



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113344/2018

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Held in Glasgow on 19, 20 and 21 February 2019

**Employment Judge: Shona MacLean
Tribunal Members: Mr R McPherson and Mr A McMillan**

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Mr D S Heenan

**Claimant
In Person**

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Innseagan House Hotel Limited t/a Innseagan

**Respondent
Represented by:
Ms J E Parker -
Company Secretary**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that:

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1. The claims of automatic unfair dismissal, unlawful deduction of wages and breach of contract are dismissed.
2. The Tribunal finds and declares that the respondents did discriminate against the claimant, contrary to Section 39(2) of the Equality Act 2010, and his complaint of discrimination contrary to section 26 of the Equality Act 2010 succeeds.
3. Further, in respect of injury to the claimant's feelings the Tribunal also orders that the respondents shall pay to the claimant a further amount of **EIGHT HUNDRED POUNDS** (£800) for his injured feelings.
4. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, it is further ordered that the respondents shall pay to the claimant the additional sum of **£41.73** representing interest upon the injury to feelings award of £800 calculated at the appropriate interest rate of

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eight percent per annum for the period between 4 August 2018, the date the claimant, and 1 April 2019, being the date of this Judgment.

REASONS

Introduction

- 5 1. The claimant seeks compensation in relation to complaints of automatic unfair dismissal; discrimination on grounds of sexual orientation; wrongful dismissal (failure to pay notice pay) and unauthorised deduction from wages.
2. Each party prepared a set of documents incorporating all documentary productions upon which they relied. The claimant gave evidence on his own account. Peter Tiffoney, a friend gave evidence on his behalf. For the
10 respondent, the Tribunal heard evidence from Ms Parker, Company Secretary, October Smyth-Parker (Marketing Administrator), Steven Sparkes, Head Chef of the Portsonachan Hotel (the Portsonachan); and Gary Smith, General Manager of the Portsonachan.

15 The Relevant Law

3. Section 95 of the Employment Rights Act 1996 (the ERA) states that an employee will be treated as dismissed if his contract is terminated by the employer with or without notice; he is employed under a limited term contract and the contract expires by virtue of the limiting event without being renewed
20 under the same terms; or he resigns with or without notice because of a repudiatory breach of contract by the employer.
4. Section 104 of the ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principle reason) for the dismissal is that the employee: (a) brought proceedings
25 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 which is a relevant statutory right.

5. It is immaterial whether the employee has the right or whether the right has been infringed but the claim to the right in that it has been infringed must be made in good faith.
6. Section 13 of the ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless a deduction is required or authorised to be made by the statutory provision or a relevant provision of the worker's contract or that the worker has previously signified in writing his agreement or consent to the making of the deduction.
7. Section 23 of the ERA provides that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13.
8. Section 4 of the EqA lists the protected characteristics which include sexual orientation.
9. Section 26 of the EqA provides that a person (A) harasses another (B) if (A) engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating (B's) dignity or creating intimidating hostile degrading humiliating or offensive environment for (B). (A) also harasses (B) if (A) engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect as above. In deciding whether the conduct has the effect referred to each of the following must be considered:
 - a. (B's) perception
 - b. the other circumstances of the case and whether it was reasonable for the conduct to have that effect.
10. Section 27 of the EqA provides that (A) victimises (B) if (A) subjects (B) to a detriment because (B) does a protected act which includes raising a grievance that (A) or another person has contravened the EqA.
11. Section 124 of the EqA provides that if there is contravention of a provision the tribunal may make a declaration of rights, order for compensation, and any appropriate recommendation.

Issues

12. The issues to be determined by the Tribunal are as follows:

- a. Did the respondent terminate the claimant's employment?
- b. If so, was a reason for so doing because:
 - 5 i. the claimant raised issues about unpaid wages and/or
 - ii. the claimant raised a grievance with his manager about derogatory comments by a colleague on 3 or 4 August 2018?
- c. If the dismissal was automatic and unfair, what remedy is to be awarded?
- 10 d. Is the claimant entitled to pay in lieu of notice?
- e. Has the respondent made any unlawful deductions from the claimant's wages?
- f. Was the claimant subject to unwanted conduct related to a protected characteristic (sexual orientation) or of a sexual nature that had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive environment for him?
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- g. If so did the respondent take all reasonable steps to prevent harassment taking place?
- h. What remedy should be awarded if any?

