EMPLOYMENT TRIBUNALS

BETWEEN

Claimant ***Respondent***

Mr Thomas Morris **AND** **GTC Pub Management Limited (In creditors' voluntary liquidation)**

JUDGMENT OF THE TRIBUNAL

Heard at: Manchester (by cvp) **On: 23 March 2022**

Before: Employment Judge A M Buchanan

Appearances

For the Claimant: In person
For the Respondent: No attendance and no response entered

JUDGMENT

It is the Judgment of the Tribunal that:

1. The complaint in respect of unauthorised deduction from wages is well founded and the respondent is ordered to pay to the claimant **£3131.58** for unpaid wages in respect of the period ending with the date of termination of his employment on 14 July 2021. The sum of £3131.58 is a gross amount and the claimant is to account to the appropriate authorities for any income tax and employee national insurance contributions due in respect of the sum of £3131.58. This amount is increased by 10% namely **£313.15** pursuant to the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). Accordingly, the total due in respect of this complaint is **£3444.73p**.

2.The complaint of unauthorised deduction from wages in respect of unpaid holiday pay is well founded and the respondent is ordered to pay to the claimant **£769.49** in respect of unpaid holiday pay. The sum of £769.49 is a gross amount and the claimant is to account to the appropriate authorities for any income tax and employee national insurance contributions due in respect of such sum of £769.49. This amount is increased by 10% namely **£76.94** pursuant to the provisions of section 207A of the 1992 Act. Accordingly, the total due in respect of this complaint is **£846.43p**.

3. The complaint of automatic unfair dismissal by reason of having made a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 is well founded and the claimant is entitled to a remedy. The alternative complaint of dismissal by reason of assertion of a statutory right pursuant to section 104 of the Employment Rights Act 1996 falls away.

4. The respondent is ordered to pay to the claimant **£3420** compensation for unfair dismissal. This amount is increased by 10% namely **£342** pursuant to the provisions of section 207A of the 1992 Act. The total due in respect of this complaint is **£3762.00p.**

5. The Employment Protection (Recoupment of Benefits) Regulations 1996 ("the 1996 Regulations") do not apply to this award.

6. The complaint of wrongful dismissal is well founded. There will be no award of compensation in order to avoid double recovery.

7. The complaint of harassment related to sexual orientation advanced pursuant to sections 26 and 40 of the Equality Act 2010 fails and is dismissed.

8. The alternative claim of direct sexual orientation discrimination advanced pursuant to section 13 of the Equality Act 2010 fails and is dismissed.

9. The total sum due from the respondent to the claimant is **£8053.16** and this sum is payable forthwith.

REASONS

Preliminary matters

1.1 The claimant instituted these proceedings on 27 August 2021 relying on an early conciliation certificate on which Day A was shown as 13 July 2021 and Day B was shown as 24 August 2021. Complaints were advanced of automatic unfair dismissal, harassment related to sexual orientation or in the alternative direct sexual orientation discrimination, arrears of pay and notice pay.

1.2 The respondent failed to file a response or appear at this or an earlier hearing.

1.3 A private preliminary hearing ("PH") by telephone took place on 29 November 2021. Orders were made at that hearing for a hearing of the complaints advanced as the burden of proof lay with the claimant, and it was inappropriate to give Judgment under Rule 21 of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules").

1.4 The claimant represented himself at the final hearing. The respondent did not attend.

1.5 At the conclusion of the submissions, I decided to reserve Judgment in order to give detailed consideration to the complaints advanced. This Judgment is issued with full reasons in order to comply with the requirements of Rule 62(2) of the 2013 Rules.

The complaints

2 The claimant advances the following complaints to the Tribunal:-

2.1 A complaint of automatic unfair dismissal advanced pursuant to sections 103A or 104 of the Employment Rights Act 1996 ("the 1996 Act").

2.2 A complaint of harassment related to sexual orientation pursuant to sections 26 and 40 of the Equality Act 2010 ("the 2010 Act") or in the alternative discrimination because of sexual orientation pursuant to sections 13 and 39 of the 2010 Act.

2.3 A claim for "other payments". This relates to unpaid wages by unpaid or underpaid furlough payments and holiday pay and is advanced pursuant to the provisions of Part II of the 1996 Act.

2.4 A claim for unpaid notice pay (breach of contract) relying on the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. The claimant also advanced a claim for a redundancy payment but withdrew that claim and it was dismissed by a Judgment dated 24 November 2021.

4 The Issues

The issues in the complaints advanced are as follows:

Time limits

1. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 14 April 2021 may not have been brought in time.

2. Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

2.2 If not, was there conduct extending over a period?

2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

Protected disclosures

3 Did the claimant make one or more qualifying disclosures as defined in section 43B of the 1996 Act?

3.1 The claimant says he made disclosures on these occasions:

PD1 On 23 December 2020 to LW when he asserted that furlough pay had not been correctly calculated.
PD2 On 13 January 2021 when he raised the same matters with LW and with Lisa W.
PD3 In January/ February 2021 when he raised the same matters with the accountants of the respondent.
PD4 0n approximately 22 January 2021 when he raised the same matters with HMRC.

3.2 Did he disclose information?

3.3 Did he believe the disclosure of information was made in the public interest?

3.4 Was that belief reasonable?

3.5 Did he believe it tended to show that:

3.5.1 a criminal offence had been, was being or was likely to be committed;

3.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.5.3 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.6 Was that belief reasonable?

3.7 If the claimant made a qualifying disclosure, was it made:

3.7.1 to the claimant's employer?
3.7.2 to the respondent's accountant?
3.7.3 to HMRC being a prescribed person namely HMRC within section 43F of the 1996 Act.
If so, it was a protected disclosure.

Unfair dismissal

4. Can the claimant prove that there was a dismissal?

5. Has the claimant shown the reason or principal reason for dismissal?

6. Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed or

7. Did the claimant assert a statutory right referred to in section 104 of the1996 Act?

8. Was the reason or principal reason for dismissal that the claimant asserted a statutory right? If so, the claimant will be regarded as unfairly dismissed.

Remedy for unfair dismissal

9. What basic award is payable to the claimant, if any?

10. If there is a compensatory award, how much should it be? The Tribunal will decide:

10.1 What financial losses has the dismissal caused the claimant?
10.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
10.3 If not, for what period of loss should the claimant be compensated?
10.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
10.5 Did the respondent or the claimant unreasonably fail to comply with it?
10.6 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
10.7 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

Wrongful dismissal / Notice pay

11. What was the claimant's notice period?

12. Was the claimant paid for that notice period?

13. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Harassment related to sexual orientation (Equality Act 2010 section 26)

14. Did the respondent do the following alleged things:

14.1 In or around October 2020 say the claimant had only been employed to enable the respondent to matchmake him with another member of staff?
14.2 Ask the claimant to perform as a dame at an event at the Pub in December 2020?
14.3 Make other off the cuff throw away remarks about sexual orientation directed to the claimant?

15. If so, was that unwanted conduct?

16. Was it related to sexual orientation?

17. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

18. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Direct sexual orientation discrimination (Equality Act 2010 section 13)

19 What are the facts in relation to the following allegations:

20.1 The matters mentioned at 14.1-14.3 above

20.2 Did the claimant reasonably see the treatment as a detriment?

20.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances was or would have been treated? The claimant relies on a hypothetical comparison.

20.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of sexual orientation?

20.5 If so, has the respondent shown that there was no less favourable treatment because of sexual orientation?

Unauthorised deductions

21. Did the respondent make unauthorised deductions from the claimant's wages in respect of furlough pay and holiday pay and, if so, how much was deducted?

22. How much is the claimant owed?

5. Witnesses

In the course of the hearing, I heard from the following witnesses:

Claimant

5.1 The claimant gave evidence and called no other witnesses. The claimant confirmed the contents of a witness statement extending to 6 pages and also confirmed the contents of a schedule of loss (pages 2 and 3).

Respondent

5.2 The respondent had not entered a response and I had no evidence from the respondent.

6. Documents

I had a bundle running to some 98 numbered pages. Any reference to a page number in these reasons is a reference to the corresponding page in the agreed bundle. I noted that the bundle contained some correspondence which the claimant had had with ACAS as part of the conciliation exercise. That correspondence is not admissible

pursuant to section 18(7) of the Employment Tribunals Act 1996 and therefore I did not have regard to it.

Findings of Fact

7. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, I make the following findings of fact on the balance of probabilities:

7.1 The claimant was born on 27 April 1995. The claimant began work for the respondent on 2 September 2020 as a bar manager at a new public house under the name of Hogarth's in Rochdale ("the Pub"). It was run by a husband and wife duo namely Lee and Lisa Wolstenholme. The claimant's employment began following a period of closure because of the covid-19 pandemic.

7.2 The claimant was issued with a contract of employment (pages 4-5). The contract confirms the date of commencement of employment as 2 September 2020 and the hours of work to be 16 hours minimum (per week). The contract provided that the claimant should give two weeks' notice to leave employment but that he would receive one weeks' notice of termination once his probationary period had expired. The probationary period was three months during which employment could be terminated without notice. The claimant was paid the national living wage which was £8.72p per hour when his employment began and rose to £8.91 per hour on 1 April 2021.

