# EMPLOYMENT TRIBUNALS

**Claimant:** **Jordan Sherman**

**Respondent:** **H&A B-Side Limited**

**Heard at:** **London South (by CVP and in person)**

**On:** **26 & 27 January 2023**

**Before:** **Employment Judge Carney**

**Representation**
Claimant: In person
Respondent: In person

# JUDGMENT

1. The claimant's claim of unfair dismissal is not well-founded; this means the claimant was not unfairly dismissed.
2. The claimant's complaint of breach of contract is well-founded and is upheld. The respondent is ordered to pay the claimant the sum of £283.50 gross (less appropriate deductions for tax and national insurance contributions) by way of compensation for unpaid notice pay.
3. The claimant's complaint that there was an unlawful deduction from his wages is well-founded. The respondent is ordered to pay the claimant the sum of £1,606.52 gross (less appropriate deductions for tax and national insurance contributions).
4. The Claimant's complaint that the respondent failed to pay an amount due to him in lieu of holiday that had accrued and not been taken on termination of employment is well-founded. The respondent is ordered to pay the claimant the sum of £1,386 gross (less appropriate deductions for tax and national insurance contributions).

# REASONS

**Introduction**

1. By a claim form presented on 17 July 2020, the claimant complained of (i) unfair dismissal because he had made a protected disclosure, (ii) wrongful dismissal without notice or pay in lieu of notice, (iii) unlawful deduction from wages, and (iv) failure by

the respondent to pay him for statutory annual leave entitlement.

2. The respondent resisted all the complaints and said it had dismissed the claimant without notice because he had committed gross misconduct.

**Issues**

3. The issues to be determined by the tribunal were identified at a preliminary hearing on 6 September 2021 and confirmed at the start of the hearing, as follows:

***Protected disclosure***

3.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant says he made the following disclosures:

3.1.1. The claimant says in a WhatsApp message dated 31 May 2021 the respondent was endangering his health and that of his grandma.

3.1.2. The claimant says that in a WhatsApp message dated 05 June 2019 he alleged it was unlawful to require him to do work for the Respondent whilst on furlough.

3.1.3. The claimant says that in an email dated 19 June 2021 he alleged the Respondent was failing to pay his contractual wages.

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, or was being committed namely the claimant was required to work for the respondent whilst the respondent was claiming furlough pay for the claimant contrary to the provisions of section 76 of the Coronavirus Act 2020 and the HMRC directions made thereunder.

3.5.2. a person had failed, or was failing to comply with any legal obligation namely a failure to pay the Claimant his contractual wages.

3.5.3. the health or safety of any individual had been, was being or was likely to be endangered namely requiring the Claimant to endanger his health and safety and that of his grandma whom he was moving to live with by working.

3.6. Was that belief reasonable?

3.7. If the claimant made a qualifying disclosure, whether it was a protected disclosure because it was made to the claimant's employer.

***Automatic unfair dismissal***

4. Was the reason or principal reason the claimant's dismissal that the claimant made a protected disclosure?

***Remedy for unfair dismissal***

5. If the claimant was unfairly dismissed, what remedy should be awarded?

***Wrongful dismissal***

6. What was the claimant's notice period?
7. Was the claimant paid for that notice period?
8. If not, was the claimant guilty of gross misconduct? It is for the respondent to show on the balance of probabilities that the claimant did something so serious that the respondent was entitled to dismiss without notice.

***Unauthorised deduction from wages***

9. What was the effective date of dismissal of the claimant?
10. As at the effective dismissal what was the claimant's weekly pay?
11. Was the claimant paid his contractual wages (adjusted under the furlough scheme) for the period from 1 May 2020 until the effective date of termination?
12. If not, did such non-payment amount to an unauthorised deduction from the claimant's wages and, if so, how much was deducted?

***Holiday pay***

13. What was the claimant's leave year?
14. How much of the leave year had passed when the claimant's employment ended?
15. How much leave had accrued for the year by that date?
16. How much paid leave had the claimant taken in the year?
17. Were any days carried over from previous holiday years?
18. How many days remain unpaid?
19. What is the relevant daily rate of pay?

**Procedure, documents and evidence heard**

20. I heard oral evidence from the claimant and from Mr Brook Anderson on behalf of the respondent. Before the hearing, the claimant had provided a bundle of documents of approximately 30 pages. He had also disclosed an audio file of a voice note message, Bethan Ayers (the respondent's manager) had left on his phone on 5 June 2020. This had been previously disclosed to the respondent and was played several times during the course of the hearing.

