



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Miles

**Respondent:** GS & LT Hesp t/a The Great Western Hotel

**Heard at:** Cardiff (via video)      **On:** 21<sup>st</sup> April 2021 and chambers discussion on 29<sup>th</sup> April 2021

**Before:** Employment Judge Howden-Evans  
Tribunal Member W Morgan  
Tribunal Member C Stephenson

## Representation

Claimant: Mr Leong, Solicitor, Newport CAB

Respondent: Mr C Howells, Counsel

## Reserved Judgment on Remedy

The Tribunal's unanimous decision is:

1. The Respondent is ordered to pay **£35,057.09** to the Claimant, in respect of unauthorised deductions from her wages.
2. It is just and equitable for the Claimant to be awarded **£4,996.02** compensation in respect of the Respondent's refusal to permit the claimant to exercise her rights under Regulation 13 and 13A Working Time Regulations 1998.
3. The Claimant is awarded **£2,854.40** compensation for unfair dismissal, **£1,409.40** in respect of notice pay and **£704.70** in respect of holiday pay for holidays accrued but not taken during the period 1<sup>st</sup> January 2018 until 20<sup>th</sup> May 2018.
4. The Claimant is awarded **£10,172.82** compensation for injury to feelings resulting from sexual harassment (and interest thereon).
5. The total amount outstanding that the Respondent is liable to pay the Claimant is **£55,194.43**

# REASONS

1. In the Judgment on Liability dated 6<sup>th</sup> March 2021, the tribunal made declarations that the Respondent had:
  - 1.1. made unauthorised deductions from the Claimant's wages, in that she had not been paid the national minimum wage.
    - 1.1.1. The Tribunal accepted the claimant had not been paid the national minimum wage throughout her employment (ie since 5<sup>th</sup> January 2015) but, was only eligible to claim for the period 24<sup>th</sup> October 2016 to 20<sup>th</sup> May 2018 (because of s23(4A) Employment Rights Act 1996). We found that throughout this relevant period the claimant was working 60 hours per week on average; 52 weeks of the year.
    - 1.1.2. Whilst the respondent has deducted £80 per week for accommodation from the claimant's wages, throughout the relevant period, the Tribunal noted that the claimant was only provided with a bedroom from May 2017 and had been sleeping in the laundry room in the cellar prior to that date – the tribunal noted there was an issue as to whether the allowance that can be offset for providing accommodation (when calculating the national minimum wage) was applicable in those circumstances.
  - 1.2. refused to permit the claimant to exercise her rights under Regulation 13 and 13A Working Time Regulations 1998.
    - 1.2.1. The Tribunal accepted, as parties agreed, the claimant had not taken a single day of holiday leave, since her employment commenced on 5th January 2015. We found the respondent had refused to permit the claimant to exercise her right to take paid annual leave – the claimant had requested time off and had been told "*We can't spare you. You worked last year without a day off – you can do it again*". We accepted that the appropriate approach to the claimant's holiday entitlement was to make an award of compensation under Regulation 30 (3) & (4) Working Time Regulations 1998 as suggested by the EAT in *Sash Window Workshop Limited and King* and expanded by the Court of Appeal and ECJ in that case. In light of the ECJ's decision in *Max-Planck-Gesellschaft zur Forderung der Wissenschaften e V v Shimizu* [2019] 1 CMLR 1233, the Tribunal accepted it was just and equitable in all the circumstances for the claimant to be compensated for 84 days holiday in the holiday years 2015, 2016 and 2017.
  - 1.3. Constructively unfairly dismissed the Claimant; and
  - 1.4. Contrary to s40(1)a and s26 of Equality Act 2010, harassed the claimant by unwanted conduct of a sexual nature.
    - 1.4.1. The Tribunal accepted the claimant had received unwanted conduct

of a sexual nature on 3 occasions.

2. At the remedy hearing on 21<sup>st</sup> April 2021, the tribunal heard evidence on oath from the Claimant. The Claimant was represented by Mr Leong, solicitor with Newport CAB; Mr Howells, Counsel, represented the Respondent. Mr Hesp and Ms Hall (a CAB representative) observed the hearing.
3. The Claimant had prepared a written impact statement which formed part of the 98-page Remedies Bundle. The tribunal read the impact statement and accepted it as the Claimant's evidence in chief. The Claimant gave evidence on oath – there were supplemental questions, cross examination by Mr Howells, tribunal questions and finally re-examination.
4. The tribunal also had the benefit of a Schedule of Loss and an Amended Counter Schedule of Loss and authorities relied upon by each party. Both Representatives gave oral closing submissions. Whilst the Tribunal were able to finish hearing evidence and oral closing submissions on the day, there was insufficient time for the Tribunal to consider its decision. The Tribunal considered its decision at a chambers discussion on 29<sup>th</sup> April 2021.

