward that might arise. To facilitate these duties a baby intercom was installed on 17 January between the Respondent and the Applicant during night-time hours. The calculation of the hourly rate should be based on a full 24 hours per day.

- 8.3 The Minimum wage rate applicable in the Applicant’s case is £6.65 per hour. The accommodation and food offset is £92 per week.

Assuming all 24 hours are paid in any one day the computed hourly rate is £2.33 (£1300 x 12 months / 365 days : 24 = £1.78 per hour + the weekly offset which in hourly terms is £0.55 per hour = £2.33 per hour.

- 8.4 The Minimum Wage (Guernsey) Law, 2009, as amended provides by Section 1(1) that a worker who qualifies for a 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.
- 8.5 The Applicant qualified. Regulations made pursuant to Section 2 (3)(a) of ‘The MW Law’ also make provision for determining the hourly rate of remuneration in any pay period.

Thus what is 'work' or 'working' for the purposes of 'The MW Law' is to be determined by those regulations made under its powers.

- 8.6 The Commerce and Employment Statutory Minimum Wage Employment Guide distinguishes between workers who are engaged on time work and salaried hours work. It provides the procedure for establishing the hours worked for the purposes of the MW calculation (time work v salary) and lays down the procedure for determining whether the Minimum Wage is paid or not.
- 8.7 The claimant falls within the category of someone doing 'salaried work' as defined in the Employment Guide. Workers paid for a set basic number of hours a year, who receive an annual salary paid in equal or monthly instalments are salaried workers. The contract does not have to state the hours as an annual figure, but it must be possible to work out from the contract what the basic hours are. Salaried hours workers must be paid the Minimum Wage for hours spent at work and required to be working; on standby; or on call, at or near the place of work.
- 8.8 The Applicant is qualified under 'The MW Law' to be paid not less than the Minimum Wage and the determination of the hourly rate must be in compliance with the regulations in force in the period January to March 2015.

**9.0 Summary of Submissions by the Respondent on the Minimum Wage Complaint**

- 9.1 The Respondent provided a 'chronology of events' (ER1 Tab 15 refers). This details the hours it asserts were worked by the Applicant in the period 5 January to 18 March 2015 and the payments made to her.
- 9.2 The Respondent contends that the Applicant commenced work at approximately 8.00 am with preparing breakfast and concluded her tasks at approximately 8.00 pm after serving dinner and tidying the kitchen.

As can be seen from Tabs 5, 6 and 7 ER1, the Applicant's primary duties were to buy food and prepare the Respondent's meals, which were consistently:

Coffee and an egg (a light breakfast).  
Soup and bread/sandwich (a light lunch).  
A balanced and small dinner.

The Applicant's secondary duties were to clean the kitchen and undertake light housework including some laundry, watering plants and from time to time cleaning the bathroom and the Respondent's bedroom. The Respondent already engaged the services of a professional cleaning company once a week to undertake the bulk of the cleaning.

The Respondent contends that the Applicant was therefore not carrying out duties throughout the entire day and that she spent a lot of time in her room or chatting with his neighbour, Mrs Nancy Allen - see witness evidence at Tabs 2 and 4 ER1.

- 9.3 The Applicant was contractually entitled to take two hours off every day and despite being encouraged to take these breaks she would often choose not to (preferring to

rearrange kitchen cupboards etc.) of her own accord - see witness evidence at Tabs 2 and 3 ER1.