21. The respondent had disclosed one WhatsApp message from the claimant to Mr Anderson dated 9 June 2020. In addition, the respondent had prepared a document headed "Defence", which Mr Anderson requested be treated as his witness statement.

22. Over the course of the hearing, the claimant disclosed a small number of additional documents, to which the respondent did not object. These were some bank statements showing when he had been paid by the respondent, an Instagram post of the claimant making cocktails, additional WhatsApp messages between the bar manager Bethan Ayers and the claimant from various dates in May and June 2020. And two photographs of a ladies' toilet that the claimant had been painting.

23. Mr Anderson initially said he would apply for a security video to be put into evidence but upon realising that the hearing would have to be adjourned to give him an opportunity to obtain and share the evidence, he decided not to do so.

24. Mr Anderson had technical difficulties accessing the cloud video platform hearing room. After several unsuccessful attempts, the hearing was converted to a hybrid hearing and he came into the tribunal to participate in it.

***Fact-findings***

25. The respondent is H&A B-Side Limited. The respondent's business, in which the claimant worked, is a small cocktail bar called Voodoo in Balham. It has capacity for 45 customers and currently has two full-time and two part-time employees. Voodoo is the respondent's only business. Mr Brook Anderson is the main shareholder and director of the respondent.

26. The claimant is nephew to Mr Anderson's (domestic) partner. Bethan Ayers, the manager of Voodoo, is the claimant's cousin and daughter of Mr Andersons's partner. Ms Ayers did not attend the tribunal to give evidence.

27. The claimant was employed by the respondent as a barman from 27 September 2019. Initially part-time (whilst he also had another job), the claimant started working full time for the respondent from the end of October 2020. Although Mr Anderson initially disputed this start date, the tribunal accepted the claimant's evidence on this. There is a one-page employment details document showing start date as 30 October 2019, but the claimant explained that that was when that document was created. The claimant gave convincing corroborating detail about his first day being the opening night of the bar, mentioning the lack of cocktail menus and glasses. His account matches the bank statements he provided, showing when he was paid by the respondent. And the respondent agreed that the claimant's start date was 27 September in its ET3 (response to the claim).

28. The claimant was an experienced bar tender and cocktail mixologist who had previously had bar jobs, which he used to supplement the income he makes as a self-employed artist.

29. The claimant and Mr Anderson disagreed about his hours and pay. The claimant said he was paid £11 per hour and that he worked shifts from 4:30pm to 11:30 pm five or six days a week, totalling between 30 and 40 hours a week. He said his daily rate of pay was £77. Although Mr Anderson initially disputed that the claimant was paid £11 per hour he conceded it over the course of the hearing. Mr Anderson said the claimant worked 24 to 30 hours per week. I prefer the claimant's account because it is supported by the documents he provided. In particular, the claimant included in the bundle a one-page employment details document which says that his 'normal hours' are 30 or more a week. The claimant also provided shift rotas showing he worked 5 and 6 day weeks in November 2019 and January 2020. The respondent did not provide any documentation to dispute the claimant's evidence (such as different shift rotas, bank statements or pay slips).

30. The claimant's hours varied from week to week, in common with lots of bar jobs. He did not have exactly the same pay date each month but it was always towards the end of the month. On 31 January 2020, he was paid £1,221.00 (gross). On 29 February 2020, he was paid £1,699.50 (gross). He received pay slips for these months.

31. In March 2020, the country went into lockdown due to Covid-19. On 23 March the government announced the lockdown and on 26 March 2020, government lockdown measures came into force. As a result, the bar had to close. On 1 April 2020 the claimant was furloughed. He was paid furlough pay of £1,228.48 gross for April 2020 and was given a payslip dated 30 April 2020.

32. The claimant did not receive any further payments designated as 'furlough pay' or get payslips for May or June 2020 but he did receive £400 from the respondent on 18 June.

33. The claimant said that Mr Anderson required him to work during the lockdown in May, even though the pub was closed and he was furloughed. He said that Mr Anderson had asked him and Ms Ayers to go into the bar to make cocktail mixing videos for social media promoting the business (on 9 May). And that Mr Anderson had also required them to do decorating work in the bar, painting the women's toilet. The claimant says he did this work reluctantly, believing it to be against the terms of the government Coronavirus job retention scheme.