### **The Issues**

5. By closing submissions, the issues to be determined by the tribunal were:

#### Unauthorised deductions from wages; failure to pay National Minimum Wage

6. The Claimant contended:
  - 6.1. The Claimant's average week's wage should be calculated in accordance with s221 to 224 Employment Rights Act 1996 and should be by reference to 12 weeks' wages prior to the end of the Claimant's employment and was £55.41 per week;
  - 6.2. The Tribunal should only take account of money that had been paid and recorded on the payslips – this did not include any additional sums that may have been paid for "making breakfasts"
  - 6.3. The allowance that can be offset for providing accommodation should only be applied from 1<sup>st</sup> May 2017 onwards, at which point the Claimant was provided a bed.
7. The Respondent contended:
  - 7.1. Calculations should be divided into four periods and the Claimant's average weekly wage should be calculated by reference to Reg 6 & 7 National Minimum Wage Regulations 2015, with weekly wage (before the accommodation offset was added) being £86 per week.
  - 7.2. During the period May 2016 until May 2018, the Tribunal should assume the Claimant received an additional £50 per week on average for making cooked breakfasts (the Claimant was paid £5 per room for cooked

breakfasts).

7.3. The allowance that can be offset for providing accommodation should be applied from May 2016 as the Claimant was allowed to sleep in the laundry room on the premises from this point in time. (The Claimant asserts in the laundry room there was only a chair to sleep in; the Respondent asserts a bed was placed in the laundry room).

Appropriate recommendations:

8. The claimant was seeking the following recommendations:

8.1. Respondent to introduce policies and procedures on disciplinary, grievances, equality, harassment etc line with ACAS's Code of Practice and compliant with the Equality Act 2010.

8.2. Mr Hesp to undergo equalities and management training.

8.3. A copy of the judgement to be sent to regulatory bodies if recommendations are not complied with within three months.

8.4. Letter of apology / acknowledgment from Mr Hesp on headed paper to the Claimant

9. The Respondent submitted:

9.1. The recommendations set out in paragraphs 7.1, 7.2 and 7.3 (above) were not appropriate as the Claimant had already ceased employment with the Respondent and would not be returning, so these recommendations could not be said to have the purpose of obviating or reducing the adverse effect on the Claimant.

9.2. The recommendation set out in paragraph 7.4 was not appropriate as Mr Hesp does not accept that he has sexually harassed the Claimant, so he can't apologise for something he doesn't accept (per *Governing Body of St Andrews Catholic Primary School and others v Blundell* UAEAT/0330/09)

The appropriate award for Injury to Feelings (including any aggravated damages).

10. The Claimant claims £45,000 for Injury to Feelings (of which £10,000 is for aggravated damages), an award in the Vento top-band (as adjusted by the Presidential Guidance) for "the most serious cases, such as where there has been a lengthy campaign of harassment" and is seeking interest on the Injury to Feelings award.

11. The Respondent's Counter Schedule of Loss contends the Injury to Feelings award should be £3,500 (with no award for aggravated damages), an award in the lower band of Vento.

Denying the Claimant annual leave

12. The Claimant is seeking compensation of £4,996.02 for the 84 days of holiday that she was denied and compensation of £12,500 for not being permitted to take any holiday throughout her 3 ½ years of employment. The Claimant accepts there is no power to make an award of damages for injury to feelings for denying the Claimant annual leave.
13. The Respondent submits the Claimant has suffered no financial loss as she worked and was paid for these days and submits there was no evidence the Claimant had suffered an injury to her health – the Respondent submits no award of compensation should be made.