20 **Findings in fact**

13. The Tribunal makes the following findings in fact.

14. The respondent is a limited company of which Mrs Parker is Company Secretary and her husband David Parker is a Director. The respondent operates two hotels: the Portsonachan Hotel in Loch Awe (the Portsonachan) and the Innseagan House Hotel Limited (the Innseagan) in Fort William.
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15. Gary Smith manages the Portsonachan where October Smyth-Parker works as a marketing administrator along with her husband Steven Sparkes who is the head chef. Zoe Knapper worked at the Portsonachan between January and June 2108 as head receptionist.
- 5 16. The employees based at the Portsonachan were paid weekly fortnightly in arrears. Mr Smith would provide payslips to employees but only if asked. The terms and conditions of employment were issued once an employee had completed a four-week trial period. At the same time, the employees would be issued with a handbook. A copy of the handbook was kept in a filing cabinet
10 at Portsonachan along with the personnel files. When new staff started, they were asked to complete a starter form which set out the employee's details including home address, national insurance number and bank account.
17. The Innseagan is a 23-bedroom coaching hotel which operates seasonally, March until early October. Until June 2018, the Innseagan was run by Linda
15 Aitken. Approximately six employees worked with her.
18. Mrs Parker is responsible for paying all employees' wages and accounting to HMRC. Mrs Aitken provided Mrs Parker and Mr Smith with details of each employee's weekly wage. Mr Smith would provide Mrs Parker with the same information for those employees based the Portsonachan. He would process
20 the payroll information for all employees on a Tuesday and provided the information to Mrs Parker who would make the appropriate payments into the employee's bank accounts.
19. While the payslips that Mr Smith processed referred to a pay date which was always a Tuesday being the day on which he input the information onto the
25 system, this was not the date on which salary was paid to the employees. The employees at Portsonachan were paid a salary on a weekly basis usually although not always on a Friday. There was no set pay day.
20. For personal reasons, Mrs Aitken resigned in June 2018 as did most of the employees who worked at the Innseagan.

21. Mrs Parker contacted Ms Knapper to ask if she was interested in managing the Innseagan as there were several bookings for coach parties during the season. Ms Knapper was up for the challenge. She was to recruit employees to work at the Innseagan and receive support from the chefs and housekeeping staff at the Portsonachan. Evening meals for coach parties (when required) would be prepared at the Portsonachan and transferred to the Innseagan and cooked there by one of the chefs from the Portsonachan.
22. Ms Knapper started at the Innseagan sometime in July 2018. She was responsible for recruiting staff for the Innseagan and running the business. She liaised with Mr Smith if she required additional support. She also provided Mr Smith with details of the wages that were to be paid as he had responsibility for processing the pay information.
23. Around 16 July 2018, Ms Knapper advertised a post of Reception/Housekeeper/General Assistant on a recruitment website. She interviewed the claimant over the telephone. The claimant indicated that he was looking for full time hours. Ms Knapper did anticipate any problem given that she did not have a full complement of employees. Ms Knapper asked the claimant to start working on Wednesday 18 July 2018. The claimant was informed that he would be paid £8 per hour.
24. On 18 July 2018 the claimant started working at the Innseagan. The claimant was asked to work a split shift to which he agreed. Ms Smyth Parker was there helping with the housekeeping. A coach party was arriving that day. Mr Sparkes was travelling to Innseagan later to prepare the evening meals.
25. The claimant asked when his wages would be paid. Ms Smyth Parker said that she was paid on a Friday, but he would have to speak to Ms Knapper as Ms Smyth Parker did not know the arrangement for the employees at the Innseagan. Ms Knapper said that the weekly wage ran from Monday to Sunday. She did know the day on which the claimant would be paid.
26. Ms Smyth Parker warmed to the claimant; she felt that he would be an asset at the Portsonachan and mentioned this to Mr Sparkes when he arrived later that day. The claimant was given a lift by Mr Sparkes and Ms Smyth Parker

during which they discussed the Portsonachan. The claimant mentioned that he was based in Fort William because his boyfriend worked in the local supermarket.