34. Mr Anderson denies that he required Ms Ayers and the claimant to work and said he'd asked for volunteers and that the claimant had 'leapt' at the chance because he was so bored by lockdown**.** Mr Anderson did not provide any supporting evidence for this assertion. He said in evidence that he had a WhatsApp message in which the claimant said being asked to decorate was 'the best news he'd heard all day because he was bored out of his head'. But Mr Anderson did not provide the message for the tribunal to consider. The claimant provided several contemporaneous WhatsApp messages in which Mr Anderson appears to be requiring the claimant and Ms Ayers to work, for example a message from Ms Ayers saying that Mr Anderson 'wants the whole place cleaned. So while you paint I'll clean everything'. There are also messages between Ms Ayers and the claimant in which both express reluctance about the work, saying doing the videos is embarrassing. Mr Anderson submits that the claimant would not have come to work, if he did not wish to but I accept the claimant's evidence that he did not volunteer or wish to work and did so reluctantly because he was fearful of losing his job at a time of great economic uncertainty.

35. On 28 May 2020, the claimant painted the toilet. On the same day the claimant had a meeting with Bethan Ayers and Mr Anderson. Mr Anderson initially denied this meeting

happened, but it is backed up by the contemporaneous WhatsApp messages of the claimant. The claimant says he asked when he would receive outstanding furlough money during this meeting.

36. In the respondent's ET3, it says the claimant's employment was terminated without notice on 28 May because he was intoxicated whilst at work. During the hearing, Mr Anderson initially said that the claimant's employment was terminated on 28 May and that a P45 confirming this was issued on 1 June. The claimant denied receiving a P45 at all and it was never disclosed to the tribunal. Mr Anderson told the tribunal he dismissed the claimant because he was intoxicated and that could jeopardise the licence for the premises. Mr Anderson also claimed the claimant had poured paint down the toilet which had hardened in the toilet pan, requiring him to get workmen out at significant expense to rectify the damage but that the real reason for terminating the claimant's employment was the claimant's drug or alcohol use on the premises.

37. The tribunal does not accept that the claimant was intoxicated on the premises on 28 May, as it is extremely unlikely that Mr Anderson would then have asked him to come into work over the course of the next few days, which he did, as set out below.

38. There was another meeting between Bethan Ayers, Mr Anderson and Mr Sherman on Monday 1 June 2020. On the same day, the claimant did more decorating work in the women's toilet. The claimant says that in this meeting Mr Anderson told him that he could see his heart wasn't in the job and that because of Covid people were desperate for jobs and that he could fire him. Also, that Mr Anderson said 'I don't know how you get money, whether poncing about' and that the claimant believed Mr Anderson was calling him a 'ponce' and he was shocked and upset by this.

39. Again, Mr Anderson initially denied the 1 June meeting occurred, but I accept the claimant's account as it is backed up by contemporaneous WhatsApp messages dated 31 May in which Mr Sherman says he will come and finish the bathroom the next day and Ms Ayers says 'Me you and brook will meet for a meeting beforehand, tomorrow 4pm'.

40. In the WhatsApp message of 31 May, the claimant refers to planning to go to Birmingham. The claimant was going to Birmingham because his grandmother was sick and his parents were abroad and couldn't visit her. The claimant had also recently lost his rented accommodation and did not have anywhere to stay in London.

41. On 4 June 2020 the claimant sent a WhatsApp message about work to Bethan Ayers, which he says is the first protected disclosure. It is a brief message from the claimant to Bethan Ayers and says, 'I think his [sic] is waiting until I finish paint'. The claimant says this means Mr Anderson is waiting until I finish painting to pay furlough pay. It then says 'his [sic] not legally allowed to get us to work.' The claimant says that in this message he was telling the respondent that it was endangering his health and that of others. He also says he was telling Ms Ayers they shouldn't be working whilst on furlough.

42. On the same day the claimant sent a Whatsapp message to Mr Anderson asking when he would get paid and Mr Anderson answered it would be when the money comes in. Mr Anderson then asked when the claimant was coming in to finish painting the toilet. The claimant said he'd come in 'on Friday', which was the next day (5 June).

43. But on 5 June the claimant sent a WhatsApp message telling Mr Anderson he would not come in. He relies on that message as his second protected disclosure. In that message the claimant said, 'I decided not to come and service the bathroom today as from the pictures and discussed last Monday, the wall clearly needs a full coverage in mould sealant […]. I would of come down to repaint the corner if that was the only issue. Me and Beth have tried our best for hours the last week. I wish this was discussed rather than waiting for me in Balham to discuss this especially in a time

when we are meant to be keeping our distance and working from home. I think a professional needs to be called in to fix this not us and even more so when it is illegal for us to giving any service to the business other than online right now. And the main reason is I can't get over the language you used in our last meeting. Indirectly calling me a ponce and threatening twice. It is out of order talking to anyone like that employee or otherwise'.