Holiday pay for the period 1st January 2018 until 20th May 2018

14. The Claimant contends she is owed 12 days' of holiday pay for leave accrued but not taken. She calculates this as £704.70
15. The Respondent contends she is owed 92.1 hours of leave calculated at £721.14

Notice pay

16. Parties agree the Claimant is owed £1,409.40 in respect of notice pay.

Unfair dismissal

17. Parties agree the Claimant's basic award is £2,354.40.
18. The Claimant contends the compensatory award should be £21,765.12 for one year's loss of earnings.
19. The Claimant also seeks compensation for loss of employer contributions to pension and £500 for loss of statutory rights.
20. The Respondent submits the Claimant has failed to mitigate her loss and has made a lifestyle choice to accept a roof over her head for work as a carer rather than properly remunerated income. The Respondent submits there should be no compensatory award for loss of earnings beyond July 2018.
21. The Respondent submits there has been no loss of employer contributions to pension, as the Claimant was not earning sufficient income to qualify for schemes like NEST and the Claimant's age meant she was not eligible to qualify for pension schemes.

**Findings of fact**

22. The Claimant started employment with the Respondent on 5<sup>th</sup> January 2015, at which time she was 65 years old.
23. At all times during her employment with the Respondent, the Claimant was in a vulnerable position because of her financial difficulties and not having a home.

We found the Respondent exploited the Claimant's circumstances.

**Findings relevant to unlawful deductions from wages / national minimum wage calculations**

24. Initially the Claimant slept in a shared mixed sex dormitory, but when this was let out, for over a year she slept in a chair in a cold laundry room in the cellar. From 1<sup>st</sup> May 2017, the Claimant was provided with a bed in a bedroom.
25. The Tribunal found that, on average, the Claimant was working for the Respondent 60 hours per week; 52 weeks of the year, undertaking cleaning for the whole hotel (except the area behind the bar); changing, washing, drying and ironing bedding and after the chef left, preparing breakfasts.
26. The Claimant was paid an extra £5 per room for breakfasts sold. The Respondent asserts we should assume the Claimant was paid an additional £50 per week for breakfasts sold and this should be added to her wages. This is not borne out by the P60 and payslips, which we accept are the best evidence as to the Claimant's total remuneration.
27. The Claimant's P60 with the Respondent, for the year ending 5<sup>th</sup> April 2018 provides her total gross pay for the year was £6,392, which equates to £122.92 per week. The Respondent has only been able to provide payslips for the period 24<sup>th</sup> February 2018 to 19<sup>th</sup> May 2018. The Claimant was paid weekly and from these payslips we note that the claimant's gross weekly pay (ie before deductions and before the £80 deduction for accommodation) for the 7 weeks during the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018 was £910 which equates to an average of £130 per week.
28. Every week, the Respondent has deducted £80 for accommodation from this gross weekly pay, which means the Claimant's weekly take home pay has ranged from £80.14 to £44.92.

**Findings relevant to compensation for being denied the right to annual leave**

29. Whilst it is accepted the Claimant has not had a day's holiday leave during her 3 years and 5 months of employment, other than the general health and wellbeing benefits associated with having a day's holiday (as can be implied per EAT decision of *Sash Windows*), the Tribunal are not aware of the Claimant suffering any additional loss because of not having holiday leave. There is no evidence to suggest the Claimant has suffered a health condition or any other type of loss as a result of being denied her right to take holiday leave.

**Findings relevant to sexual harassment**

30. The Judgment on Liability identified the following specific acts of sexual harassment:
  - 30.1. During summer of 2015 Gary Hesp slid his arm around the back of the Claimant's waist when they were alone in an upstairs guest room

- 30.2. During the winter of 2016 Gary Hesp slid his arm around the back of the Claimant's waist when they were alone in the downstairs cellar (the laundry room)
- 30.3. On New Year's Eve 2017 after 10pm Mr Hesp put his right arm around the Claimant's waist as the Claimant let him into the hotel, again this occurred when they were alone.
31. The tribunal found each of these events to be an act of sexual harassment. We accepted that Mr Hesp did not intend to violate the Claimant's dignity or create a humiliating environment; so this was not conduct with the proscribed purpose. However against the backdrop of these incidents occurring when they were alone, and on one occasion, in the room that was supposed to be her personal sleeping accommodation, and as Mr Hesp was her boss and the Claimant, a mature lady, was trapped in a powerless situation, we accepted the Claimant reasonably perceived Mr Hesp's actions as violating her dignity and creating a degrading and humiliating environment for her.

