**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4102744/2022 & 4102745/2022 Hearing at Edinburgh on 21, 22 and 23 June 2023**

**Employment Judge: M A Macleod**

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| **(1) William Sorrie**<br>**(2) Pamela Sorrie** | **Claimants**<br>**Represented by**<br>**Mr J Lawson**<br>**Solicitor** |
| Samuel Smith Old Brewery (Tadcaster) | Respondent<br>**Represented by**<br>**Mr N MacDougall**<br>**Advocate** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

1. That the claimants' claim of unfair constructive dismissal succeeds, and that the respondent is ordered to pay to Mr Sorrie the sum of One Thousand Nine Hundred and Seventy One Pounds and Fourteen Pence (£1,971.14); and to Mrs Sorrie the sum of Three Thousand Nine Hundred and Seventeen Pounds and Thirty Pence (£3,917.30); and
2. That the claimants' claim of unlawful deductions from wages fails and is dismissed.

## REASONS

1. In this case, the claimants advance claims of constructive unfair dismissal and unlawful deductions from wages. The respondents resist all claims made by the claimants.

2. A Hearing was listed to take place on 21 to 23 June 2023 in the Employment Tribunal Office, Edinburgh.

3. The claimants appeared and were represented by Mr J Lawson, solicitor. The respondent was represented by Mr N MacDougall, advocate.

4. The parties presented a Joint Inventory of Documents, to which reference was made throughout the Hearing.

5. Both claimants, Mr and Mrs Some, gave evidence on their own account. The respondent called as witnesses Humphrey Richard Woollcombe Smith, Common Brewer, Chairman and Area Manager; and Linda Jane Stuart, Estate and Property Manager.

6. A list of Agreed Facts was placed before the Tribunal and relied upon in the course of the Hearing.

7. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

### Findings in Fact

8. There are two claimants in this case. The first claimant is William Sorrie, whose date of birth is 14 May 1955; the second claimant is Pamela Sorrie, whose date of birth is 18 November 1966. They are a married couple.

9. The respondent is a private unlimited company, Brewers and Wines and Spirits Merchants, with responsibility for a number of public houses (pubs) in England and Scotland. The company is based in Tadcaster, in Yorkshire. Their Area Manager is Humphrey Smith, who has responsibility for all pub managers in the north of the United Kingdom, including Scotland.

10. In September 2018, the claimants were running and managing a pub in Darlington for the respondent when they were offered the opportunity to move back to Scotland (both claimants are Scottish) to take over responsibility for the Cramond Inn, in Cramond Village in Edinburgh, also managed by the respondent.

11. They accepted, and an Agreement (the Agreement) was signed both by them and Mr Smith on 26 September 2018 (86ff), in which they agreed to be employed as the Joint Managers of the Cramond Inn from 18 October 2018.

12. Clause 1.2 of the Agreement provided that *"For the avoidance of any doubt, the Manager(s) acknowledge and agree that nothing in this Agreement shall give him/her/them any right to occupy or manage any particular licensed premises. The Manager(s) agree that subject to clause 1.3 below they will from time to time serve and act as permanent, temporary or relief Manager(s) of any other of the Company's licensed premises as the Company may direct and for such periods and subject to such conditions as the Company may require."*

13. Clause 2 provided that they would work such hours as were necessary for the proper conduct and execution of their duties and responsibilities; and would maintain the premises open in accordance with legislation and the instructions of the Area Manager. In addition they were required not to work on account of any other person in any other business without first obtaining the written consent of the respondent.

14. In clause 6.1, the Agreement stated: *"The Manager(s) shall during the continuance of this Agreement use and occupy the Premises free of rent and rates and similar property related taxes, provided always that the Manager(s) shall be entirely responsible for Council Tax payments or any such replacement taxes from time to time introduced and any income tax charge arising from his/her/their occupation of the Premises…The occupation of the Premises by the Manager(s) and his/her/their family shall be a condition of the Manager(s) employment and will not create any*

*relationship of Landlord and Tenant between the Company and the Manager(s)."*

15. Under "Salary", clause 7.1 provided: *"During the continuance of this Agreement and the employment hereunder the Company shall by the last date of each calendar month (or at the end of such other intervals as may be agreed between the Manager(s) and the Company) pay to the Manager(s) by credit transfer a salary for his/her/their services in instalments at the rate of £33,300 per annum or at such other rate as shall from time to time be agreed in writing. In the case of joint Managers the salary will be split equally on a 50/50 share basis."*