44. By 'other than online', the claimant meant it would not be unlawful to do online work from home. The claimant was raising this issue because of the public health and safety aspects of the dangers of spreading Covid-19 and he was particularly concerned because he would be going to stay with his grandmother and did not want to pass on any infection to her as a vulnerable older person. He thought he was being put at increased risk of catching Covid-19 by being asked to travel into the bar, which he had to do on public transport and because he would be mixing with others (Ms Ayers and Mr Anderson) at the bar.

45. Mr Anderson replied to the claimant's WhatsApp message saying Bethan [Ayers] would call him. That day, Ms Ayers left the claimant the voice message on his phone that we listened to in the hearing. In that message Ms Ayers said:

    45.1. Jords, he's just phoned me, he's told me to relay this to you. If you want to call him, by all means call him, he's happy to talk to you. It's not personal or anything but he's saying what you said to him, it didn't go like that, so when you sa – he never called you a ponce, he said his sentence was basically that you're stealing in terms of – I can't remember in terms of what but stealing – he said by all means you can ponce if you want. He didn't say he said you were poncing, he said you can carry on poncing things or, if that's how you do it in your life. […] And also in terms of it being illegal working on furlough, he says it would be illegal to work on furlough if he was still making money at the bar but then the government are paying you not him. He says that's illegal, he said but it's not illegal for you to be on furlough and you're allowed to be maintaining and keeping up shit in the bar but he's not making any profit from it, you're maintaining the bar so it's not illegal. He says you need to read more, read your literature. And he says he's not doing this battling no more. You obviously don't agree with the way he does shit. He doesn't agree with the way you do shit. He said he employed you and was happy with you as a mixologist, he still is. He's not doing this battling shit, it's not worth it no more. So he's going to return your furlough back to the government and look for another staff.

46. The claimant had believed the reference to 'ponce' was a reference to him. The voice message supports the claimant's account that Mr Anderson had used this word when talking to him on 1 June 2020, they'd had an argument and the claimant had objected about it in his WhatsApp of 5 June. Ms Ayers message is her trying to put forward what she thinks Mr Anderson's views are on this, which were that when Mr Anderson had used the word 'ponce' he said he was using it to talk about people taking what they weren't entitled to.

47. This voice message is not a communication of dismissal. It is an indication that Mr Anderson has had enough and wants to find someone to replace the claimant. But it does not unequivocally communicate that employment has come to an end immediately or a date on which it will do so.

48. At some point soon after this date the claimant went to Birmingham to visit his grandmother.

49. On 9 June, the claimant sent Mr Anderson a WhatsApp message apologising. This is the message Mr Anderson disclosed. In it the claimant said:

    49.1. Hi Brook, I just wish to apologise for my last message. I was having a manic

moment, stressed with moving, money and general nature of the unsettled environment. I understand we have a difference in opinion but it's about time I listen to you as a boss and respect the way you want things done. I have taken on board your concerns about my time keeping and I will ensure this will be addressed immediately if you give me the opportunity I will be punctual and have an improved attitude towards my work. I sincerely hope we can move forward with the situation. I am genuinely sorry for the upset I have caused and would like the opportunity to rectify matters. Please can you let me know your thoughts.

50. The claimant needed his job, as it was his livelihood. After he sent this message, he had various telephone conversations with Ms Ayers about returning to work in the week of 19 June, when bars would be permitted by the government to open for takeaways.

51. On 18 June, the claimant received £400 into his account from the respondent with no accompanying pay slip or written explanation. Mr Anderson says this was a payment on account of furlough money owing to the claimant and that he sent it so the claimant had the money to return to London and return to work at the bar when it opened. Mr Anderson says he was doing this for the sake of his partner (the claimant's aunt) and that the claimant was not entitled to the full amount of furlough pay because of the damage he had caused the toilet and the cost of putting it right.

52. On 19 June, the claimant sent a message to Mr Anderson by email and WhatsApp saying Bethan Ayers had said Mr Anderson would like him to go to work at the bar the following week. In that message the claimant asked about outstanding furlough pay and if there was a reason it hadn't been paid: 'I know Bethan was paid her furlough in full (May's wages) at the beginning of June. I have not received my May's furlough apart from the 400 pound paid yesterday. Is there a reason why I have not been paid in full or at the same time as Bethan? I have been told that you are withholding my wages to punish me, is this true?' The claimant says that this was this third protected disclosure and that in it he told the respondent it was failing to pay his contractual wages and that this was a breach of a legal obligation. I find that the reason the claimant raised this issue was because he needed the money.