### **The impact the acts of discrimination have had on the Claimant**

32. On each occasion the Claimant stepped away from Mr Hesp to indicate she was not consenting to this touching but she felt powerless to say or do anything further – she felt her only option was to ignore the touching and act as though it had not happened.
33. The Claimant perceived herself as being an older woman in a vulnerable situation and as such she felt demeaned by Mr Hesp's unwanted conduct of a sexual nature. She felt trapped in a difficult situation as there was no-one to complain to as her bosses were Mr Hesp and his wife and she believed that if she complained she would be ousted from the hotel and would have nowhere to live.
34. The touching did have an appreciable impact on the Claimant – she found herself ruminating about what had happened, asking herself questions about what would have happened if she had responded differently. Subsequently she confided in a friend about the incidents. Sometime after leaving the Respondent's employment, the Claimant was able to recognise that this conduct of a sexual nature had added to her feelings of low self-esteem.

### **Findings relevant to the Compensatory Award in the Unfair Dismissal claim**

35. The Claimant was 69 years old at the date of dismissal. At that point in time, whilst she could drive, she did not have a car.
36. On 12<sup>th</sup> March 2018, whilst still working for the Respondent, the claimant started working 13 hours per week as a visiting carer to an elderly widow, for which she was paid £100 per week.
37. When she ceased employment with the Respondent, on 20<sup>th</sup> May 2018 she moved into a coach house as the owner offered her free accommodation to help her to leave the Respondent.

38. In July 2018, the Claimant became a full time carer for the elderly widow and moved in to live with her. She was then paid £150 per week until 23<sup>rd</sup> December 2018. Sadly the elderly widow died on 17<sup>th</sup> December 2018. The Claimant was allowed to live in the widow's flat until 25<sup>th</sup> March 2019 at which point she moved into Belmont House Residential Home as an unpaid carer for the home owners, an elderly couple. She continues to live at this address and care for one of the home owners.
39. In October 2019, the claimant started to receive her state pension and in October 2020, the claimant started to receive her teachers' pension.
40. The tribunal accept that the Claimant has not provided any evidence suggesting she has looked for alternative employment since leaving employment with the Respondent; rather she has very kind-heartedly chosen to help friends in return for accommodation.

### **The Law - Remedies under the Equality Act 2010**

41. s124 and s119 Equality Act 2010, enable an employment tribunal to order the Respondent to pay the Claimant compensation (ie any remedy that a High Court could grant in tort, including compensation for injured feelings); and enable an employment tribunal to make appropriate recommendations.
42. It is well established that compensation is based on tortious principles. The aim is to put the Claimant in the position she would have been in if the discrimination had not occurred. (see for instance, *Abbey National v Chagger* [2010] ICR 397). The award should compensate the claimant for her loss caused by the discrimination; it is not to punish the respondent.
43. An Injury to Feelings award attempts to provide compensation for “*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on*” caused by the discriminatory acts (per Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police* (No.2) [2003] IRLR 102, CA)
44. In *Armitage, Marsden and H M Prison Service v Johnson* [1997] IRLR 162, EAT, Mrs Justice Smith gave the following oft-cited guidance:
- “(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor’s conduct should not be allowed to inflate the award.*
- (2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham’s phrase, be seen as the way to untaxed riches.*
- (3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any*



*particular type of personal injury award; rather to the whole range of such awards.*

*(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*

*(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made."*

45. The starting point, when considering the amount to award for injury to feelings is the guidance given by Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police* (No 2) [2003] IRLR 102. In *Da'Bell v NSPCC* [2010] IRLR 19, EAT, Judge McMullen QC confirmed the figures adopted in *Vento* should be adjusted to reflect inflation and subsequent Presidential Guidance notes have further adjusted the *Vento* figures to reflect the Court of Appeal decisions in *Simmons v Castle* [2012] EWCA Civ 1039.

46. The Tribunal is grateful to both advocates for providing examples of comparable injury to feelings cases. We are also aware of amounts recommended in the Judicial Studies Board Guidelines for personal injury awards. However, the tribunal are also mindful of EAT guidance that "*a comparative exercise has to be treated with some caution*", as the amount of injury to feelings will depend on the particular facts of each case.

47. Turning to aggravated damages, these can be awarded where an employment tribunal is satisfied the respondent has "*behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.*" (see *Alexander v Home Office* [1988] IRLR 190, 193, May LJ)

48. The Law Commission Report 247, on Aggravated, Exemplary and Restitutionary Damages, attempted to define aggravated damages:

*"the best view, in accordance with Lord Devlin's authoritative analysis in Rookes v Barnard [1964] AC 1129, appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum."*

49. In *Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill, emphasised that aggravated damages are compensatory; they should not be used to punish conduct. Mr Justice Underhill explained the features that can attract an award of aggravated damages can be classified under 3 heads:

- 49.1. the manner in which the defendant has committed the tort;
- 49.2. the motive for it; and
- 49.3. the defendant's conduct subsequent to the tort, but in relation to it.