- 9.4 The Applicant was contractually entitled to take one full day off every week and despite being encouraged to take these breaks she would often choose not to (preferring to take £60 in lieu of a day off instead); see witness evidence at Tab 2 ER1 and the Respondent's answers to the Applicant's questions dated 18 June 2015.
- 9.5 Taking into account the three days that the Applicant took off in January, the Applicant's working hours during January are generously calculated to be 10 hours per day before and after the Respondent was in hospital and three hours per day whilst he was in hospital. **Totalling 186 hours in January.**
- 9.6 Taking into account the fact that the Applicant took no days off (and contends that she took no two-hour breaks) during February, the Applicant's working hours have been generously calculated to be 12 hours per day for the entire month. **Totalling 336 hours in February.**
- 9.7 Taking into account that the Applicant left the Respondent's employ at 11.00 am on 18 March, and again that she says she took no two-hour breaks during March, the Applicant's working hours have been generously calculated to be 12 hours for 17 days and three hours for her final day of employment. **Totalling 207 hours in March.**
- 9.8 The Applicant's Pay
- 9.9 Total remuneration is (according to Section 3 of the Minimum Wage (Administrative Provisions) (Guernsey) Regulations, 2010 (Tab 31 ER1), the total number of payments received by the Applicant (as wages) added to the amount to be 'offset' for food and accommodation (as prescribed by the Minimum Wage (Accommodation and Food Offsets) (Guernsey) (Amendment) Regulations, 2014 (Tab 30 ER1 Refers).
- 9.10 In January the Applicant was paid £1300 by way of her monthly salary and £368 (£92 x 4) by way of food and accommodation. **Total pay of £1,668.**
- 9.11 In February the Applicant was paid £1300 by way of her monthly salary, £240 (£60 x 4) by way of overtime/pay in lieu of her untaken days off and £368 (£92 x 4) by way of food and accommodation. **Total pay of £1,908.**
- 9.12 In March, the Applicant was paid £1300 by way of her monthly salary, £60 by way of overtime/pay in lieu of her untaken day off and £230 (£92 x 2.5) by way of food and accommodation. **Total pay of £1,590.**
- 9.13 The Applicant's Hourly Rate of Remuneration

Section 2 of the Minimum Wage (Administrative Provisions) (Guernsey) Regulations, 2010 (Tab 31) holds that hourly rates are calculated by dividing total remuneration by the total number of hours worked.

The Applicant's average hourly rate throughout the 10.5 weeks of her employment (total pay of £5166 divided by total hours of 729) was therefore equal to £7.09.

#### 9.14 Hours Spent Sleeping at her Home

The Applicant contends that the hours she spent sleeping at her home throughout her employment should be deemed to be hours worked by her but this is misguided.

'The MW Law' (Tab 26 ER1) states at clause 32(2) that:

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

'The MW Law' further prescribes at Section 2(3) that regulations may be enacted to determine *"the circumstances in which ... a person is to be treated as, or as not, working"*. No such regulations have been enacted in Guernsey to date so I refer to the UK's National Minimum Wage Regulations 2015 (Tab 27 ER1) where such regulations have been drafted (Regulation 27) which state that *"hours treated as worked for the purpose of determining whether the worker works more than the basic hours in the calculation year"* include *"hours a worker is available at or near a place of work for the purposes of working, **unless the worker is at home.**"*

If it is argued that the Applicant was not 'at home' while she was sleeping in her flat annexed to the Respondent's house, Section (2) of the UK Regulation 27 states that *"hours when a worker is available **only includes hours when the 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 sleeping.**"*

For the avoidance of doubt Regulation 27 reaffirms Regulations 15(1) and 16(1) of the UK's previous National Minimum Wage Regulations, 1999 (Tab 28) which held that:

*"In addition to time when a worker is working, time work includes time when a worker is available at or near a place of work, other than his home, for the purpose of doing time work and is required to be available for such work except that, in relation to a worker who by arrangement sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purpose of working." 15(1).*

*"Time when a worker is available at or near a place of work, other than his home, for the purpose of doing salaried hours work and is required to be available for such work shall be treated as being working hours ... except that, in relation to a worker who sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being working hours when the worker is awake for the purpose of working". (16(1).*

If it is found that there are additional night hours to add to the hours worked figure, then this new and final hours total must be divided by the total pay she received (£5,166) to create an average hourly rate and determine whether she received the Minimum Wage in accordance with 'The MW Law'.

### 10.0 Conclusions

10.1 There are four primary elements to the complaints made by the Applicant. Firstly the assertion of a breach of a statutory right as provided for in The Employment

Protection (Guernsey) Law, 1998 as amended in requiring a payslip to be provided by the Respondent in compliance with the Conditions of Employment (Guernsey) Law, 1985.