16. Clause 20 addressed the claimants' right to paid holiday. They were entitled to 35 days' holiday, including 5 nominal rest days), in a holiday year from 1 January to 31 December. The clause concluded: *"No holiday entitlement shall be carried forward from one holiday year to the next (other than with the Company's prior agreement to the extent permitted by law)."*

17. Clause 28 confirmed the respondent's obligation to enrol the claimants into a National Employment Savings Trust.

18. The duties which the claimants required to carry out in the pub included serving customers, running the pub, ordering and ensuring the appropriate levels of stock, cleaning the pub and running the kitchen in the pub, which served food to customers. They employed a chef, a bar assistant and two waitresses, though when lockdown was imposed in March 2020 due to the coronavirus pandemic, those staff were lost to the business.

19. Mr Sorrie had an accident at work on 16 December 2018, resulting in a broken toe. Mrs Sorrie emailed Linda Stuart, who though bearing the title of Estate and Property Manager was in practical terms Mr Smith's assistant. The incident happened at the Glittering Star, where, on the evidence, the claimants were still working.

20. It is appropriate to address the difficulties which arise in the evidence about the dates of the claimants' employment. Although the Agreement states that

they commenced employment at the Cramond Inn in October 2018, it is plain from the contemporaneous email to Ms Stuart by Mrs Some on 16 December 2018 reporting the incident that they were still employed at the Glittering Star in Darlington at that point; which suggests that they did not commence employment at the Cramond Inn until 2019 at the earliest.

21. All that can be said is that the evidence on this was not entirely clear, but ultimately little turns on it.

22. Mr Sorrie sustained a further injury at work on 20 December 2019 which affected his knee; and he exacerbated that injury to his knee on 6 January 2020 when moving an oil drum.

23. On or around 20 March 2020, the pub closed due to the pandemic and the national lockdown which was imposed at that time. The claimants were placed on furlough, and received 80% of salary through the furlough scheme; in addition, Mr Smith instructed that they be paid the remaining balance of 20% so that they did not lose wages.

24. The pub was closed until approximately July 2020, when it reopened until October 2020, when it closed again due to the reimposition of coronavirus restrictions.

25. Throughout this period the claimants remained in residence at the pub, rent free.

26. The pub was due to reopen on or around 17 May 2021. Mr Smith attended at the pub for a meeting with the claimants on or around 12 May 2021, when they were carrying out cleaning work in preparation for the return of customers.

27. The meeting was recorded and subsequently transcribed. A copy of the transcript was sent to the claimants by Mr Smith by letter dated 19 May 2021 (109), in which he said:

*"Dear Mr and Mrs Sorrie,*

*I enclose a transcript of our meeting at the Cramond Inn on 12 May 2021.*

*When it is open and legally allowed to operate fully the Cramond has been our busiest food pub in the north and when the sun shines can also sell a lot of beer both inside the pub and in the garden.*

*Clearly Mr Sorrie should not risk any more damage to his health but instead go on sick until he eventually has his knee replacement operation and has had time to properly fulfil his post-operation recuperation.*

*We agreed that to manage the Cramond Inn which has the potential when the sun shines of being such a demanding business to run as a couple, never mind as a single manager, would put great strain on Mrs Sorrie and could entail risk to her health and to Mr Sorrie's if he tried to assist her on any occasion while on sick. I therefore instructed you not to order either beer of food (sic) and not to re-open the Cramond Inn with the lockdown now ending.*

*You said that if you left the Cramond Inn you would like to relocate near your family in Dundee. Unfortunately as you know we only have two pubs in Scotland, both in Edinburgh, and we do not have vacant possession of the living quarters a the Doo'Cot which again, if fully trading, has the potential of being a demanding pub to run.*

*We could offer Mrs Sorrie the single management of a quiet wet-only pub in Tadcaster, the Fox and Hounds.*

*We have not heard from you since our meeting on 12 May 2021 and as you will appreciate, we need to do something about the Cramond Inn given that pubs are being allowed to re-open.*

*Perhaps you would let us know by close of business on Monday 24 May 2021 whether or not you wish to move to the Fox and Hounds, Tadcaster.*

*Yours sincerely,*

*H R W Smith"*

28. The transcript (11Off) was attached to that letter. Present during the recorded discussion were Mr Smith, and the claimants.