7.3 The respondent was obliged to close the Pub on 22 October 2020 following re-introduced restrictions because of the pandemic. The claimant was assured that he would be placed on furlough, and he agreed to that being so. Up until that point in time, taking information from payslips before me (page 28), the claimant had worked 233.5 hours over a period of 7 weeks 1 day. This equated to an average of some 32.65 hours per week. This equates to a gross weekly income of £284.70p (£8.72 x 32.65) over that period. The gross figure for that period would equate to some £2035 60. From information before me, I find the claimant received £1991.89 net (pages 18 and 28) and that gives me confidence in those figures. There was no income tax due and only minimal national insurance and employee pension contribution.

7.4 The claimant received the first furlough payments on 3 December 2020 of £546.06 net (page 18) which was considerably less than he was expecting. On 24 December 2020 there was an exchange of messages in which Lisa Wolstenholme ("Lisa") told the claimant the furlough payment was based on an average of the previous 4 weeks before furlough to which the claimant replied: *"80% of the previous 4 weeks would have been £821. I only got £546"* (page 7).

7.5 The claimant raised the matter with Lisa and she promised to look into it. The matter was in point of fact looked into by Lee Wolstenholme ("Lee") who wrote to the claimant on 6 January 2021 to confirm that "*the government have under paid you. You will get it backdated not sure when this will happen though*" (page 9). The claimant wrote to the respondent and said that he was entitled to receive the correct amount from the respondent even though the employer may have received a reduced amount from the government. A heated exchange took place on 13 January 2021 between the claimant and Lee during which I accept Lee said to the claimant *"You*

keep pushing and pushing, you're going to fuck it up for everybody else". Lisa then became involved again and calmed the situation but said words which the claimant found troubling namely: "*The accountant has done a little something so we all get a little bit more".* The claimant was genuinely and reasonably troubled by these remarks.

7.6 On 14 January 2021 Lee wrote to the claimant: "*I have just got off the phone to them, you will receive £971.86 on your next pay day, this brings everything up to date, you will then get £792 every four weeks after that . That's take-home pay".* The claimant replied: "*Thank you for sorting this, Lee. I completely understand how stressful it is on everyone. So, I really appreciate it".* Lee replied: "*OK do you agree with the figures before they send it again"?* The claimant replied "*Yes, I do"* (page 10).

7.7 The claimant received from the respondent new calculations of his entitlement on 14 and 19 January 2021. The claimant accepted that the calculations looked accurate and agreed them. Cordial relations with his employers were restored.

7.8 On 22 January 2021 the claimant contacted HMRC and reported suspected fraud on the part of his employer in relation to the furlough scheme. The claimant was told he would not hear the outcome of his report.

7.9 On 1 February 2021 whilst still on furlough, the claimant was asked to complete outstanding on-line training and did so by 19 February 2021. The courses undertaken were a variety of Front of House and Management courses (pages 41-52). The claimant had apparently been assigned the wrong courses but, after discussion with Lee, decided to remain on the same management courses with a view to increasing his prospects for promotion.

7.10 On 19 February 2021 Lee wrote to the claimant that he had just received £344.49 being the shortfall from the furlough scheme and that he would transfer it over. The claimant received that amount into his bank on 19 February 2021 (page 18).

7.11 On 6 May 2021 the claimant received a missed call from Lee at 20:09 and then a message from Lee which read: "*OK, well you haven't turned up to any training so we will take as you have left".* and which stated that the claimant had resigned his employment by not attending some in person COVID 19 compliance training which had taken place at the Pub on 5 and 6 May 2021. The claimant had not been notified of any training and thus had not attended. The claimant lived very close to the Pub (where the training took place) and, whilst working before the lockdown, had been telephoned by the respondent on more than one occasion to cover shifts which were short staffed. Those requests were made by telephone or text and the claimant had made himself available at short notice. There were five employees who did not attend the so-called mandatory training days but only the employment of the claimant and one other (Kelly Sheldon "KS") was terminated. KS had also contacted HMRC in respect of furlough payments received from the respondent.

7.12 When other employees attended the mandatory training days, they noticed that nothing had been laid out for the claimant and KS. This was reported later to the claimant who concluded that it suggested that neither the claimant nor KS were in

fact expected to attend. At no point over the two-day training period was the claimant contacted by the respondent to enquire where he was and why he had not attended. The claimant could and would have attended if he had been notified.

7.13 The claimant contacted KS after hearing she was no longer employed by the respondent and discovered that she too had made reports of fraud to HMRC. The claimant accessed his own personal tax account from HMRC and found that there appeared to be a discrepancy of some £2866.25 between the amounts claimed by the respondent for him in furlough payments and the amounts paid over to him. The claimant made another report of suspected fraud by the respondent to HMRC after the message of 6 May 2021 from Lee. The claimant heard nothing from the respondent after the message of 6 May 2021.