27. On 24 July 2018 Mrs Parker was at the Innseagan and was introduced to the claimant. From the discussions with Mrs Parker and Ms Knapper the claimant understood that he was to be paid one week in arrears on Monday 30 July 2018 and had arranged his finances accordingly.

28. Around late July 2018 Tiene Gerrard was employed at the Innseagan as a housekeeper.

29. On 30 July 2018, the claimant discovered that his wages had not been paid. He was concerned as he had financial obligations which he had agreed to pay that day. The claimant spoke to Ms Knapper who said it would be sorted out.

30. Ms Knapper contacted Mrs Parker and explained that the claimant had been expecting his wages that day; he needed them as he had financial commitments. Mrs Parker was not intending to pay the claimant until Friday 3 August 2018. However, Mrs Parker estimated the hours the claimant had worked and made a payment of £250 into his bank account. She told Ms Knapper that any balance due would be paid to the claimant in his next week's wages.

31. The claimant was not told that the payment was an advance and that his pay was not due until 3 August 2018. He was not told how the amount paid had been calculated; the period to which it related; and what deduction if any had been made. He did not receive a payslip. The claimant was told by Ms Knapper that any shortfall would be paid in his next wages. The claimant expected to be paid on Monday 6 August 2018.

32. On 4 August 2018, the claimant contacted his friend Peter Tiffoney to ask him to bring a fresh uniform and toiletries to the Innseagan as the claimant had been asked to work a double shift. Mr Tiffoney agreed. The claimant was finishing the bedrooms for the coach party. Mr Tiffoney met the claimant

sometime after 6pm outside the kitchen door which was open. Mr Tiffoney and the claimant had a chat and the claimant returned to the kitchen.

- 5 33. Ms Knapper, Mr Sparkes, Ms Gerrard and another colleague from the Portsonachan were in the kitchen. As Mr Sparkes tried to squeeze past the claimant, Mr Sparkes said, "*What do you want? Dick or arse?*". Mr Tiffoney overheard the comment and looked through the kitchen window. He saw Mr Sparkes bending over a counter and speaking to the claimant but could not hear what else was being said. The claimant was upset by the comment. He felt awkward and embarrassed.
- 10 34. The claimant's face went red and he walked out of the kitchen. He was joined by Ms Knapper. The claimant asked what Mr Sparkes' comment was about and said that it was out of order. Ms Knapper agreed and apologised. Ms Knapper said that the claimant should focus on serving rather than going back into the kitchen. The claimant felt angry but understood that Ms Knapper was going to speak to Mr Sparkes about the comment.
- 15 35. On 6 August 2018, the claimant expected to receive his wages. He was surprised when there was no payment to his bank account. The claimant spoke to Ms Knapper who apologised. She said that she would speak to Mrs Parker.
- 20 36. On 7 August 2018, the claimant received a payment into his bank account of £258.36. He was not told how the amount paid had been calculated; the period to which it related; and what deduction if any had been made. He did not receive a payslip. On his calculation, the claimant had not been paid the hours that he had worked and as he had no payslip he did not know the basis upon which the sum had been calculated.
- 25 37. Mrs Parker made a mistake. On 7 August 2018 she paid the claimant for 35.5 hours when Ms Knapper said that he was to be paid for 50 hours. Mrs Parker told Ms Knapper that the claimant would "*get the difference next Tuesday*". That was not communicated to the claimant.

38. The claimant sent an email to Mrs Parker on 8 August 2018 expressing concern that he was not being paid on time and for the hours that he had worked. The claimant said that unless it could be resolved, he would need to contact Citizens Advice and ACAS for advice. The claimant set out his understanding of the position and why he believed he was not being paid the correct amount. His email concluded, *"I would like to request that the rest of what I am owed be paid into my account today as soon as possible as I need this money yesterday. And from here out, I be paid on a Monday on time and in full for each work and also be given a full detailed payslip and a contract of employment to keep us all right."*
39. The claimant spoke to Mr Smith who told him that the email would be passed to Mrs Parker. Mr Smith explained that he processed the wages for HMRC, it was Mrs Parker who paid the wages into the employee's bank accounts.
40. Mrs Parker was on holiday. She decided that as the employees based at the Innseagan were paid on different days, Tuesday would be the most convenient day. Ms Knapper was informed of this.
41. On 13 August 2018, the claimant attended work but there were no wages in his bank account. The claimant spoke to Ms Knapper who told him that he was now being paid on a Tuesday. The claimant expressed surprise as he understood he was to be paid on a Monday. Ms Knapper said that as everyone was paid on different days it had been decided that Tuesday would be the best date. The claimant indicated that his pay had been short for the past two weeks. He was stressed and needed to make arrangements. The said that he needed to get advice and asked if he could leave work so that he could try and sort something out. Ms Knapper gave the claimant permission to leave. Provided he was paid the claimant was due back at the Innseagan on Wednesday 15 August 2018.
42. On the morning of Tuesday 14 August 2018, the claimant checked his bank account. No payment had been received. The claimant spoke to Ms Knapper who said that she too had not been paid and that things would be sorted out.