50. The features identified affect the award of compensation because they aggravate the distress caused by the actual wrongful act. Employment tribunals should ask *“what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?”*
51. Aggravated damages are an aspect of injury to feelings and may be expressed as a separate award or as an element of the injury to feelings award.
52. *“The ultimate question must be not so much whether the respective awards [injury to feelings and aggravated damages] considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.”* Commissioner of Police of the Metropolis v Mr H Shaw UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill.

### **The Law – Remedies under Employment Rights Act 1996 and National Minimum Wage Regulations**

53. The process for determining whether the national minimum wage has been paid is set out in the National Minimum Wage Regulations 2015 (NMWR), Regulation 7 - to calculate the worker's average hourly rate the tribunal need to divide the total qualifying remuneration received in the given pay reference period by the number of hours worked in that period and compare this figure with the appropriate national minimum wage rate at the time.
54. NMWR, Regulation 6 defines the pay reference period as being a maximum of one month or in the case of a worker who is paid wages by reference to a period shorter than the month, that period. So as the Claimant was paid weekly, the appropriate pay reference period is one week.
55. When considering the total remuneration received during a period, the tribunal needs to consider the gross amount (ie before deductions) received.
56. Where an employer has deducted a charge from the worker's pay in respect of the provision of accommodation, Regulation 14(1), NMWR provides that, to the extent that the accommodation charge exceeds the accommodation offset allowed, it will be deducted from the total remuneration received during the pay reference period
57. When a worker is paid at a rate less than the national minimum wage, S17(1) NMWA 1998 provides the worker is entitled to be paid the greater of
- 57.1. The shortfall between the amount paid and the amount that should have been paid under the NMW at the time; and
  - 57.2. The sum payable if the rate of the NMW applying at the time of the arrears being determined had been applicable throughout the relevant period.

### **Conclusions**

Unauthorised deductions from wages; failure to pay National Minimum Wage

58. We accept the correct approach to calculating this loss is set out in the National Minimum Wage provisions.

59. To calculate this we have:

- 59.1. Worked out the total qualifying remuneration received by the Claimant in the given pay reference period (taking into account the effect of the charge for accommodation and the accommodation offset allowed)
- 59.2. divided the total qualifying remuneration received by the Claimant in the given pay reference period by the number of hours worked in that period and compared this figure with the appropriate national minimum wage rate at the time.
- 59.3. Then having worked out the amount of the original underpayment in the pay reference period we have divided that by the minimum wage rate that applied at that time
- 59.4. and multiplied the figure by the minimum wage rate that applies now (to comply with S17(1) NMWA 1998).

60. Working from the P60 and payslips, which was the best evidence available to us, we accept that at all relevant times the Respondent was deducting £80 per week for accommodation. We are not aware of any authority that defines the term "accommodation" for the purposes of NMW provisions, so we have had to accept that the Respondent is entitled to offset accommodation even when the accommodation provided consisted of a dilapidated chair to sleep on in the laundry room in the cellar.

61. During the period 24<sup>th</sup> October 2016 to 1<sup>st</sup> April 2018 the best evidence we have as to the Claimant's gross weekly remuneration is the P60 which indicates her gross weekly income was £122.92 per week (before deductions).

62. During the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018, the best evidence we have are the pay slips which indicate the Claimant's gross weekly income was £129 per week (before deductions).

63. The Accommodation offset permitted in NMWR was

- 63.1. £42 per week between 24<sup>th</sup> October 2016 and 31<sup>st</sup> March 2017 (22.6 weeks).
- 63.2. £44.80 per week between 1<sup>st</sup> April 2017 and 31<sup>st</sup> March 2018 (52 weeks)
- 63.3. £49 per week between 1<sup>st</sup> April 2018 and 20<sup>th</sup> May 2018 (7 weeks)

64. This means the amount of accommodation charged (£80 per week) exceeded the accommodation offset permitted in the NMWR by the following amounts:

- 64.1. **£38 per week** (£80 charged - £42 per week permitted) between 24<sup>th</sup> October 2016 and 31<sup>st</sup> March 2017 (22.6 weeks).
- 64.2. **£35.20 per week** (£80 charged - £44.80 per week permitted) between 1<sup>st</sup> April 2017 and 31<sup>st</sup> March 2018 (52 weeks)

64.3. **£31 per week** (£80 charged - £49 per week permitted)  
between 1<sup>st</sup> April 2018 and 20<sup>th</sup> May 2018 (7 weeks)

65. We then calculated the total remuneration received by the Claimant in the given pay reference period (taking into account the effect of the charge for accommodation and the accommodation offset allowed)

65.1. During the period 24<sup>th</sup> October 2016 to 31<sup>st</sup> March 2017 (22.6 weeks) the **Claimant's total remuneration was £84.92 per week** (gross weekly income of £122.92 per week minus the £38 by which the accommodation charged exceeded the accommodation offset permitted by NMWR).

65.2. During the period 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2018 (52 weeks) the **Claimant's total remuneration was £87.72 per week** (gross weekly income of £122.92 per week minus the £35.20 by which the accommodation charged exceeded the accommodation offset permitted by NMWR).

65.3. During the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018 (7 weeks) the **Claimant's total remuneration was £99 per week** (gross weekly income of £130 per week minus the £31 by which the accommodation charged exceeded the accommodation offset permitted by NMWR).

66. As the Claimant was averaging 60 hours work per week, each week she was being paid:

66.1. During the period 24<sup>th</sup> October 2016 to 31<sup>st</sup> March 2017 (22.6 weeks) the Claimant was paid **£1.41 per hour** (£84.92 per week divided by 60 hours).

66.2. During the period 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2018 (52 weeks) the Claimant was paid **£1.46 per hour** (£87.72 per week divided by 60 hours).

66.3. During the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018 (7 weeks) the Claimant was paid **£1.65 per hour** (£99 per week divided by 60 hours).

67. This meant the Claimant was paid less than the minimum wage as follows:

67.1. During the period 24<sup>th</sup> October 2016 to 31<sup>st</sup> March 2017 (22.6 weeks) the Claimant was paid £1.41 per hour when the NMW was £7.20 per hour. **This was an underpayment of £5.79 per hour for 60 hours per week for 22.6 weeks = £7,851.24**

67.2. During the period 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2018 (52 weeks) the Claimant was paid £1.46 per hour when the NMW was £7.50 per hour. **This was an underpayment of £6.04 per hour for 60 hours**

**per week for 52 weeks = £18,844.80**

67.3. During the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018 (7 weeks) the Claimant was paid £1.65 per hour when the NMW was £7.83 per hour. **This was an underpayment of £6.18 per hour for 60 hours per week for 7 weeks = £2,595.60**

68. To comply with s17(1) NMWA 1998, we have divided the original underpayment by the minimum wage rate that applied at that time and multiplied this by the minimum wage rate that applies now (£8.91 per hour).

68.1. During the period 24<sup>th</sup> October 2016 to 31<sup>st</sup> March 2017: The underpayment of £7,851.24, divided by £7.20 per hour is 1,090.45 x current NMW (£8.91) = **£9,715.90**

68.2. During the period 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2018: The underpayment of £18,844.80, divided by £7.50 per hour is 2,512.64 x current NMW (£8.91) = **£22,387.62**

68.3. During the period 1<sup>st</sup> April 2018 to 20<sup>th</sup> May 2018: The underpayment of £2,595.60, divided by £7.83 per hour is 331.49 x current NMW (£8.91) = **£2,953.57.**

69. This means the total amount owed to the Claimant as an unlawful deduction from wages for failing to pay the national minimum wage is **£35,057.09** (£9,715.90 + £22,387.62 + £2,953.57).

Discrimination by sexual harassment - Appropriate Recommendations:

70. The tribunal finds that the following recommendations would obviate or reduce the adverse effects of the discrimination on the Claimant:

70.1. On or before 14<sup>th</sup> August 2021, Mr Hesp should write a letter of apology addressed to the Claimant, care of Newport CAB. The tribunal have considered the authority of *The Governing Body of St Andrews Catholic Primary School & Ors v Blundell* (which Counsel for the Respondent referred us to). We note that Mr Hesp does not concede he sexually harassed the Claimant; this Tribunal has found that whilst Mr Hesp may not have deliberately sexually harassed the Claimant, his actions had that effect upon the Claimant. We are not dictating the words to be used in this letter of apology, rather we expect Mr Hesp to reflect on the impact his actions have had on the Claimant and to write a suitable letter.