7.14 The claimant had not resigned his employment and so raised a grievance with the respondent on 2 July 2021 (pages 19-20). In the letter dated 1 July 2021, the claimant made it plain that the training dates of 5 and 6 May 2021 had not been communicated to him and that he had not resigned his employment. He did not consider that his employment had been terminated. The claimant referred back to the events of 13 January 2021 when he had been subjected to what he described as *"verbal abuse, aggressive language and an overall unpleasant voice call".* The claimant complained that he was still underpaid and that there appeared to have been a claim of furlough pay made by the respondent for him on 14 June 2021 amounting to £1024.90 which he had not received. The claimant asked that all his pay slips be sent to him.

7.15 Lee responded to the grievance on 7 July 2021 (page 23) with a letter which said a letter had been sent to the claimant on 7 May 2021 to confirm his employment had been terminated. It was asserted that the claim of £1024.90 on 14 June 2021 had been the result of a clerical error by accountants. A copy P60 to 5 April 2021 and a copy P45 was enclosed which showed the termination date of the claimant's employment to have been 24 April 2021 (pages 24 and 25). The claimant received that letter on 14 July 2021.

7.16 The respondent claimed to have sent to the claimant a letter terminating his employment on 7 May 2021, but the claimant received no such letter. The pay slips sent to the claimant by letter dated 7 July 2021 stated that some payments had been made to the claimant in cash. I find that the claimant never received any payment from the respondent in cash and that all payments were sent direct to his bank account (pages 17/18).

7.17 In planning for Christmas 2020 events at the pub, the claimant was asked by Lisa if he would dress up as a pantomime dame and serve drinks. The claimant had never expressed an interest in drag and had given no indication that dressing up in that way would be of interest to him. The claimant could not say when that conversation took place, but I infer it was before the pub closed on 20 October 2020. The claimant did not raise this issue with the respondent at any time before instituting these proceedings.

7.18 The evening before the closure of the pub on 22 October 2020, a conversation developed between the claimant and Lisa in which she stated to the claimant that one of the motivating factors in employing him was to "*set him up"* with another male

employee whom she suspected to be gay. The claimant is an openly gay man. The claimant did not raise this issue with the respondent at any time before instituting these proceedings.

7.19 The claimant made various applications for employment in July and August 2021 (pages 53 onwards). He was successful in finding employment and began work on 4 October 2021. From that point in time, he has no ongoing loss of earnings.

7.20 The claimant was advised on 14 January 2021 that the respondent company proposed to enter into creditors' voluntary liquidation. That information came to the claimant from the accountants appointed to assist in the voluntary liquidation. That step was taken after the claimant had served his schedule of loss on the respondent which claims a total sum of £46326.39 compensation in these proceedings. The letter from the accountants stated that they had been advised that the claimant was *"owed funds by the Company following a Court Order"*. The claimant was sent forms to complete in relation to the Redundancy Payments Office.

Submissions

8. The claimant chose not to make submissions.

9. The Law

Automatic Unfair Dismissal

9.1 I have reminded myself of the provisions of part IVA of the 1996 Act and the detailed definition of qualifying disclosure and protected disclosure. I note that the claimant must show that he disclosed information as opposed to simply making an allegation but that I should not become too concerned with the distinction between an allegation and information. I note that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

9.2 I note that in **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. The claimant must also have a reasonable belief that any disclosure being made is in the public interest.

9.3 I have reminded myself that any disclosure which in the reasonable belief of the employee making it tends to show that a breach of a legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure.

9.4 I have reminded myself of the provisions of sections 43F of the 1996 Act and the provisions of the Public Interest Disclosure (Prescribed Persons) Order 2014. I note that the Commissioners for Her Majesty's Revenue and Customs ("HMRC") are the appropriate body to receive information in respect of matters relating to the functions of HMRC and I note that the administration of the furlough scheme was a function of HMRC.

9.5 I have reminded myself of the provisions of section 103A of the 1996 Act which read:-

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".

9.6 In relation to the burden of proof I note that the burden to prove the reason for any dismissal lies with the claimant as he did not have two years qualifying service to advance a claim of ordinary unfair dismissal against the respondent pursuant to sections 94/98 of the 1996 Act.

Harassment related to sexual orientation: section 26 of the 2010 Act

9.7 The relevant provisions of section 26 of the 2010 Act provided:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--.sexual orientation;

9.8 In relation to what is required to establish a case of discrimination by harassment I have reminded myself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's sexual orientation (in this case).

9.9 I have noted the provisions of section 123 of the 2010 Act in respect of time limits. I have reminded myself of the distinction between continuing discrimination extending over a period of time and a series of distinct acts. I have reminded myself of the decision in **British Coal Corporation -v- Keeble 1997 IRLR 336** and the provisions of **section 33 of the Limitation Act 1980** in respect of the exercise of discretion to extend time in which to allow a claim of discrimination to be considered for remedy.

Unauthorised deduction from wages.

9.10 I have noted the provisions of the Coronavirus Job Retention Scheme and the provisions of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 which came into force on 31 July 2020.