The claimant then attempted to contact Mr Smith and Mrs Parker by telephone but was informed that they were unavailable.

43. At 12:49 on 14 August 2018, Mr Smith sent an email to the claimant telling him to stop harassing Ms Knapper, Mrs Parker and himself about wages (the Email). Mr Smith said that payment would be made directly into the claimant's bank account today as agreed. The Email continued, "*I am advised that you walked out of the Innseagan Hotel yesterday, Monday 12 August, of your own accord and we therefore take it that you are no longer employed by Innseagan House Hotel as you have terminated your position.*"
44. The claimant was unaware of the Email when he was telephoned by Mr Smith around 14:20 on 14 August 2018. Mr Smith indicated that it had been agreed that the claimant would be paid on a Tuesday and it was now Tuesday. The claimant said that he was not told that he would be paid on a Tuesday, his wages were short, and he had not received a payslip. Mr Smith confirmed that the wages would be paid today at some point. He asked the claimant to stop telephoning. Mr Smith said that, "*we presume that you quit yesterday and I've sent you an email to that effect*". The claimant explained that he had not seen any email and told Ms Knapper that he was not working until he was paid. Mr Smith said that, "*Everyone gets paid weekly, fortnightly in arrears and there was no specific day for payment, it was just weekly*".
45. The claimant read the Email. He replied by email sent on 14 August 2018 at 15.28 (the Reply) stating that he was not harassing people but simply wanted to know when his wages were to be paid. The claimant said that he did not walk off shift the previous day and left to attend an appointment with a view to seeking advice on the situation and to plan to cover his financial commitments and that he would return on receipt of his wages being paid. The Reply stated, "*I have every intention of returning to work despite all that has gone on as long as payroll is sorted or have I to assume that I am not to return to work tomorrow. Please let me know as soon as possible.*"
46. Mr Smith responded to the Reply by email sent on 14 August 2018 at 18.38 attaching three wage slips dated 24 July 2018, 31 July 2018 and 7 August

2018. Mr Smith advised that the claimant's final wage slip and P45 would follow in the next few days.

47. The claimant sent an email on 14 August 2018 at 20.02 sought clarification about returning to work given the reference to sending, "*a final wage slip and P45*". Mr Smith replied on 14 August 2018 at 20.22, "*You left work yesterday, therefore resigning your position, hence the reason that you will receive your P45 in the next few days. We do not require you to return to the Innseagan Hotel.*"

48. On 14 August 2018, the claimant received payment for 50 hours of work when by the respondent understood that he had work 35.5 hours. The payslip showed a pay date of 7 August 2018. The claimant received subsequent payments on 22 August 2018 and 29 August 2018 of £120 and £96 respectively.

49. At the date of termination, the claimant was 32 years of age. He has been looking for employment but has been unable to find a permanent job in Fort William. He is in receipt of Universal Credit. The claimant has moved to Thurso to mitigate expenses and has found new employment with early effect from March 2019.

Observations on Witnesses and Conflict of Evidence

50. The Tribunal considered that the claimant was a polite and respectful person who genuinely believed what he said in evidence. Overall, the Tribunal considered that he was honest and reliable. There were three exceptions to this: the car journey, the rate of pay and the list of hours worked.

51. Mr Tiffoney was a long-standing friend of the claimant who in the Tribunal's view gave his evidence honestly and in an understated manner. He did not seek to embellish his involvement and was candid about what he heard and what he did not. While the Tribunal was mindful that he was loyal to the claimant, the Tribunal's impression was that Mr Tiffoney was upset and he was giving evidence because the respondent was questioning his integrity.