It is 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; however, on the basis of the evidence presented, at no time during her employment did she complain to the Respondent, nor to Marie Trubuil, as to the lack of a pay-slip. It would appear that the Respondent was totally unaware that his legal advisers were not providing the appropriate paperwork to the Applicant. The Tribunal also notes that this issue was not contained in the Applicant's grievance letter of 10 March 2015. The only point at which the Applicant raises the issue is in her resignation letter of 18 March 2015. The Tribunal concludes that within the meaning of The Employment Protection (Guernsey) Law, 1998 as amended this does not amount to an assertion of a statutory right made reasonably clear to her employer during her employment, and not responded to, entitling the Applicant to resign her employment.

- 10.2 The second primary element of the Applicant's complaint is that the Respondent breached his duty of care in not providing a safe place of work within the meaning of Section 11 of The Employment Protection (Guernsey) Law, 1998 as amended.

One part of her argument is that her employer did not allow her to secure her contractual leave days and that mental duress was applied to her such that she felt compelled to forgo this leave for a number of weeks. It would seem to the Tribunal that these contractual leave days were willingly forfeited by the Applicant for a sum of £60 per day. What is disputed is the amount paid in cash to the Applicant for each of these days; the Applicant states that these days were paid at the rate of £42.75 whereas the Respondent has the clear recollection that he paid the Applicant £60.00 per day. The issue of disputed quantum is dealt with in our conclusions on the Minimum Wage allegations.

The Tribunal has also formed the view that, as an experienced carer with formal qualifications, the Applicant should have been able to manage her client's expectations and if necessary been able to call upon local health professionals to support her view. The Applicant had contact with both the hospital authorities and the Respondent's doctor and presumably could have made contact with them as to her workload and suggested potential solutions. It seems barely conceivable that she would agree to be the sole carer and submit herself to an exhausting and possibly unending seven day regime given her past professional experience. The Tribunal finds no merit in her allegation that mental duress was applied to her to forgo her weekly leave.

The Applicant also stated as part of her claim that the Respondent was angry, verbally abusive and shouted at her without any reason.

The Tribunal notes that the Respondent is suffering from multiple debilitating symptoms relating to his current medical condition and that he is very hard of hearing. Although we did not have the opportunity to see and hear from him in person it is clear from the testimony of Marie Trubuil he is somewhat cantankerous and a very independent person. He is evidently prone to raising his voice and clearly

from the evidence offered is frustrated by the diminution of his physical capabilities. In his written evidence the Respondent is adamant that he was not verbally abusive toward the Applicant and his general demeanour is further corroborated by the witness evidence of his neighbour Mrs Allen and that of Ms Trubuil, who has provided care for the Respondent for five years.

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 that no qualified carer or nursing assistant or nurse could reasonably claim any psychiatric injury on the basis of this behaviour.

There is as yet no ruling by the Royal Court as to what behaviour might justify an employee claiming a fundamental breach of a contract, however a prior judgment by the Employment and Discrimination Tribunal of Guernsey provides some assistance in defining the threshold which would need to be crossed to uphold such a claim. In *Appelqvist v the States of Guernsey* [2011] it was held that for an employer to fundamentally breach a contract of employment by way of bullying and harassment, the Tribunal would be looking for examples of "*overbearing insolence; personal intimidations; petty tyranny*". The behaviour of the Respondent does not seem to amount to such; the Tribunal is sympathetic to the Respondent's argument that it is hard to imagine that an 89 year old man, who is often bed bound and suffers from a host of medical problems, could be capable of intimidating anyone to the degree claimed by the Applicant.

The Tribunal therefore defines that there is no merit in this part of the Applicant's claim and dismisses it.