Uplift under section 207A of the 1992 Act.

9.11 I have considered the provisions of section 207A of the 1992 Act and guidance from the Employment Appeal Tribunal on how to consider uplifting awards for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. I note that I must consider whether the Code applies to the complaint in question, whether there has been a failure to apply the code, whether any failure was unreasonable and whether it would be just and equitable to uplift any award for that failure up to 25%.

Discussion and Conclusions

10. I approach my conclusions by dealing with the various complaints advanced and issues arising in the following order:

10.1 The question of the date when the employment of the claimant terminated and the manner in which it terminated namely by resignation or express dismissal.

10.2 The question of any sums due to the claimant in respect of unpaid wages (furlough pay) and unpaid holiday pay up until the date of termination.

10.3 The question of whether any dismissal of the claimant was unfair and/or wrongful.

10.4 The calculation of any compensation due to the claimant in respect of his dismissal.

10.5 The question of the alleged harassment related to sexual orientation (or in the alternative direct discrimination) and any compensation due for that complaint.

Date and manner of termination of employment

11.1 There are various dates suggested for the date when the employment of the claimant with the respondent terminated. The first date which appears on the form P45 is 24 April 2021. There is no evidence at all to support that date as the date of termination. I did not hear from the respondent, and thus I had no explanation for that date being shown on the form P45. However, I conclude without difficulty that the claimant's employment did not end on 24 April 2021. There is no evidence of any contact between the claimant and the respondent on that date.

11.2 The next date suggested for termination is 6 May 2021 being the date on which Lee Wolstenholme wrote to the claimant to say that, as he had not attended mandatory training, the respondent would take it that he had left his employment. I have considered the effect of those words. They are not unambiguous words of dismissal but rather an attempt on the part of the respondent to construct a resignation. I accept the evidence of the claimant that he had no intention of resigning his employment on 6 May 2021 and did not in fact do so. I accept that the claimant had not been notified of any requirement to attend training events on either 5 or 6 May 2021. I accept that the claimant was keen to return to work for the respondent and would have done so if invited. I have considered whether the words of Lee Wolstenholme can be taken as words of dismissal. I have considered how a

reasonable employee reading those words in the context of the correspondence would have understood them and I conclude that no reasonable employee would have taken those words to be words of dismissal. The words demonstrate an attempt to engineer a resignation from the claimant which arose either through misunderstanding or through a cynical attempt by the respondent to engineer a termination of employment by resignation but certainly not by dismissal. In either event, the words written on that date do not amount to words of dismissal and I conclude that the employment of the claimant did not end on 6 May 2021.

11.3 I accept the evidence of the claimant that a letter said to have been sent to him on 6 May 2021 by the respondent confirming the termination of his employment with the respondent was not received by him. I found the claimant's evidence on this point to be entirely reliable and I have noted the absence of any correspondence from the claimant to the respondent in answer to any such letter. All that supports my conclusion. I have considered the contents of the letter of grievance written by the claimant dated 1 July 2021. That letter makes no reference to any correspondence of the like which the respondent states in its letter of 14 July 2021 had been sent. Accordingly, I conclude there was no dismissal of the claimant by letter in May 2021. A letter sent by the respondent on 13 July 2021 was received by the claimant on 14 July 2021 and it is clear from the contents of that letter that the claimant was dismissed by the respondent. An employee cannot be dismissed by an employer without knowing of the dismissal. I conclude that it was on 14 July 2021 that the claimant first knew he had been dismissed by the respondent and that is the date of termination of employment. The claimant was on furlough until that date, and I shall calculate sums due to the claimant on that basis.

Unauthorised deduction from wages

12.1 The information about the income received by the claimant is confusing. The claimant's taxable income record from HMRC (pages 15 and 16) gives a total taxable income which on both pages does not equate to the sums set out above the total. On page 15 the total is £6102.84 whereas the sums above that total £7111.34 – a difference of £1008.50 namely the first entry for 25 January 2021. On page 16 the total shown is £2639.08 whereas the sums above that total £3663.98 – a difference of £1024.90. In both cases, and having examined the claimant's bank statements, I shall work on the total shown on the statements and not the actual total namely £6102.84p and £2639.08p. The information contained in the electronic bundle was difficult to decipher in parts – in particular the figures on the various financial documents enclosed.

12.2 The average weekly income of the claimant in the seven weeks and 1 day he worked before 22 October 2020 was £284.70 as set out at paragraph 7.3 above. I find the claimant agreed to be placed on furlough and was entitled as a result to 80% of that sum until furlough ended which it did on 14 July 2021 with dismissal. I do not overlook that the minimum wage increased from 1 April 2021 to £8.91 per hour and thus from 5 April 2021 the amount due to the claimant increased slightly. The period from 22 October 2020 until 5 April 2021 is 23 weeks and the period from 5 April 2021 to 14 July 2021 is 14 weeks. I calculate the gross furlough pay due to the claimant was 80% x £284.70 namely £227.76. That increases to 80% x £290.91 from 1 April 2021 namely £232.72.