52. Mrs Parker gave her evidence in a calm and controlled manner. The Tribunal appreciated that Mrs Parker was on annual leave from around 7 August 2018 which exacerbated the situation. However, the Tribunal considered that while Mrs Parker might have been preoccupied with her family holiday she was aware of what was happening and in control of the finances. The Tribunal also felt that Mrs Parker gave the impression that certain policies, practices and procedures were in place. This was evidently not so. To the extent they existed, of which there was scant evidence, the employees including Mr Smith appeared to be unaware of them.
53. Ms Smyth Parker was an honest and reliable witness to the extent that her evidence was relevant to the issues to be determined by the Tribunal.
54. Mr Sparkes was a friendly witness who gave his evidence candidly and to the best of his recollection. He appeared to be under the impression that his sense of humour was shared by others and had no insight that the comment which he admitted to saying regularly was sexist and might cause offense.
55. Despite his experience in the hospitality business and position as General Manager the Tribunal considered that Mr Smith demonstrated a poor understanding of what was required to ensure procedures were known and followed. The Tribunal found much of what he said unconvincing and could understand why despite working at the Portsonachan for almost six months Ms Knapper appeared to have little understanding about the respondent's procedures.
56. While the claimant intended to call Ms Knapper as a witness she did not attend and neither party had requested a witness order. The Tribunal was however referred to various contemporaneous productions including text messages and transcripts of telephone calls.
57. The Tribunal's impression was that Ms Knapper was inexperienced in managing a hotel and employees. There was no evidence that the respondent provided her with written terms and conditions for her position as Manager of the Innseagan. She also appeared to be uncertain when her wages were to

be paid. There was no evidence of the employee handbook containing the respondent's policies being available at the Innseagan.

58. While the respondent's witnesses referred to Ms Knapper receiving support from the employees at the Portsonachan that was not the Tribunal's impression. Ms Smyth Parker and Ms Sparkes said that they spoke to the claimant on his first day about working at the Portsonachan and Mr Smith offered the claimant Ms Knapper's job.
59. There was conflicting evidence about whether the claimant was given a lift from Mr Sparkes and Ms Smyth Parker on 18 July 2018. The claimant had no recollection of this. Mr Sparkes and Ms Smyth Parker had a vivid recollection of the journey because of the difficulty Mr Sparkes experienced in executing a hill start as a learner driver.
60. The Tribunal considered that this had little bearing in relation to the issues to be determined. On balance the Tribunal felt that the claimant probably did get a lift that day which was more memorable to Mr Sparkes and Ms Smyth Parker than to the claimant. The Tribunal was satisfied on the evidence before it that while being discreet the claimant was open about his sexual orientation.
61. There was conflicting evidence about the claimant's rate of pay. The claimant said that he was initially employed on £8 per hour. However, after two days of work Ms Knapper said that she wanted the claimant to be her second and take on more responsibility. He would be paid £8.50 per hour with immediate effects. Mrs Parker and Mr Smith said that they understood the claimant to be employed at £8 per hour. Mr Smith said that he did not have authority to increase employees' wages without Mrs Parker's approval. While posts were advertised with a salary band it was unusual to increase the payment during a trial period.
62. The Tribunal considered that it was highly likely that Ms Knapper spoke to the claimant about his hourly rate increasing to correspond with increased responsibility. However, the Tribunal was not convinced that this was to take effect immediately. The Tribunal considered that while Ms Knapper was given responsibility to recruit employees Mrs Parker had a tight hold of the financial

reigns. Accordingly, Ms Knapper would have spoken to Mrs Parker when she wanted any increase in the claimant's rate of pay.

5 63. Another conflict in evidence was in relation to the date on which employees were paid. The claimant said that Ms Smyth Parker thought it would be a Friday as that was when she was paid. He said that Mrs Parker told him when they met on 24 July 2018 that he would be paid on the Monday. He was eventually paid on 30 July 2018 but then paid on a Tuesday. Mrs Parker said that she paid employees on a Friday. Ms Smyth Parker said that she was paid on a Friday. Mr Smith said that employees were paid weekly but there was no set day. On re-examination he said that usually it was a Friday.