29. The following are relevant extracts from the transcript:

*"HS: So there is Humphrey Smith and there is Mr and Mrs Sorrie. So I don't know, we should be open I suppose or ready to open shouldn't we, I mean what's the rules in Scotland is it.*

WS: *We should be open on the 17th.*

*PS: that's the rule we would like to open on the 17th inside and outside with alcohol. Before it was only outside.*

*HS: And inside without alcohol.*

*PS: Without alcohol.*

*HS: Yes. So you are aiming for that are you.*

*WS: Yes.*

*HS: But meanwhile you are a bit lame aren't you.*

WS: *I have been told to keep off my leg because I am just making it worse.*

*HS: Well your toe is a problem too isn't it. You have got you have made two claims on the brewery's insurance haven't you for your toe which happened at Darlington didn't it…*

*[There followed a lengthy discussion about the accidents which Mr Sorrie had had, and then they discussed his health.]*

*PS: But because of covid, because you went to the hospital initially in the January and they said three months so that would have been April 2020 but we were thinking well your birthday is in May we have until May, the four months and then you could go back if it is not any better but then the covid happened. So in that time you were just phoning getting pain killers but the pain killers were*

WS: *Yes they made me sick.*

*PS: Then he was getting*

HS: Well have you an appointment then now.

WS: I just got one just a wee while ago and they put me on Tramadol tablets and paracetamol.

PS: Paracetamol.

HS: Have you a date for your operation though.

WS: No because they said between six months and a year because of the backlog. So I am going to be off.

PS: In the meantime it's every three months it's a steroid injection.

W/S: Yes a steroid injection in my knee.

PS: You got a steroid injection on that last appointment.

HS: Obviously you joined after we had ended the health insurance as you said but you know the brewery could I suppose pay for a private operation if that would help.

14/S: I don't know.

HS: But do you think that you should be doing the job really, you know, because you are quite fragile aren't you, you know, it is it is a

PS: Yes you can't even stand for long, you can't.

IVS: The doctor actually told me that I shouldn't have been doing that, I shouldn't have been going up stairs and things because it is just going to make it worse.

PS: Even if you stand too long. But if we are out shopping or we arein a queue at the supermarket he's like (gasp) because he is like standing or anything you just get. Even going over bumps in the car, you know ifi am driving and you have got this aw and you like aw.

HS: You know working behind a bar you can knock a knee very easily and you are standing all the time.

*PS: Yes.*

*WS: Yes.*

*HS: What do you think, do you think you ought to, I don't know, do you think iti s a good thing for yourself that you continue in the job, I don't know.*

WS: *I don't think I could.*

*PS: Well not just now until you get your operation.*

*WS: Yes. That's going to be between six months and a year.*

*PS: Then after that I don't know how long the recuperation period, once you get the knee you know there's, we were talking to Ian and he had one and it took him months he wasn't even able to lift his leg. I think he's, he can get to here now and that was a few years ago he had his knee done.*

*HS: Really.*

WS: *He had to go to the knee (inaudible) which is a full knee replacement.*

*PS: Oh I don't know what he got…*

*HS: What do you think, you know, should you be managing jointly the Cramond Inn*

*PS: Well obviously if you go, if he goes on the insurance then I am going to be left with a lot of pressure you know plus obviously you know, I know they are coming tomorrow to look about the fence but they have to, you are having to guard the car park to make sure people, because people will just, even when we are open people are just sitting in the garden.*

WS: *Having picnics.*

*PS: And having their own drinks and you are turning your back for two minutes and you come back and you are like excuse me this is private you know this is for customers only. So.*

*HS: Well we don't know what to do with this archaeology, so we are just going to risk it and put a fence up really and if they tell us to take it down they tell us to take it down but.*

*PS: So there is all that, which would be then that I would have to be in the kitchen. I am a bit anxious about it, I will be truthful, I will be truthful I am very anxious about it because he always did the bar side of things, the cellar. I know how to change kegs I am not but he is perfect at keeping beer, he knows what he's doing.*

*HS: So you can't do everything can you, you will be spoiling your health.*

*PS: Exactly.*

*HS: We don't want you…*

*PS: …the stress, I mean I feel a bit anxious just thinking about it, opening up and you know having to do it myself. And then obviously there is all and if it's table service, this is, all these things are coming through my head Mr Smith.*

*HS: That's right, well initially it is going to be quite controlled isn't it…*

*PS: So I don't know how we will go forward.*

*HS: Do you think you should honestly for your own sake consider whether you really want to stay in the job here.*

*PS: I know but where do you get another job at this time with covid, with everything that's going on and then.*