12.3 23 weeks x £227.76 totals £5238.48 and 14 weeks x £232.72 totals £3258.08. This gives a total gross entitlement of £8496.56p from the beginning of furlough to the date of dismissal. I conclude that there was no shortfall in wages paid for the hours the claimant worked up until the beginning of furlough on 22 October 2021.

12.4 I turn to consider what the claimant actually received in that period of time. Using gross figures, the claimant received £549.54 in week 35, £549.54 in week 39, £1380.81 in week 43, £824.31 in week 47, £824.31 in week 51, £824.31 in week 2 and £412.16 (excluding holiday pay) in week 6. I take those figures from the information at pages 29-32. I compare that to the information at pages 15 and 16. Any discrepancy is explained by a deduction of pension contribution. The total gross income received in the period in question is £5364.98. If that sum is deducted from £8496.56 the balance is **£3131.58p**. I award that sum for unauthorised deduction of wages up to the date of termination of employment on 14 July 2021. This is a gross sum, and the claimant is to account on receipt to the appropriate authorities for any income tax and employee national insurance contributions due in respect of that sum.

12.5 The claimant raised these matters with the respondent in a letter of grievance of 1 July 2021. Instead of being invited to a grievance hearing the claimant received a letter of dismissal from the respondent dated 7 July 2021. The ACAS Code of Practice clearly applied to those circumstances and the failure to hold a grievance meeting is a serious breach of that code. Schedule A2 of the 1992 Act includes section 23 of the 1996 Act as a complaint to which the provisions of section 207A of the 1992 apply. The breach by the respondent was unreasonable. It would have been an easy and speedy matter to offer a grievance meeting. The claimant applied for a 10% uplift for this breach, and I consider it just and equitable to award that uplift. The uplift is **£313.15** and therefore the total due for this complaint is **£3444.73p.**

Unpaid holiday pay

13.1 The claimant was employed from 2 September 2020 until 14 July 2021. In that period, he took no holidays and received no holiday pay save for £641.42 gross on termination (page 32).

13.2 The claimant was entitled to 5.6 weeks holiday per annum pursuant to the Working Time Regulations 1998 and in the period of his employment his accrued entitlement was 4.85 weeks. The gross weekly pay for these purposes is £290.91 (being the gross weekly average pay on termination) which multiplied by 4.85 gives a gross figure of £1410.91. If £641.42 is deducted, a balance remains of **£769.49** and I award this sum for unpaid holiday pay at date of termination. This is a gross sum, and the claimant is to account on receipt to the appropriate authorities for any income tax and employee national insurance contributions due in respect of that sum.

13.3 For the same reasons set lout at paragraph 12.5 above, I award an uplift of 10% on this sum namely **£76.94**. The total due for this complaint is therefore **£846.43p**.

Wrongful Dismissal

14.1 The claimant was dismissed without notice or notice pay on 14 July 2021. At the point of dismissal, he had worked for more than one month but less than one year

for the respondent. His statutory notice entitlement was one week. As it happens that corresponds to his contractual entitlement.

14.2 I conclude below that the claimant was unfairly dismissed, and I award compensation for the period from dismissal until the claimant found other and equivalent employment in October 2021. That compensation covers the one week notice period. If I award compensation for wrongful dismissal, there would be double recovery. Therefore, whilst the wrongful dismissal complaint is well-founded, I make no award of compensation.

Unfair Dismissal

15.1 I have considered whether the claimant made a qualifying and a protected disclosure at any time during his employment. I note from the list of issues that four such disclosures are alleged. I did not hear from the respondent. I remind myself that the burden to prove the reason or principal reason for dismissal lies with the claimant and I have considered whether he has done so on the balance of probabilities.

15.2 I have given close attention to the allegation that the claimant reported suspected fraudulent activity on the part of the respondent to HMRC in January 2021. I note from the list of issues that at one time this was said to have taken place in March or April 2021 but ,from the claimant's oral evidence, I am satisfied that the first such contact was made in January 2021. I accept the claimant's evidence that he contacted HMRC fraud line and reported the respondent for failing to administer the furlough scheme properly and for failing to make correct payments to him. I accept that the claimant genuinely and reasonably believed that he was reporting activity on the part of the respondent which evidenced that the respondent was failing to comply with its legal obligations in relation to the furlough scheme. I am satisfied that he had a reasonable belief that it was in the public interest for that disclosure to be made given the public funds were involved. I note that shortly after the disclosure was made in January 2021, the respondent made some corrections to the claimant's furlough pay which the claimant accepted. I conclude that the report by the claimant was a qualifying disclosure.