10 64. The Tribunal considered that even if employees at the Portsonachan were paid weekly on a Friday there was no evidence before the Tribunal that all employees at the Innseagan were paid on a Friday. The evidence suggested that employees at the Innseagan were paid on a variety of days. In early August 2018 Mrs Parker decided unilaterally to pay them on a Tuesday.

15 65. There was a dispute over any outstanding wages due to the claimant. The respondent did not have a system in place recording and agreeing the hours worked by its employees at the Innseagan. The respondent had paid the claimant for the hours that Ms Knapper said in a contemporaneous text that the claimant worked at the rate of £8 per hour. The claimant sent a record of hours worked to Mrs Parker following the termination of his employment. He said that it was accurate and based on notes recorded on his mobile telephone at the time. This information conflicted with the some of the claimant's oral evidence and that of the respondent's witnesses. accurate and reliable record. The Tribunal was not satisfied that the evidence produced by the claimant was reliable.

20 25 30 66. There was conflicting evidence about events on 4 August 2018. The claimant said that Mr Sparkes said, "Do you want dick or arse?". This was confirmed by Mr Tiffoney who overheard the comment from the backdoor. Mr Sparkes denied saying, "dick" but admitted when squeezing past employees in the kitchen to habitually if they wanted "tits or arse". The Tribunal was provided

with witness statements from Ms Gerrard and Ms Knapper on which it placed no reliance as they were not present at the final hearing. The Tribunal did however consider the transcript of a telephone call between the claimant and Ms Knapper on 4 September 2018 in which she confirmed the comments were made but stated categorically that Mr Tiffoney was not present.

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67. Given Mr Sparkes' admission the Tribunal did not consider that much turned on this point. Mr Tiffoney did not say that he was in the kitchen. While Mr Sparkes did not admit to using the word, "dick" as he usually used the word "tits" the Tribunal concluded that it was more likely than not that he did. The Tribunal's impression was that Mr Sparkes considered that he was on good terms with the claimant and was aware of his sexual orientation.

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68. The final area of conflicting evidence was in relation to events on 13 August 2018. The claimant's evidence was that on being told that he was not being paid until the Tuesday (14 August 2018) he needed to leave work to sort things out with money and seek advice about what to do. He would return on the Wednesday as he would have the Tuesday off. As the claimant had not been paid on the morning on 14 August 2018 he called Ms Knapper who hung up on him. He then attempted to call Mr Smith who was not available. Mr Smith called him later to say that the wages were being paid and that he had sent the Email. After reading the Email the claimant sent the Reply clarifying that he had not walked out and had every intention to return. Mr Smith sent further emails clarifying that the claimant was being sent his P45 and was not required to return to the Innseagan. Mr Smith said that the claimant called him on 13 August 2018. Mr Smith asked him to stop calling and allow Mr Smith to sort it out. The claimant responded that he would not be back and asked for his payslips and P45 then hung up. Ms Smith spoke to Ms Knapper on 14 August 2018. The claimant had not attended work so Mr Smith sent the P45 and payslips as requested.

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69. The Tribunal was unconvinced by Mr Smith's evidence on this point. It was not put to the claimant in cross examination that he resigned during a telephone conversation with Mr Smith. The Tribunal also considered that Mr Smith's evidence contradicted the contemporaneous email exchange. The

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Tribunal preferred the claimant's evidence about the events on 13 and 14 August 2018.

Submissions

5 70. The claimant said that the proceeding could have been avoided but he had been met with rudeness and the respondent had taken no responsibility for what happened. The respondent had no real chain of command and had a lackadaisical attitude towards issues. The respondent could have prevented the remarks being said but did not consider it to be an issue just banter.

10 71. The respondent said that the sexual orientation claim was exaggerated. The claimant was not upset at the time and Mr Tiffoney was not present. The position was seasonal. The claimant had been paid the correct hours and he walked out; he was not dismissed. The claimant had not interest in resolving matters.

Discussion and Deliberations

15 *Did the respondent terminate the claimant's employment?*

72. In this case there was a question whether there had been a dismissal. It was for the claimant to show on a balance of probabilities that it was more likely than not that the contract was terminated by dismissal rather than by his resignation.