53. There are further WhatsApp messages between Bethan Ayers and the claimant dated 19 June in which the claimant tells Ms Ayers that Mr Anderson has said he is withholding money from his furlough pay because the claimant had caused £700 worth of damage by pouring paint down the toilet. Ms Ayers expresses surprise at this and says Mr Anderson had never told her that. The claimant denies causing any damage and says he did not pour paint down the toilet.

54. I find that the claimant did not pour paint into the toilet, causing damage, or that if there was paint in the toilet it was done accidentally and was of a trivial amount. If the claimant had caused significant damage, Ms Ayers would have been aware of the damage, and it is evident from her voice message of 5 June and her WhatsApp message of 19 June that she is not aware of it, nor that Mr Anderson was withholding money in respect of any damage caused by the claimant. I also find it inexplicable that if the claimant had caused this damage, Mr Anderson would wish him to return to work for him. And I note that the matter was not raised before around the 19 June, nor has Mr Anderson produced any corroborating evidence, such as an invoice from the workmen for mending the toilet or a photograph of the damage.

55. In this series of WhatsApp messages Ms Ayers says to the claimant that Mr Anderson said that the claimant has 'completely lost May's wages and you are fired'. But that she had battled it and Mr Anderson said he would be willing to take the claimant back and give him June's furlough payment if he came back to work to help with the takeaways.

56. I find that this message terminated the claimant's employment, as it is the first

communication which unequivocally states his employment is over (albeit that he could get his job back in the future).

57. Although initially Mr Anderson had said the claimant's employment was terminated on 28 May, he also said in the course of the hearing that he had never told the claimant that he was fired before he left for Birmingham and that the claimant 'couldn't commute from Birmingham to London'. Mr Anderson changed his position during the course of the hearing and accepted that the claimant's last day of employment was 19 June.

58. The claimant alleges the reason for his employment being terminated was his protected disclosures. Mr Anderson alleged during the hearing that the claimant was dismissed for gross misconduct. In particular, he said the claimant:

    58.1. Was taking stimulants (alcohol or drugs) whilst working in the bar, putting the bar licence and the livelihoods of everyone who worked there at risk.
    58.2. Was often late, putting the burden of opening the bar onto the manager
    58.3. Did not abide by the dress code, which was initially to wear black and then became a t-shirt with the name Voodoo on it, and that the claimant wore unsuitable clothes to work.
    58.4. Didn't care about the work.

59. In his ET3, the respondent had said the claimant was dismissed on 28 May 2020 without notice because Mr Anderson had found him to be intoxicated "whilst working at the bar" and that 'there are strict rules in place about being intoxicated and or taking drugs on the premises whilst working a shift and serving customers'. It claims that, whilst employed, the claimant visited the toilets in Voodoo with three other people, which Mr Anderson believed was to take drugs. During the hearing, Mr Anderson said this incident had actually occurred after the claimant's employment had ended when he was a customer in the bar. Mr Anderson said he had CCTV evidence of this incident, but he could not find and produce it in time for the hearing. This particular incident cannot have been the reason for dismissal if it occurred after employment had ended. And the claimant denies this incident ever occurred and also denies that he was ever intoxicated or high whilst working. I do not accept that the claimant was intoxicated at work. I find Mr Anderson's explanation that he did not give any warnings for intoxication (which he said happened more than once) because the claimant was family to be unconvincing. I also note that intoxication was not mentioned in Ms Ayer's voice message of 5 June, or the claimant's 'apology' email of 9 June, indicating that as an issue it had never been discussed between them. Furthermore, I find it implausible that Mr Anderson would have sent the claimant £400 on 18 June so that he could return to London and work for him, if the claimant had been drinking or taking drugs at work and putting the respondent's licence at risk.

*60.* I find that the reasons for the claimant's dismissal were that Mr Anderson and the claimant had fallen out and were having many arguments. I am persuaded in particular by Ms Ayer's voice message of 5 June and the claimant's 'apology' email of 9 June that there were several reasons they had fallen out. They included the fact that they had had an argument about whether or not Mr Anderson called the claimant a 'ponce'. Also, that Mr Anderson believed the claimant was often late, that he had a bad attitude to his work and that he did not do things the way Mr Anderson wanted them done.