15.3 I am satisfied that the disclosure to HMRC was made by the claimant in accordance with section 43F of the 1996 Act because the alleged failure by the respondent fell within the description of matters in respect of which HMRC was the prescribed body to receive that report. I am satisfied that the claimant reasonably believed the allegations he was making were substantially true. I conclude that it was this disclosure which lay at the heart of the reason for dismissal. The disclosure to HMRC was a protected disclosure.

15.4 I infer that, at some point between January and May 2021, the respondent became aware of complaints made to HMRC and because of the contact between the claimant and the respondent in December and January 2020/2021, the respondent concluded that it was the claimant (possibly amongst others) who had made complaints. Whilst I note that good relations had apparently been restored between the claimant and the respondent after 13 January 2021, a number of things happened after that date which are troubling.

15.5 I note that when the claimant eventually received his P45, his leaving date was shown as 24 April 2021 which indicates that the respondent had decided on that day that the claimant was to leave its employment. There is no logical basis for that to be stated as the date of termination. Next, I accept that the claimant was not invited to the training events on 5/6 May 2021 and that the respondent then used that absence as an excuse to seek to manufacture a resignation by the claimant. The fact that the respondent was unsuccessful in that design is not relevant to the question of what was motivating the actions of the respondent at the time. I note and accept that another employee of the respondent had also made complaints to HMRC was also not invited to those training events. I accept the evidence from the claimant that at no time was he contacted on 5/6 May 2021 by the respondent enquiring why he had not attended the training and I accept that this is in marked contrast to the way the respondent used to contact him by telephone when at work given that he lived a very short distance from the Pub. I note and accept that when the claimant filed a grievance with the respondent, the respondent referred to a letter which had allegedly been sent to the claimant in May 2021, but I accept that no such letter was received by the claimant. I accept that after the claimant's purported resignation in May 2021, the respondent continued to claim furlough payments for the claimant. Whether or not that was a clerical error is something I cannot judge given that I did not hear from the respondent or anyone on behalf of the respondent. I accept that other employees also failed to attend the training events on 5/6 May 2021 but were not dismissed. Those are all very troubling matters around the circumstances of the claimant's dismissal.

15.6 The claimant asks me to infer from the combination of those factors that the reason or principal reason for his dismissal in July 2021 was because he had made a protected disclosure to HMRC. The claimant carries the burden to prove the reason for his dismissal on the balance of probabilities. I conclude that he has done so and on balance I am satisfied that the principal reason the respondent acted as it did in May through to July 2021 was because the claimant had made a protected disclosure to HMRC. I infer that by May 2021 the respondent had concluded that the claimant was behind reports to HMRC (of which by then I infer it knew) and so moved to dismiss the claimant albeit under the guise of resignation. The claimant had been a good employee and had shown flexibility and a willingness to work whenever required. There was no reason to have dismissed the claimant and I conclude that the reasons relied on by the respondent were manufactured because of the protected disclosure.

15.7 From that it follows that the claimant was automatically unfairly dismissed and is entitled to a remedy for unfair dismissal.

15.8 In those circumstances, I do not need to consider whether any other alleged disclosures to the respondent amounted to protected disclosures and I do not need to consider the alternative reason advanced for dismissal namely the assertion of a statutory right.

Unfair Dismissal compensation

16.1 The claimant sought the remedy of compensation.

16.2 The claimant had worked for the respondent for less than two years. This is not a case where there is an entitlement to a minimum basic award. Accordingly, applying the provisions of sections 118-122 of the 1996 Act, there is no basic award of compensation.

16.3 I conclude that if the claimant had not been unfairly dismissed, he would have been back working for the respondent on 14 July 2021. I accept the claimant's evidence that he found better paid employment on 4 October 2021. I find that the claimant made reasonable efforts to find alternative employment and there was no failure on his part to mitigate his losses. The claimant did not receive state benefits from the point of his dismissal until 4 October 2021 and therefore the 1996 Regulations do not apply to any award.

16.4 The period from 14 July 2021 until 4 October 2021 is 12 weeks. For these purposes I must use the net weekly earnings of the claimant from the respondent. The claimant did not earn enough to pay income tax and national insurance contributions were minimal. The weekly gross figure of earnings at dismissal would have been £290.91. I adopt the figure of £285 as the net weekly wage. 12 weeks at £285 is **£3420** and I award that sum for loss of earnings.

16.5 I award no sum for loss of statutory rights as the claimant had not worked long enough for the respondent to earn protection from ordinary unfair dismissal. The claimant is protected from automatic unfair dismissal in his new employment from day one.