- 10.3 A third element of the Applicant's claim was that she had drawn her employer's attention to the alleged underpayment of the Minimum Wage and that her assertion of this right was in her grievance letter of 10 March 2015; this was ignored thus entitling her to consider herself as dismissed from her employment. The Applicant made no attempt to check with the Respondent that he had received this communication despite living on the same premises and the Tribunal accepts that neither the Respondent nor Ms Trubuil saw this communication until 23 April 2015. The Applicant's actions were not sufficient to amount to an assertion of a statutory right within the meaning of The Employment Protection (Guernsey) Law, 1998 as amended entitling her to consider herself as dismissed.
- 10.4 The fourth and final element of the Applicant's claim was for the underpayment of the Minimum Wage and was attended by a complex set of circumstances. In addition the Tribunal found the current Guernsey 'MW Law' to be silent on a number of issues with which it had to come to resolution. It should be noted that

Guernsey does not have 'Working Time Regulations' as provided for by many other jurisdictions. Finally 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 as 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.

- 10.5 On the issue of alleged underpayment of the Minimum Wage the Tribunal sought to understand the areas where there was agreement between the parties prior to examining the differences.

Both parties agreed that the first day worked by the Applicant was 5 January 2015 and her employment ended on 18 March 2015; there was also agreement that under The Minimum Wage (Guernsey) Law, 2009 as amended the Applicant qualified to be paid the Minimum Wage. It was also evident from submissions by both parties that the offset of £92 per week for the provision of food and accommodation could be added to any hourly computation of the Applicant's wages. It was jointly accepted that between 19 January and 29 January 2015 the Respondent was an in-patient at the Princess Elizabeth Hospital; and that in the period 1 February to 28 February the Applicant did not take her weekly leave day and worked seven days a week. Finally both parties made the distinction between waking and sleeping hours; beyond these areas there is no agreement.

- 10.6 The Respondent submits that the Applicant was paid a total sum of **£5166** for her period of employment composed of three monthly payments of £1300 (**£3900**) plus 10.5 weeks of food and accommodation offset at £92 per week (**£966**) plus five payments of £60 in lieu of days off (**£300**). Having considered all the evidence from both parties the Tribunal agrees that the Applicant did receive these payments and the sum **£5166** should be used for the determination of an hourly rate.
- 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.
- 10.9 'The MW Law' requires that individual pay reference periods must be used in the calculation of a Minimum Wage; the pay reference periods were monthly in accordance with the contract of employment and separate calculations need to be made for each month of the Applicant's employment.
- 10.10 The Tribunal considered each of the three monthly pay periods in turn. In considering the 'January Pay Period' the Tribunal took into account the Respondent's witness statement. The Respondent testified that from the commencement of her employment the Applicant was working for 12 hours per day less a two-hour rest

break; typically commencing her duties at 8.00 am, with a break taken typically between 2.00 pm and 4.00 pm and an evening meal being served at approximately 7.00 pm, with some final duties to clean up in the kitchen, finishing by 8.00 pm. This amounts to 10 worked hours a day.

- 10.11 The Tribunal was persuaded that the Respondent required more support than indicated in the pre-employment communications, it has also concluded that given the lack of any record by the Respondent (or his agent/legal advisors) of hours worked it believes 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. With reference to the tables in ER1 Tab 15 and EE1 Pages 58 to 60 this ruling should be applied to the following dates in January 2015, 6-11, 13-18, 29-31; these being the days the Respondent was in residence. This amounts to **150** eligible hours.
- 10.12 The Tribunal has also concluded that whilst the Respondent was in hospital between 19 and 28 January that the Applicant's daily visiting time of three hours a day should be included and this amounts to a calculation of **30** eligible hours.
- 10.13 The Applicant claimed that all her sleeping hours should have been accepted as eligible hours under 'The MW Law'. The Tribunal disagrees; the Applicant stated that her routine was to check on the Applicant prior to retiring for the night and then as she typically woke at 4.00 am for a personal toilet break she would briefly check that all was well with the Applicant. These checks were entirely at her own discretion; she was not obliged to perform these duties by the Respondent, the Tribunal believes it appropriate to apply guidance from the English Appeal Court ruling in 'Walton v The Independent Living Organisation' on 'working during sleeping hours' as noted in paragraph 7.7 of this judgment. The Tribunal has concluded the Applicant was not continuously working for 24 hours per day.
- 10.14 The Tribunal does accept, on the basis of the Applicant's evidence, that as the Respondent's health deteriorated prior to 19 January and on his return on 29 January there were a few occasions in that month when he needed her personal attention during the night time period. On the basis of the Applicant's evidence the hours spent working in the sleeping period amount to no more than **10** eligible hours in January 2015.