WS: *You would have to look for another house, that's the thing.*

*PS: It's all the stress. It's a lot of stress, there's a lot of stress coming with that.*

*HS: You want to be placed near your children in Dundee your son and…*

WS; *Dundee yes, Dundee. We would dhave to do that. That might take a while because we would have to see the what do you call it, the council, to see whether we could get housed in Dundee. That's the thing.*

*PS: So what are you thinking then, are you thinking..*

*HS: Well I am just worried you know really. I am not sure that it is a good thing for you to reopen the pub you know.*

*WS: Yes.*

*PS: Right..."*

30. Mrs Some asked Mr Smith whether he had other managers in mind, and he replied that he did not, but stated that "we have a duty of care and I honestly am doubtful". Mr Sorrie replied "Yes I just couldn't, I am going back to the doctor, the doctor says I shouldn't be especially with the pain killers because if I am on my feet I am not feeling the pain and these pain killers could be doing a lot worse."

31. At the end of the meeting, Mr Smith assured Mr Sorrie that he was "very honest" and that "you have always had integrity", and then said "Well would you like to think about really."

32. The claimants' evidence was that they were confused and uncertain as to the outcome of the meeting. Mr Smith considered that the pub was one which would "take a lot of running", and he had concerns about Mr Sorrie's fitness to do so. In his evidence before this Tribunal, Mr Smith more than once described Mr Sorrie as having been unwise in failing to take care of his own safety, in the manner in which the injuries he sustained had occurred.

33. When the claimants received Mr Smith's email of 19 May 2021, they were surprised and dismayed. They replied on 22 May 2021 (123):

*"Dear Mr Smith,*

*Your email dated 19 May 2021 was received.*

*The content of your letter was surprising and out of the blue.*

*The Cramond Inn can be a busy business to run when the sun is shining but with a good team behind you it is not impossible for a single manager. You stated that there is a risk to Mrs Sorrie's health if she were to run the Cramond Inn as a single manager and that the solution was to uproot and move to Tadcaster.*

*We feel that the suggestion to uproot and move hundreds of miles away because Mr Sorrie has had an accident is extremely detrimental to both our Mental Health and we are in complete disbelief that this is your proposed solution.*

*You have only given us 5 days to make this huge life changing decision, which we feel is impossible and is also making an impact on our Mental Health.*

*Can you please explain to us the consequences if we refuse this offer.*

*Yours sincerely,*

*Mr and Mrs Sorrie"*

34. Mrs Sorrie commenced a period of sickness absence on 21 May 2021. She obtained a fitness to work statement from her GP dated 21 May 2021 (155) which provided that the reason for her absence was "Work stress". She was signed as unfit until 18 June 2021, and then continuously until 11 January 2022 (fit notes 156 to 162).

35. Mr Sorrie commenced a period of long term sickness absence on 24 May 2021.

36. The pub remained closed on the instructions of Mr Smith at that time, notwithstanding the loosening of national restrictions

37. Mr Smith responded on 28 May 2021 (124). He stressed that the respondent must *"exercise a duty of care to all of its employees".* He went on:

*"When the sun shines people in Edinburgh flock to the Firth of Forth and the Cramond Inn becomes a most demanding pub to run on food and drink. The village of Cramond is strictly conserved and is constrained for either deliveries or removals. Mr Sorrie has had two accidents when performing his duties at work, resulting in injury. It is the brewery's clear position that this pub can only properly be run by a joint management couple and I am not prepared as area manager to run what I regard as a material risk to our duty of care in Mrs Sorrie effectively running the Cramond Inn as a single manager with Mr Sorrie living there on sick. There will undoubtedly be a temptation for hi to assist to whatever degree given the workload required to perform the management role…*

*You both joined us to run our Glittering Star in Darlington which you jointly ran for a year before you asked for the move to the Cramond inn in order, you told me, to live near your son residing in Dundee, and we agreed to this transfer.*

*Tadcaster is also considered a desirable place to live and is not very far from Darlington. Another alternative would be for Mrs Sorrie to run as a single manager the Oak Tree, Catterick Village, very near Darlington. Though we would prefer a couple to run the Oak Tree which is a busier pub than the Fox and Hounds it is nothing near as busy as the Cramond Inn and we could open it for a reduced number of hours so as to enable Mrs Sorrie to run it as a single manager while allowing Mr Sorrie the necessary waiting time and recuperation time from his knee operation.*