70.2. On or before 31<sup>st</sup> January 2022, the Respondent should have in place and have notified its workers of written policies and procedures covering:  
70.2.1. Grievance procedures; and  
70.2.2. Equality and diversity.

70.3. On or before 31<sup>st</sup> January 2022, Mr Hesp should have attended at least a 1 day training course in discrimination and harassment; this training needs to cover sexual harassment.

71. On or before 25th February 2022, the Respondent should write to the Employment Tribunal confirming that each of these recommendations has been complied with, within the specified time scale.
72. Whilst the Claimant is no longer employed by the Respondent, the tribunal considers it will reduce the Claimant's hurt feelings if Mr Hesp now takes steps to ensure that no future employee or worker experiences the treatment the Claimant has experienced. By contacting ACAS or a firm of solicitors, Mr Hesp will be able to find suitable policies and access suitable training, and this will give the Claimant some comfort that current workers at the Respondent's hotel are unlikely to experience harassment in the future and will know how to raise a grievance should they encounter problems.
73. The tribunal has declined to make any further recommendations
- The appropriate award for Injury to Feelings (including any aggravated damages).
74. The tribunal are tasked with fully compensating the Claimant for her loss that has been caused by the unlawfully discriminatory acts.
75. The tribunal considered whether it was appropriate to make an award for aggravated damages and considered the 3 heads identified by Mr Justice Underhill in *Commissioner of Police of the Metropolis v Mr H Shaw* (the manner, the motive and the defendant's conduct subsequent to the tort, but in relation to it). The Claimant has suggested it is appropriate to award aggravated damages as Mr Hesp was the claimant's manager, there was no grievance policy in place and Mr Hesp has subsequently denied harassment.
76. The Tribunal reminded itself that aggravated damages must be compensatory in nature; in relation to any aggravating features the Tribunal must ask "what additional distress did they cause to this particular claimant?" This was where the Tribunal was in difficulty as the claimant has not identified any additional hurt that had been caused by these factors. In the absence of any evidence of additional distress, the Tribunal has declined to make an award specifically attributed to Aggravated Damages.
77. Turning to consider the overall Injury to Feelings award, the Tribunal considered whether it was possible to separate the Injury to Feelings caused by each of the acts of discrimination and concluded it would be artificial to do so. Instead, the tribunal has had in mind all 3 acts of discrimination and the impact that they collectively had upon the Claimant.
78. As noted in the findings of fact, we are compensating the Claimant for the injury to feelings caused by 3 incidents of sexual harassment. On each occasion the Claimant was alone with Mr Hesp and Mr Hesp put his arm around her waist, which the Claimant reasonably felt violated her dignity and created a degrading and humiliating environment.
79. We acknowledge that the Claimant felt powerless to do or say anything about these incidents and that this has had an appreciable impact on her. We accept

that as a mature lady these incidents caused the Claimant upset and added to her feelings of low self-esteem. However, we note that the Claimant has not had to seek help from her GP or others and has not been too unwell to work or to go about her day-to-day activities as a result of these incidents.

80. Having considered the authorities we are satisfied that it is appropriate to make an award in the Vento bottom-band. We are awarding an overall Injury to Feelings award of £7,000. We are satisfied that this award fully and fairly compensates the Claimant for the distress she experienced as a result of these 3 incidents of sexual harassment.

#### Interest on the Injury to Feelings award

81. The tribunal has a discretion to award interest on the injury to feelings award at up to 8% per annum from the act of discrimination. As there are a number of acts of discrimination, the Tribunal has decided to award interest from, 1<sup>st</sup> September 2015, as the Claimant had experienced the first act of discrimination by this date. Reg 6 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 explains this should be calculated up to the day of calculation. The Tribunal has calculated interest up to 29<sup>th</sup> April 2021 at a rate of 8% per annum. This amounts to 2068 days (inclusive) and the interest on the Injury to Feelings award amounts to £3,172.82.