20 73. The Tribunal referred to its findings. It was satisfied that the claimant had permission to leave work on 13 August 2018 to sort out his finances. He intended to return on 15 August 2018 provided he was paid on 14 August 2018 which was when Mr Knapper said he would be paid. Ms Knapper reiterated on 14 August 2019 that the claimant would be paid that day. The
25 Tribunal considered that the claimant had not clearly said that he was resigning. The Tribunal's view was reinforced by the Email where Mr Smith wrote "*we therefore take it that you are no longer employed by Innseagan House Hotel as you have terminated your position*" and the comment during the subsequent telephone conversation "*we presume that you quit yesterday and I've sent you an email to that effect*". These comments in the Tribunal's
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view ran counter to the respondent's position that the claimant's actions amounted to an unequivocal resignation.

74. The Tribunal also noted that in the subsequent email correspondence the claimant confirmed that he did not walk off shift the previous day and left to attend an appointment with a view to seeking advice on the situation and to make arrangements to cover his financial commitments and that he would return on receipt of his wages being paid. Despite the claimant's clarification Mr Smith told him not to return to work. The Tribunal concluded that the claimant was dismissed.

10 *What was the reason for dismissal?*

75. The Tribunal then turned to consider the reason for the claimant's dismissal. The Tribunal was satisfied that at the time the claimant was dismissed he asserted to the respondent that it had not paid his wages. The Tribunal also accepted that the claimant was acting in good faith when he asserted that his wages had not been paid; he genuinely believed that his wages were to have been paid on the Monday.

76. The Tribunal considered that Mrs Parker had decided that the Innseagan employees were to be paid on a Tuesday. This had not been effectively communicated to the claimant. The Tribunal had no reason to believe that Mrs Parker did not intend to pay the claimant on 14 August 2018. She had told Ms Knapper that was when payment would be made. The amount that Mrs Parker paid was based on information previously provided to her by Ms Knapper. Mr Smith also understood that the claimant was to be paid on 14 August 2018. The reason for Mr Smith emailing the claimant was that Mr Smith thought that the claimant had resigned; the claimant had left work the previous day and did not attend on 14 August 2018. While the Tribunal considered that the respondent dismissed the claimant it did not consider that the reason for so doing was that the claimant raised issues about unpaid wages.

77. There was no evidence before the Tribunal to suggest that Mr Smith that knew that the claimant raised a grievance with Ms Knapper about derogatory

comments by Mr Sparkes on 3 or 4 August 2018. Accordingly, the Tribunal concluded that this was not the reason for the claimant's dismissal.

78. As the claimant's dismissal was not automatically unfair the Tribunal did not consider remedy under this head of claim which was dismissed.

5 *Is the claimant entitled to pay in lieu of notice?*

79. The Tribunal considered that the claimant was given no notice of termination of employment. However, he had been employed for less than four weeks. He was therefore not entitled to statutory notice or a payment in lieu. There was no evidence that he had a contractual entitlement to notice.

10 *Has the respondent made any unlawful deductions from the claimant's wages?*

80. While the Tribunal found it surprising that the respondent did not have a system in place recording and agreeing the hours worked by its employees at the Innseagan, the Tribunal did not consider that the record produced by the claimant to Mrs Parker following the termination of his employment was an accurate and reliable record. On the evidence before it the Tribunal was not
15 satisfied that the claim for unlawful deductions was well founded.

Was the claimant subject to unwanted conduct related to a protected characteristic (sexual orientation) or of a sexual nature that had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive environment for him?

20 81. The Tribunal considered that unwanted conduct can include a wide range of behaviour including spoken words. A single act can amount to unwanted conduct. Unwanted is essentially the same as unwelcome or uninvited.

82. While the Tribunal considered that there may have been a culture of banter in the kitchen the Tribunal did not find that the claimant was a willing participant
25 in inappropriate banter. While Mr Sparkes said that he used the phrase frequently in the kitchen the Tribunal did not find that that he used it more than once in the claimant's presence. The Tribunal therefore did not consider that the claimant's failure to tell Mr Sparkes that he found the phrase offensive did

not mean that he had no objection especially as the claimant spoke to Ms Knapper immediately afterwards and she agreed that it was inappropriate.

83. The Tribunal concluded that the claimant was subject to unwanted conduct related to a protected characteristic. The Tribunal moved onto consider if the unwanted conduct creating a hostile, degrading and humiliating or offensive environment for him.

84. The Tribunal was satisfied that Mr Sparkes made the comment in a light-hearted manner and did not intend to hurt the claimant.