*/ would stress that what we are proposing is a temporary measure and will be reviewed in the light of Mr Sorrie's ongoing medical position but in the short-term prognosis is that he will be unfit for work for the foreseeable future.*

*Under the terms of your Management Agreement, we are entitled to require you to transfer between our licensed premises and I accordingly give you 14 days' notice of our requirement for you to move to either the Fox and Hounds, Tadcaster or the Oak Tree, Catterick - the choice being yours.*

*I do hope you will understand why this is necessary but I am afraid to say that if you refuse our requirement then we will regard it as a serious breach of your contract which may lead to the termination of your employment with ourselves. I do trust however in the circumstances that further action by us will not be necessary.*

*I would of course be very happy to discuss the situation with you further if you have any queries you would wish to raise. I would stress that the proposed move will have no effect on your contractual income which will remain as it would have been had you continued at the Cramond."*

38. The claimants were very unhappy, and in Mrs Sorrie's case, stressed and anxious about the short deadline to make choices which they considered they could not make. There were no discussions between the parties about what steps might be taken in order to allow the claimants to remain at the Cramond Inn. For a number of months there was an impasse between the parties. The claimants remained in occupation of the Cramond Inn. There was no communication between the parties from the end of May until the beginning of November 2021.

39. On 2 November 2021, Thomas McFarlane, solicitor, of Messrs Shepherd & Wedderburn, telephoned the claimants and spoke to Mrs Sorrie, who was surprised to receive such a call without warning. He asked how they were. Mrs Sorrie explained how they were feeling, but he intervened to ask her if they considered that they had the right to live in someone else's property. Mrs Sorrie felt the call to be rather intimidating.

40. On 14 December 2021, Messrs Shepherd & Wedderburn, solicitors, wrote to the claimants (127):

*"As you are aware, we act on behalf of the Company [Samuel Smith Old Brewery (Tadcaster)]...*

We *refer to the enclosed management agreement between the Company and you both dated 26 September 2018 ('the Agreement').*

*In terms of Clause 1.1 of the Agreement you both agreed to become Managers for the Company in respect of 'such licenced premises as nominated from time to time by the Company' from 18 October 2018 until such time as the Agreement is terminated.*

*Termination of the Agreement*

*We hereby give you notice that the said Agreement is terminated by the Company with immediate effect. Your employment is therefore terminated with immediate effect and you are no longer Managers for the Company.*

*Reason for termination*

*In terms of Clause 25.3 of the Agreement, the Company is entitled to summarily terminate the Agreement, without the requirement for any notice or payment in lieu of notice, in the event that you are guilty of any serious breach of the Agreement…*

*You both met with Mr Humphrey Smith of the Company at the Premises on 12 May 2021 whereby you discussed the reasons why you both felt unable to re-open and properly run the Premises, a busy food and beverage pub. The Company therefore followed up with a letter to you dated 19 May 2021 offering you the opportunity to move to a quieter, beverage only pub - the Fox and Hounds in Tadcaster. The Company explained its reasoning for this in the letter and sought confirmation of your position in respect of its offer by 24 May 2021…*

*Despite further communications from the Company and from its English solicitors, Ward Hadaway, you have refused to move premises. Most recently, when you spoke to our Thomas McFarlane on the telephone on 2 November 2021 you re-iterated that you would not move premises.*

*Your refusal to move premises at the request of the Company, as you are required to do in terms of the Agreement, is a serious breach of the Agreement, entitling the Company to summarily terminate the Agreement and your employment with immediate effect…"*

41. The letter went on to advise that the claimants were allowed until 7 January 2022 to vacate the premises, failing which an action would be raised against them at Edinburgh Sheriff Court seeking their removal together with the payment of damages.

42. This caused the claimants a considerable amount of anxiety. One of their concerns was that Mr Sorrie was on the waiting list for an operation to his knee, and that if they were to move from the Lothian Health Board area to Dundee, in the Tayside Health Board area, Mr Sorrie might lose his place on the waiting list and have his treatment deferred. In addition, they were distressed to have lost their jobs and with it their place of residence.

43. Furthermore, the claimants were concerned at the reference to contact having been made with them by Ward Hadaway. They had never heard of Ward Hadaway, nor had they heard from them in that time.

44. The claimants' position was that they had never refused to move, nor had they rejected the offers which had been made to them. Their view was that it would be possible to remain in the Cramond Inn, with Mrs Sorrie single managing the pub, with some administrative help and guidance from her husband. They felt that there had been no discussions with them to try and resolve the situation.