16.6 The claimant was dismissed summarily by letter. There was a serious failure by the respondent to comply with the provisions of the ACAS Code of Practise which did apply even though the claimant did not have two years' service. Schedule A2 of the 1992 Act includes section 111 of the 1996 Act as a complaint to which the provisions of section 207A of the 1992 apply. The breach by the respondent was unreasonable. It would have been an easy and speedy matter to hold a meeting to discuss the dismissal. The claimant applied for a 10% uplift for this breach, and I consider it just and equitable to award that uplift. The uplift is **£342** and therefore the total due for this complaint is **£3762.00p.**

Harassment related to sexual orientation

17.1 The claimant filed this claim on 27 August 2021 having contacted ACAS for early conciliation on 13 July 2021. Accordingly, any matter which arises before 13 April 2021 is out of time. I asked the claimant for an explanation of the delay in bringing proceedings for harassment related to sexual orientation. The claimant candidly told me that he did not consider the matters about which he now complains to have been acts of harassment when they occurred but only reached that conclusion after his dismissal in July 2021. The claimant could not give me a date when the two comments about which he complains as amounting to harassment were spoken, but I conclude that they must have been spoken before the Pub was closed on 22 October 2020. For a timely claim, ACAS should have been contacted by 22 January 2021. The claims of harassment related to sexual orientation are some six months out of time.

17.2 in applying section 26 of the 2010 Act, I accept that both remarks made to the claimant as to the reason for his employment and as to a request to dress as a pantomime dame were unwanted conduct by him. The remarks were made in the course of a friendly conversation and the claimant did not challenge the remarks when they were made to him by Lisa. Given what was said, I accept that the remarks related to sexual orientation. However, I do not accept that the intent or effect of those remarks was to violate the claimant's dignity. Violation is a very strong word and I do not find any violation of dignity in the circumstances of this case.

17.3 I have considered whether the remarks created for the claimant an intimidating hostile degrading humiliating or offensive environment ("the prohibited environment"). I accept that the remarks made to the claimant were offensive to him. I have considered whether there is evidence that Lisa Wolstenholme intended to be offensive, and I find no such evidence. Indeed, the claimant himself suggests that his relationship with Lisa Wolstenholme was a good one and I do not conclude that the remarks made were intended by her to be offensive.

17.4 I have considered whether the effect of the remarks was offensive and, in deciding whether that was the effect, section 26(4) of the 2010 Act requires me to consider the claimant's perception of the remarks, the other circumstances of the case and whether it is reasonable for the remarks to have had that effect. Given that the claimant only thought these comments were actionable some nine months after they had been spoken to him and given that he enjoyed a good relationship with Lisa Wolstenholme, I do not accept that it was his perception at the time the remarks were spoken that the remarks were offensive. I do not accept, in the circumstances of this case, that that would have been a reasonable conclusion on his part even if he had reached that conclusion. The remarks made by Lisa Wolstenholme should not have been made but that is not sufficient of itself to render them actionable pursuant to section 26 of the 2010 Act. Accordingly, the claim of harassment related to sexual discrimination fails and is dismissed.

17.5 The claimant did not provide any evidence in support of the alternative claim of direct sexual harassment discrimination. The claimant provided no evidence of an actual or hypothetical comparator. That alternative claim also fails and is dismissed.

17.6 If the conclusion in respect of harassment should be wrong, then I have considered the question of time limits. Any action in relation to those remarks should have been brought by three months after the date that the last remark was uttered. It seems to me that the last remark was uttered on 22nd October 2020 and therefore proceedings should have instituted, or ACAS contacted, by 21 January 2021. The period between 21 January 2021 and 13 July 2021 is almost six months and that is a lengthy period of time in the context of remarks of this nature. Time limits are short in these cases to ensure that memories do not fade particularly in relation to remarks which were made in the course of an otherwise normal and friendly exchange. The claimant gave me no reason for his delay save that he had only thought many months subsequent to the conversations that the remarks amounted to harassment. Considering all the relevant factors, I do not consider it just and equitable that time should be extended in this case. Time limits are set out in the 2010 Act for good reason and there is no reason in this case to override those time limits. In the circumstances, even if my first conclusion as to the effect of the remarks is wrong,

then the complaint of harassment related to sexual orientation would not have been allowed to proceed given that they are patently out of time.

Final Comments

18.1 The claimant was advised by liquidators that the respondent company proposed to enter into creditors' voluntary liquidation in January 2022. I note liquidators were appointed on 3 February 2022. I direct that the address of the liquidators is now substituted for the address of the respondent company and that this Judgment be sent to the respondent company care of the address of the liquidators.

18.2 On his schedule of loss, the claimant sought compensation for alleged breaches by the respondent of the Data Protection Regulations. The Tribunal has no jurisdiction over such matters and that matter cannot be considered.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 8 June 2022
JUDGMENT SENT TO THE PARTIES ON

14 June 2022

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410438/2021**

Name of case: **Mr T Morris** v **GTC Pub Management Limited (in creditors' voluntary liquidation)**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 14 June 2022

"the calculation day" is: 15 June 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.