85. The Tribunal therefore turned to consider if the unwanted conduct had that effect. The claimant was discreet about his sexual orientation. The comment was one-off, made in public in the presence of other work colleagues. The claimant spoke to Ms Knapper. The claimant felt awkward and embarrassed. His face went red and he walked out of the kitchen. The claimant did not know Mr Sparkes and Mr Sparkes did not know him. Later the claimant felt annoyed about the incident. The Tribunal considered that the comment could have been interpreted as related to sexual orientation. The claimant was offended, and it had the effect of humiliating environment for him.

86. The Tribunal then asked if it was reasonable for the conduct to have the effect on the claimant. The Tribunal did not consider that the claimant was prone to take offence. The comment was made by Mrs Parker's son in law and the head chef of the Portsonachan. The Tribunal concluded that Mr Sparkes comment amounted to harassment on the ground of sexual orientation.

Did the respondent take all reasonable steps to prevent harassment taking place?

87. Mr Smith referred to the Portsonachan employees being issued with handbook after four weeks employment. He said that the handbook said that harassment would not be tolerated. The handbook was not produced.

88. The Tribunal did not consider that the respondent took all reasonable steps to prevent Mr Sparkes making the comment. At the final hearing Mr Sparkes was open about his use of banter which he and Ms Smyth Parker found humorous and unoffensive. There was no evidence to suggest that

employees received training on the policies in the handbook. The Tribunal's impression was that the handbook, if it existed was kept in a drawer.

What remedy should be awarded?

- 5 89. The remedies available to the Tribunal are declaration of rights, order for compensation, and any appropriate recommendation.
90. The claimant did not seek any appropriate recommendation, so the Tribunal did not need to address that aspect of remedy. In finding for the claimant, the Tribunal has already made a declaration of rights in the Judgment above.
- 10 91. The main issue was to assess compensation which can include compensation for injured feelings, whether it includes compensation on any other basis.
92. Awards for injury to feelings are compensatory (see *Armitage & Others v Johnson* [1997] IRLR 162). They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.
- 15 93. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression." (see *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 [2003] IRLR 102).
- 20 94. In *Vento*, the Court of Appeal observed there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most
25 exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

95. For claims presented after 11 September 2017, the *Vento* bands are now a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.
96. In the Tribunal's judgment this is a case that appropriately falls into the lower band of the *Vento* guidelines.
97. The subjective feelings described by the claimant in his evidence at the final hearing were entirely plausible and credible. He had only worked with Ms Knapper and Mr Gerrard for a few weeks and with Mr Sparkes on a couple of occasions. Mr Sparkes is Mrs Parker's son-in-law. The claimant did not know the other colleague from Portsonachan. Against that Ms Knapper apologised for the comment and gave the claimant the impression that she would deal with the matter and speak to Mr Sparkes.
98. Applying a broad brush, the Tribunal assesses the amount payable to the claimant for injury to feelings as £800 and that is the amount the Tribunal ordered the respondent to pay to the claimant.
99. The Tribunal is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is the rate fixed for the time being, currently an amount of eight per cent per annum in Scotland.
100. By regulation 6, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. For the purposes of the award of interest, the day of calculation is today's date, 1 April 2019 being the date of this Judgment.
101. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in regulation 6(1) and (2), it may, under regulation 6(3), calculate interest for a different period, as it considers

appropriate. The Tribunal received no submission to that effect from either party, and it did not consider it appropriate to do so. The Tribunal cannot alter the interest rate of eight per cent per annum, as that is prescribed by law, and it is a matter in respect of which it has no judicial discretion to vary the interest rate, only the period to which that rate refers.

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102. Accordingly, the appropriate interest rate is eight percent per annum. The Tribunal orders the respondent to pay the claimant the additional sum of interest of **£41.73** upon the injury to feelings award of £800 calculated at the appropriate interest rate of eight percent per annum for the period between 4 August 2018, the date of the discrimination complained of and 1 April 2019, being the date of this Judgment, a period of 238 days. The Tribunal's calculation is $£800 \times 0.08 \times 238/365 \text{ days} = £41.73$.

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Employment Judge

S MacLean

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Date of Judgment

01 April 2019

**Entered in register
and copied to parties**

03 April 2019

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