45. Mr Smith's position was that it was for the claimants to communicate with Ms Stuart, not with him. Ms Stuart had been concerned to ensure that Scots Law - of which Mr Smith said they were "terrified" - was properly met and accordingly instructed Scottish solicitors to deal with the matter for them.

46. The claimants decided to appeal against their dismissal, and did so by letter dated 20 December 2021 (130). They observed that the letter of dismissal gave no right of appeal but presumed that they were able to do so.

47. They then expressed their "extreme distress" at how the matter had been dealt with, and set out their 4 points of appeal. In summary, those were:

    1. They had not indicated to Mr Smith that they were unwilling to reopen the pub, and the meeting in May had been concluded on the basis that

the matter would be considered. It was therefore clear that it was Mr Smith, and not the claimants, who did not wish to reopen the pub, they said. They were, in fact, willing to reopen it with support, but they believed that no attempts had been made to consider this.

2. They contested the respondent's position on their relocation, and could not understand why, if adjustments could be made to the Fox and Hounds, similar adjustments could not be made to the Cramond Inn. They also asserted that there were no discussions with them about how to resolve this situation.

3. They submitted that there was no discussion or meeting in relation to their absence, or to any disciplinary or capability proceedings, before they were dismissed.

4. They also argued that there was no discussion of any reasonable adjustments which might have been made in relation to Mr Sorrie, given his disability.

48. On 3 March 2023, the claimants notified ACAS of their intention to submit claims, under the Early Conciliation Scheme (42). The Early Conciliation Certificate was issued by ACAS on 11 April 2022.

49. An appeal hearing took place on 23 March 2022 by telephone. Mr G Scoreby conducted the hearing, assisted by Mrs R Smyth as note-taker, and the claimants were both in attendance.

50. Notes of the appeal hearing were produced (135ff).

51. During the course of the appeal hearing, the following exchange took place:

*"GS: What are you looking for at this meeting. Do you want your jobs back.*

*PS: That is a hard one, we loved our jobs. We have a good repour [rapport] with the customers yes would be the best outcome, but since our treatment Mr Smith has no intention of us being there since the claim.*

*If I had moved to Tadcaster or Darlington Mr Smith would have found something to get rid of us due to his reputation.*

*GS: The outcome of this appeal is solely down to me I just wanted to know what you wanted out of this and have a fair meeting.*

*PS: The company has given us no duty of care, caused stress and the relationship with the company has broken down. I don't know how we can move forward or be reinstated. There is now no relationship, we have had no support and have been treated terribly. Nothing for months and then just terminated. We have been honest and worked hard and this has been our repayment. Mr Sorrie put a claim in and we are no [now] public enemy number one.*

*GS: There is nothing about the claim in their appeal letter.*

*PS: There was no correspondence, then he put in the claim and then Mr Smith turned up there within a few days. To us it is down to the claim. That meeting was because of the claim."*

52. The respondent issued an outcome letter confirming Mr Scoresby's decision on the appeal on 31 March 2022 (140):

*7 have looked back at the process followed in respect of the termination of your employment. I am satisfied that this was a genuine attempt to bring to a head an ongoing situation that appears to have been unsatisfactory from both points of view.*

*I do however also concluded that you should have been given the opportunity to make whatever representations you considered appropriate and for them to be taken into account before any final decision was taken.*

*On that basis I uphold your appeal which means that your employment with the company is reinstated with retrospective effect.*

*There clearly now needs to be further discussion with your line manager as to how matters proceed from here but this now concludes my own personal involvement in the matter."*

53. The claimants were "elated", as Mrs Some put it in evidence, that their appeal had been upheld and that they had been reinstated. They believed that they would move forward and that they would be able to return to their jobs. They expected that the respondent would contact them to make the appropriate arrangements and discuss their return to work.

54. They heard nothing from the respondent, nor did they contact the respondent, in April 2022. In May 2022, Linda Stuart contacted the claimants to make an arrangement for Mr Smith to attend at the pub in order to ensure that leaks which had appeared in the property were attended to by tradesmen and dealt with. Mr Smith attended at the Cramond Inn in May. He met with the claimants and carried out an inspection of the leaks. He commented on the residential accommodation being sparsely furnished. Mr Smith made no comment about the pub reopening, or about the claimants' reinstatement or work situation. The claimants did not raise these matters with Mr Smith either during his visit. Mr Smith did not ask the claimants about their health, or their fitness to work, nor did the claimants volunteer any information about this to him.