The total of eligible hours for the January reference period is therefore held to be **190**. These hours are then divided into the sum total of £1300 salary plus three weeks and six days of £92 weekly offset for food and accommodation £354.86 = **£1654.86** - equal to an hourly rate of **£8.71**; this being above the legal Minimum Wage rate of £6.65.

- 10.15 Turning to the February 2015 pay period the Applicant worked all 28 days; as a compensation for not taking her four contractual leave days she received £60 per day = **£240**. Pay was **£1300** and the food/accommodation offset for the 28 days of February amounted to **£368**. Thus gross compensation for February was **£1908.00**.

The evidence from both parties described the month of February as the most intensive period of personal care for the Respondent, particularly for the first half of the month when the Respondent was often bedbound. The Tribunal accepts that for

much of the month the Applicant probably did not take her contractual two-hour break period and that it would be just and equitable to consider that the Applicant was entitled to 12 eligible paid hours per day; that is 28 days x 12 hours per day = **336 hours**. In addition the same night time routine as January was adopted for February, however there was scant evidence from the Applicant as to how many were hours spent working in the sleeping period and the Respondent was probably too poorly to record such hours; in these circumstances the Tribunal believes it just and equitable to add **20** worked hours. The total hours for February are thus calculated as **356** for a total compensation of **£1908** - equals **£5.36 per hour**. This constitutes an underpayment of **£1.29** per hour for 356 hours totalling **£459.24**.

10.16 In March 2015 the Applicant worked for 17 days and left her employment at approximately 11.00 am on 18 March. The Respondent was evidently more mobile and less in need of constant day care. The Tribunal believes it just and equitable to use the same basis for computation of eligible hours as used for January, that is 10 eligible hours per day. It believes it just and equitable to confirm that there were three eligible hours worked on the morning of 18 March. Thus total eligible hours were 17x10 = 170 hours plus three hours = **173 eligible hours**. There was no evidence as to any worked night-time hours. The Applicant was paid £1300 plus £60 for a leave day not taken = **£1360** plus two weeks and three days of £92 weekly offset for food and accommodation **£223.43** = total eligible pay of **£1583.43**. This sum when divided by 173 hours equals **an hourly rate of £9.15**; this being above the prescribed Minimum Wage rate of £6.65.

10.17 The Applicant claimed that due to the Respondent's contractual obligations she should have been paid an accrual of 5.5 days holiday entitlement; the Tribunal does not have jurisdiction over this issue and the Applicant will need to seek resolution in another place.

## **11.0 Decision**

11.1 Having considered all the evidence presented by the parties, whether written in this judgment or not, the Tribunal makes the following decisions:

11.2 The Tribunal dismisses the claim that the Applicant was entitled to be considered dismissed for assertion of her statutory right, bestowed by The Conditions of Employment (Guernsey) Law, 1985, to receive a monthly payslip.

11.3 The Tribunal dismisses the claim that the behaviour of the Respondent amounted to a breach of his legal duty to provide a safe and healthy work place as defined in The Employment Protection (Guernsey) Law, 1998 as amended and there was no legal justification entitling the Applicant to consider herself as dismissed on these grounds.

11.4 The Tribunal dismisses the claim that the Applicant asserted her right to be paid the Minimum Wage in such a manner that it entitled her to consider herself dismissed as a breach of The Employment Protection (Guernsey) Law, 1998 as amended.

11.5 The Tribunal dismisses the claim that there was any underpayment of the prescribed Minimum Wage for the reference pay periods of January and March 2015.

11.6 The Tribunal finds there was an underpayment of the Minimum Wage for the reference pay period of February 2015 amounting to £459.24. **An Award of £459.24** is therefore made.

11.7 The Tribunal dismisses the Applicant's claim for costs.

Mr P Woodward

.....  
Signature of the Chairman

22 July 2015

.....  
Date