*61.* The claimant worked from 27 September 2019 until 19 June 2020. Both parties agreed he did not take any holidays other than public holidays on 25 and 26 December 2019 and 1 January 2020 in this period. There is no relevant agreement setting out holiday entitlement or the holiday year that applies, these matters are therefore governed by the Working Time Regulations 1998.

**The law**

62. The law that I have to apply is as follows:

***Protected disclosure***

S. 43B Employment Rights Act 1996 Disclosures qualifying for protection

(1) In this Part, a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) That a criminal offence has been committed, is being committed or is likely to be committed,
(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) That a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) That the health or safety of any individual has been, is being or is likely to be endangered,
(e) That the environment has been, is being or is likely to be damaged, or
(f) That information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) […]

S. 43C Employment Rights Act 1996 Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer, or
(b) […]

***Unfair dismissal for making a protected disclosure***

S. 103A Employment Rights Act 1996

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.

***Wrongful dismissal***

63. Wrongful dismissal is a common law claim for breach of contract for failure to give adequate notice of termination of employment. An employee is entitled to the notice of termination set out in the contract of employment (or, if greater, statutory minimum notice set out in s. 86 ERA) unless the employee commits a repudiatory breach of contract justifying summary dismissal (*Laws v London Chronicle (Indicator Newspapers) Ltd* 1959 1 WLR 698, CA). Such a breach must be accepted by the employer before it is taken to terminate the employment relationship (*Geys v Société Générale, London Branch* 2013 ICR 117, SC).

64. More recent cases have described a repudiatory breach by an employee as one which 'so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' (*Neary v Dean of Westminster* 1998 12 WLUK 202, approved by the Court of Appeal in *Briscoe v Lubrizol Ltd* 2002 IRLR 607).

***Unlawful deduction from wages***

S. 13 Employment Rights Act 1996 Right not to suffer unlawful deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless –
  (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
  (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section 'relevant provision,' in relation to a worker's contract, means a

provision of the contract comprised –

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) In one or more terms of the contract (whether express or implied, and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

***Working Time Regulations 1998***

13 Entitlement to annual leave

(1) […] a worker is entitled to four weeks' annual leave in each leave year.

(2) […]

(3) A worker's leave year, for the purposes of this regulation begins –

(a) On such date during the calendar year as may be provided for in a relevant agreement; or

(b) Where there are no provisions of a relevant agreement which apply –

i. If the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

ii. If the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

13A Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

[…]

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where –

(a) A worker's employment is terminated during the course of his leave year, and

(b) On the date on which termination takes effect (the 'termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of the leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) Such sum as may be provided for the purposes of this regulation in a relevant

agreement, or

(b) Where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –

**(A x B) – C**

Where –

**A** is the period of leave to which the worker is entitled under regulation 13 and regulation 13A

**B** is the proportion of the worker's leave year which expired before the termination date, and

**C** is the period of leave taken by the worker between the start of the leave year and the termination date.

**Conclusions**

***Unfair dismissal for making a protected disclosure***

65. I must decide if the three disclosures made by the claimant are protected disclosures. If they (or any of them) are protected, I then have to decide if the claimant was dismissed for the sole or principal reason that he made it (or them). The burden of proof is on the claimant to prove the reason for the dismissal.

*Are the 'disclosures' protected?*

66. The first alleged disclosure is in the WhatsApp message of 4 June, from the claimant to Ms Ayers, the respondent's manager. A protected disclosure must be a disclosure of 'information'. It must, 'have sufficient factual content and specificity such as is capable of tending to show' one of the relevant failures (*Kilraine v London Borough of Wandsworth* [2018] ICR 1850). I do not find that the first alleged disclosure in the WhatsApp of 4 June discloses sufficient information to be a protected disclosure. It says: "I think his [sic] is waiting until I finish paint". The claimant said this means Mr Anderson is waiting until he finishes painting to pay furlough pay but the message does not say that, or explain which 'relevant failure' might be being alleged. The WhatsApp then says "his [sic] not legally allowed to get us to work." The claimant says that in this message he was telling the respondent that it was endangering his health and that of others but there is nothing in this message about endangering health and safety. It says they should not legally be working, which seems to be intimating that a criminal offence was being committed or there was a failure to comply with a legal obligation but the message does not elucidate what offence or legal obligation was being breached. In the claimant's evidence before the tribunal it was unclear whether he regarded the breach of the legal obligation to be the fact that they were in breach of rules on social distancing (which would also be a health and safety issue) or the fact that the Coronavirus Job Retention Scheme conditions were being breached. Even at this stage, it is unclear what 'relevant failure' he had in mind when he wrote this message, and there is not sufficient detail in the message to clarify what he thought was being breached or done. I therefore find that this does not contain sufficient information to amount to a qualifying disclosure.