55. The meeting achieved nothing so far as the claimants' employment situation was concerned. No work was offered to them, either before or after the meeting, nor at the meeting itself, to allow them to return to work with the respondent.

56. The claimants received no pay from the point when their employment was terminated by the respondent.

57. On 15 July 2022, the claimants wrote to the respondent (142) in a letter bearing the heading "Strictly Without Prejudice":

*"Dear Mr Smith,*

*We are writing on behalf of our on going employment.*

*As you are aware we were both re-instated to employment back in March 2022 following an appeal against both of our dismissals. Since our re-*

*instatement you have failed to provide us with any work or pay which is in breach of our contract of employment.*

*Not only that there are several express breaches of contract, the fact that you have effectively ignored us for months now and left us without any money whatsoever has damaged the working relationship beyond repair. We are owed backdated wages, holiday pay and pension contributions from the day of dismissal in December 2021.*

*Above all, we need to get back to work. If we do not hear from you by 22 July 2022 at 1500 hours then we have no other option but to resign."*

58. They asked, in their covering email (143) that the letter be passed to Mr Smith.

59. Ms Stuart responded on 22 July 2023 to acknowledge receipt of the email and to advise that she had been out of the office most of the week, and had not had the chance to address the issues in their email. She confirmed that she would make contact with them on the following Monday, and apologized.

60. She then checked with the person responsible for wages whether or not the claimants had been appropriately paid. She considered that the claimants should have spoken to her about obtaining work from the respondent, and took the view that they had not contacted her because they did not want to come back to work with the respondent. She believed that Mr Sorrie was still sick; that Mrs Sorrie was suffering from stress; that Mrs Sorrie did not want to run the Cramond Inn on her own, and they did not want to be anywhere else.

61. Ms Stuart then responded further to the claimants on 25 July 2022 (145):

*"Dear Bill and Pam,*

*I write further to my email sent on Friday.*

*You were reinstated following appeal and, as I understand the position, have been paid all moneys (sic) to which you are entitled. I am however*

*enquiring into this further as also with the question of holiday pay and pension contributions.*

*My understanding was that you both remained absent from work due to ill-health but please let me know if that is not correct.*

*I can further confirm that our respective solicitors are in contact to try to resolve all issues between us.*

*Kind regards*

*Linda"*

62. The claimants were of the view that this was an effort by the respondent to "palm us off, and that it was another delaying tactic. They considered that their relationship with the respondent had completely broken down.

63. On 26 July 2022, the claimants submitted a letter to the respondent tendering their resignations from their employment (148):

*"Dear Mr Smith*

*MR & MRS SORRIE - RESIGNATION LETTER*

I/We *are writing on behalf of our on going employment.*

*Since we were both re-instated to employment back in March 2022 following an appeal against both of our dismissals. You have failed to provide us with any monies or contact regarding work, which has went on (sic) for several months now.*

*We cannot go on this way; we have given you ample time to resolve the issues. The impact this is having on us both is horrendous.*

*The working relationship has been damaged beyond repair; therefore we have no other options but to resign.*

*Yours sincerely,*

*Mr & Mrs Sorrie*

*Cramond Inn"*

64. The letter was marked "Strictly Without Prejudice". It is not clear why.

65. Ms Stuart responded, expressing surprise (149) and asking the claimants to confirm that they had received her email of 22 July 2023. They replied (149) to say that their letter of resignation addressed the respondent's previous response. They felt it was "unacceptable after months of no progress", and said that they were not prepared to wait any longer given nearly five months of no contact and over 8 months without any pay. They considered that he terms of the respondent's response were not genuine, and were factually incorrect. They directed the respondent to contact their solicitor thereafter.

66. Since the claimants resigned, their positions have been different.

67. Mrs Sorrie obtained new part time employment in a bar in Dundee, employed by M & JMC Bars Ltd, earning £137 per week up until March 2023, and thereafter £151.09 per week. It is not a position which grants Mrs Sorrie accommodation.

68. In the schedule of loss (211), it appears to suggest that Mrs Sorrie did not obtain this employment until her resignation. However, in evidence, Mrs Sorrie indicated that she would have given up this employment if she had been reinstated. That suggests that her Dundee employment began before she resigned.

69. The evidence on this was unclear and confusing.

70. Mrs Sorrie has not applied for any other employment since her resignation, on the basis that she is content in her current role. She has not applied for any state benefits since her resignation.