#### Compensation for being denied her rights under Regulation 13 and 13 A Working Time Regulations ("WTR")

82. As explained in paragraphs 113 to 117 of the Reasons provided in respect of the liability decision, the Tribunal are satisfied it is appropriate to award the Claimant compensation for the Respondent's breach of Regulation 30(1)(a)(i) of WTR (ie for refusing to permit the Claimant to take any annual leave). Alternatively, the tribunal were satisfied it would be appropriate for the compensation awarded under Regulation 30(1)(b) WTR (the holiday pay due upon termination of the contract) to be increased by 60 days (to include Regulation 13 leave that was accrued but denied in the years 2015, 2016 and 2017 (see discussion in paragraphs 106 to 112 of those Reasons).
83. We considered what amount of compensation would be just and equitable to award in respect of the Respondent's breach of Regulation 30(1)(a)(i). When we reflected on the Claimant's loss, we accept the Claimant has already been paid for each of these days (as she has worked for each of these days). However, during a worker's final year of work with an employer, they have also worked (and been paid for) days of holiday that they have accrued but not taken and WTR operates to pay them at a rate of 1 week's wages for each week of holiday accrued but not taken during that final year of employment.
84. We also considered the extent of the employer's default. In this case, the employer had totally denied the Claimant's right to take holiday leave, let alone paid leave, for 3 years 5 months.
85. In light of the EAT, Court of Appeal and ECJ decisions in *Sash Window Workshop Limited and King* and in light of the ECJ decision in *Max-Planck-*

*Gesellschaft zur Forderung der Wissenschaften e V v Shimizu* [2019] 1 CMLR 123, we considered it was just and equitable in all the circumstances for the Claimant to be compensated for the health and welfare benefits of 84 days' holiday that she had been denied in the holiday years 2015, 2016 and 2017. The best method of quantifying the value of these health and welfare benefits was to award a day's pay for each day of holiday that had been missed (just as the WTR operates in the final year of a worker's employment).

86. The Claimant is seeking compensation of £4,996.02 for the 84 days of holiday that she was denied (as calculated in the Schedule of Loss). This calculation takes into account the correct national minimum wage that was applicable at the time. Having checked this calculation, the Tribunal are satisfied it is appropriate to award compensation of £4,996.02 for compensation for being denied her rights to take holiday during the period 2015, 2016 and 2017.

87. In addition, the Claimant is seeking a further £12,500 for not being permitted to take any holiday throughout her 3 ½ years of employment. There is no evidence of any injury to the Claimant's health and no evidence of any further loss associated with this denial of the Claimant's rights. In the absence of any further loss, the tribunal has declined to make any further award of compensation.

#### Holiday pay for the period 1st January 2018 until 20th May 2018

88. The Tribunal accept the Claimant has correctly calculated this loss in her Schedule of Loss. The Tribunal awards £704.70 in respect of holiday accrued but untaken in the year 2018.

#### Notice pay

89. Parties agree the Claimant is owed £1,409.40 in respect of notice pay.

#### Unfair dismissal

90. Parties agree the Claimant's basic award is £2,354.40.

91. The Claimant contends the compensatory award should be £21,765.12 for one year's loss of earnings. However, the Tribunal accept that since leaving employment with the Respondent, the Claimant has not looked for alternative employment. Instead, she has very kind-heartedly chosen to help out friends in return for accommodation. In these circumstances, the Tribunal cannot say that the Claimant has attempted to mitigate her loss. The Tribunal accept that there should be no award for loss of earnings or loss of employer contributions to pension.

92. The Tribunal award the Claimant £500 for loss of statutory rights.

#### Grossing up

93. The tribunal considered whether it was appropriate to "gross up" the award to reflect the tax the Claimant will have to pay on this award (beyond the £30,000



tax free threshold). As the bulk of this award (the national minimum wage calculations) are calculated using gross (rather than net) pay, the Tribunal considered it would not be appropriate to gross up this award. To be clear, the Respondent is liable to pay the Claimant the total sum of £55,194.43 – there should be no deductions for tax or national insurance as the Claimant will account for these.

Recoupment Regulations

94. The Recoupment Regulations do not apply to this award.

Interest

95. If the full amount of this award is paid before 27<sup>th</sup> July 2021, no additional interest will be payable. If the award is not paid before 27<sup>th</sup> July 2021, additional interest at a rate of £12.10 per day will be payable from 13<sup>th</sup> July 2021 until payment. (see the Employment Tribunal (Interest) Order 1990).

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Employment Judge L Howden-Evans

Dated: 13<sup>th</sup> July 2021

RESERVED JUDGMENT & REASONS SENT  
TO THE PARTIES ON 13 July 2021

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FOR THE SECRETARY OF  
EMPLOYMENT TRIBUNALS  
Mr N Roche