67. The second alleged disclosure (of 5 June 2020) to Mr Anderson refers to social distancing and that they are meant to be keeping their distance and working from home and that it is illegal to be giving any service to the business other than online. I find there is sufficient information in this disclosure given it makes it clear that the claimant's main concern is about coming into work at the bar, rather than working 'online'. It refers to social distancing requirements ('keep your distance') and it is evident by this that he has in mind the risks of spreading Covid-19.

68. Did the claimant reasonably believe he was making this disclosure in the public interest? The claimant says he was raising it because of the public health and safety aspects of the dangers of spreading Covid-19 and he was particularly concerned because he would be going to stay with his grandmother and did not want to pass on

any infection to her as a vulnerable older person. I accept that there was a public interest in blowing the whistle on health and safety risks, and on breaches of the law on social distancing, in the midst of a global pandemic and that the claimant reasonably believed he was making this statement in the public interest

69. Did the claimant reasonably believe this disclosure tended to show a 'relevant failure'? I accept the claimant believed this disclosure showed a failure to comply with a legal obligation (either the law on social distancing or the Coronavirus Job Protection scheme rules) and that he believed it tended to show that his health and safety, or that of others with whom he came into contact, was likely to be endangered. I also accept that the claimant reasonably thought this disclosure showed that by asking him to travel during the pandemic and meet others in the bar, his own health and safety and that of others was being put at risk and that a legal obligation was being breached. A belief may be a reasonable one, even if it is wrong (*Babula v Waltham Forest College* [2007] ICR 1026).

70. This disclosure was made to Mr Anderson, the principle director and shareholder of his employer. It was therefore made to his employer. The second disclosure did therefore amount to a protected disclosure.

71. The third alleged disclosure was the message sent by both email and WhatsApp to Mr Anderson on 19 June 2020 in which the claimant asks why he hasn't been paid furlough pay for May 2020. He asks 'is there a reason why I have not been paid in full or as the same time as Bethan? I have been told that you are withholding my wage to punish me, is this true?'

72. This was the email and Whatsapp complaining about not being paid his furlough pay. The claimant says this was an allegation that the respondent was acting in breach of contract, which is a failure to comply with a legal obligation. I note that the claimant did not allege that this was a breach of contract in this message, at most he leaves it to be inferred that there is something unlawful about withholding wages to punish him. However, even if I were to accept that this does amount to a disclosure of sufficient information, the claimant still has to show that he reasonably believed he was making the disclosure in the public interest. And there is nothing here to suggest the claimant thought he was raising the matter in the public interest. I have found that he raised it in his own private interest because he needed the money and thought he was entitled to it. I do not accept that he reasonably believed the disclosure was in the public interest.

73. I therefore do not accept that the first or the third disclosure amounted to protected disclosures.

*Reason for dismissal*

74. The next issue is whether the second disclosure, which is a qualifying disclosure, was sole or principal reason for the claimant's dismissal? The burden of proof is on the claimant to show this.

75. I do not accept that the sole or principal reason for the claimant's dismissal was this disclosure. It is clear from Bethan Ayers's voice message and from the claimant's 'apology' email that Mr Anderson had issues with the claimant that predated this disclosure and were not related to it. Lateness was clearly a big issue for Mr Anderson, or the claimant's 'apology' email would not have promised to address this issue. Mr Anderson clearly thought and had told the claimant he had attitude problems at work or the claimant would not have said he would improve his attitude. The message from Bethan Ayers makes it clear that the claimant and Mr Anderson were quarrelling a lot and had differences of opinion on how to run the bar. The message that 'he's not doing this battling no more. You obviously don't agree with the way he does shit. He doesn't agree with the way you do shit', indicates a pervasive inability to agree on how to do anything.

76. Given these other matters about which Mr Anderson was unhappy, the claimant has not proved that the principal reason he was dismissed was for this disclosure. The unfair dismissal claim therefore does not succeed.

***Breach of contract***

77. The claimant was not given any notice of termination of employment. It was agreed that the notice he should have received was one week, unless he had committed gross misconduct entitling the respondent to dismiss him without notice or pay in lieu of notice. The burden of proof is on the respondent to show that the claimant had committed gross misconduct.

78. I do not accept that the claimant committed gross misconduct or that the respondent dismissed him for gross misconduct. Mr Anderson submitted that the claimant's 'apology' message acknowledges the matters he had told the claimant he had to improve, including in particular, his punctuality, attitude to work and wanting to do things at the bar his way. I have accepted that these were the reasons for the claimant's dismissal, together with the fact that the claimant and Mr Anderson were having frequent arguments, including one about whether or not Mr Anderson had caused the claimant a 'ponce'. These reasons for dismissal do not amount to gross misconduct by the claimant justifying dismissal without notice.

79. The telephone message left by Bethan Ayers explaining that Mr Anderson was going to 'look for other staff' does not back up Mr Anderson's account that he dismissed for gross misconduct, as it says 'it's not personal' and that the claimant is a 'good mixologist'. It is not compatible with a finding of gross misconduct that the Mr Anderson paid the claimant money to come back to London and work for him again. If Mr Anderson really thought the claimant was taking illicit substances and his licence was at risk, I don't believe he would have asked the claimant back to work. The message that Bethan Ayers conveyed in her voice note of 5 June doesn't refer to drug or alcohol abuse.

80. In the circumstances, I find that the claimant did not commit, and was not dismissed for, gross misconduct. He was dismissed because Mr Anderson was unhappy with his punctuality and his attitude and because they were arguing a lot.

81. The claimant was therefore dismissed in breach of contract and he is entitled to damages in respect of one week's pay in lieu of notice, based on his reduced 'furlough rate of pay, which is £283.50 gross (subject to appropriate tax and national insurance deductions).

***Unlawful deduction from wages***

82. The respondent accepts the claimant was employed until 19 June. And that he did not pay him anything in respect of May or June 2020, other than £400.

83. The claimant had been put on furlough on 1 April 2020. The government furlough scheme worked by employers agreeing with their employees that they would be put on furlough and not required to work. In return employees would be paid a reduced salary, which the employer could recover from the government under its Coronavirus Job Retention Scheme. Although it was open to employers to pay more than the amount they could recover from the government scheme, there is no suggestion that the respondent did so in this case. Neither claimant nor respondent argued that the claimant should have had a greater monthly salary than that he was paid for the month of April, which was £1,228.48 gross (before deductions for tax and national insurance contributions).

84. Under Section 13 Employment Rights Act 1996, the claimant has a right not to have money deducted from the wages properly payable to him unless the deduction is authorised by his contract, or he has previously signified his agreement in writing. The

claimant did not previously agree to this deduction, and it was not authorised by the contract. So, even if the claimant had damaged the toilet, the respondent should not have deducted the money from his wages. The only recourse open to the respondent would have been to make a claim for this damage against the claimant in the small claims court for that money. In any event, as I set out above, I find that the claimant did not cause damage to the respondent's toilet.

85. The wages properly payable to the claimant at the end of May were the same wages as he had received at the end of April (£1,228.48 gross) and an equivalent pro-rated amount for the period from 1 to 19 June. He should therefore have received £1,228.48 for May. He was employed 19 out of 30 days in June before his dismissal and so should have received 19/30ths of £1,228.48. That is the sum of £778.01.

86. The total he should have received for May and June 2020 was therefore £2,006.51. He did receive £400. So, the balance owing is £1,606.52. This is a gross figure before any appropriate deductions for tax and national insurance contributions.

***Accrued holiday pay***

87. There is no relevant agreement setting out the claimant's holiday year or holiday entitlement, so under regulation 13(3) Working Time Regulations 1998 ('WTR'), his holiday year began on the date his employment began and he had worked 75% of the holiday year when his employment ended.

88. The claimant's statutory holiday entitlement (WTR 1998, reg 13 and 13A) was 5.6 weeks a year. The claimant worked 5 or 6 day weeks, so his holiday entitlement was 28 days for a full year (regulation 13A(3) WTR). The claimant's holiday entitlement for the period employed was therefore 75% x 28, which is 21 days.

89. It was agreed he had taken 25 and 26 December 2019 and 1 January 2020 as holiday. I heard no evidence that he had requested, or been required, to take holiday whilst he was on furlough. So, his accrued untaken holiday entitlement was 21 minus 3, i.e. 18 days, and he was entitled to be compensated for this on termination of employment under regulation 14(2) WTR. His daily rate of pay was £77 (gross). His entitlement in respect of holiday pay is therefore £1,386 (gross), subject to appropriate deductions for tax and national insurance contributions.

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Employment Judge **Carney**
Date: 16 February 2023