71. Mr Sorrie claims Attendance Allowance, for which he receives £247.40 every 4 weeks. It is not clear when he started to receive this allowance. He confirmed that he has now retired. He has not had the knee surgery for which he has been waiting for some time since before he resigned with the

respondent. He has not been fit to carry out full duties as a bar manager since he went off sick in his employment with the respondent.

72. Mr Some did not apply for any employment following the resignations. He has not taken up the same employment as his wife, in Dundee.

**Submissions**

73. The representatives made short submissions to the Tribunal, which were taken into account in reaching the decision below, and to which reference is made in the discussion section as appropriate.

**The Relevant Law**

74. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
>
> ...
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

75. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is Western Excavating *-v-* **Sharp [1978] ICR 221.**

*76.* In considering the issues the Tribunal had regard to the guidance given in Western Excavating and in particular to the speech of Lord Denning which gives the "classic" definition:

> "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

77. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

> "…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

78. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

79. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462,** in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or

seriously damage the relationship of trust and confidence between employer and employee."

80. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC,** in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

**Discussion and Decision**

81. Before setting out the decision reached and the reasons therefor, it is appropriate to make some observations about the evidence in this case.

82. The claimants both gave evidence in straightforward terms to this Tribunal, and I considered them both to be truthful, seeking to assist the Tribunal in the Hearing. They were, to some extent, a little vague, particularly in relation to some of the matters relating to remedy. I was prepared to accept their evidence as accurate and honest.

83. Ms Stuart emerged as a witness who sought to support the respondent's position, and to reinforce her position as assisting Mr Smith rather than making decisions of her own. Her evidence, to the extent that it was useful, appeared to be given in an honest manner and I see no reason to find that she was not attempting to assist the Tribunal.

84. Mr Smith presented in an unusual manner. His demeanour was, throughout, combative and argumentative, both with the questioner in cross-examination and with the Tribunal. He appeared to be very dismissive of the proceedings as a whole, and gave the impression that it was either a waste of his valuable time or beneath him. He constantly sought to lay off responsibility for decisions elsewhere, particularly upon the lawyers representing the company. After a short time in the witness box, he began to express very strong criticism of Mr Sorrie in particular, suggesting that the

accidents he sustained were simply his own fault as his practice was flawed.

85. Overall, I found Mr Smith's evidence to be unhelpful and not credible, where there was any divergence between his version of events and those of the claimants. It was impossible to avoid the conclusion that Mr Smith was very angry with the claimants, at least in part for having raised personal injury claims against the company, and that that influenced his behaviour towards them while they were still employed. Where there was a difference between his evidence and that of the claimants, I preferred the evidence of the claimants.

86. The issues, which I have adapted from the terms of the Agreed List of Issues submitted by the parties, between the parties were as follows:

1. **Has the respondent breached the claimants' employment contract? In particular, has the respondent breached the implied term of trust and confidence or any express contractual term?**

2. **What express contractual term has been breached, if any?**

3. **Has the implied term of trust and confidence been breached?**

4. **Was the breach sufficiently serious that it constituted a repudiatory breach, entitling the claimants to treat the contract as having been terminated?**

5. **If relying on a last straw argument, what was the last straw? Did the last straw contribute something, or was it, objectively viewed, an innocuous act?**

6. **If so, did the claimants resign in response to the alleged breach or . breaches?**

7. **Have the claimants affirmed the alleged fundamental breach of contract by virtue of any delay or conduct prior to resignation?**

**8. If the Tribunal finds that the claimants were dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996:**

**a. What was the reason for dismissal?**

**b. Did the respondent act fairly in all of the circumstances by dismissing the claimants?**

**c. Was dismissal for this reason within the range of reasonable responses open to a reasonable employer in accordance with equity and the substantial merits of the case, in terms of section 98(4) of the Employment Rights Act 1996?**

**9. With regard to the claimants' claims of unlawful deductions from wages:**

**a. Should the respondent have paid backdated pay from the date of the successful appeal to the date of the original termination date of 14 December 2022?**

**b. Should the respondent have paid the claimants from the date of the successful appeal to the date of resignation?**

**c. Were the claimants entitled to any holiday pay in respect of annual leave accrued but untaken as at the date of resignation?**

**10. If successful, what remedy should be awarded to the claimants, respectively?**

87. I deal with these issues in turn.

88. In addressing issues 1 to 7, it is necessary to understand the precise nature of the alleged breaches of contract raised by the claimants. The List of issues does not provide details of those breaches.

89. Mr Lawson, in his submissions, set out the following alleged breaches:

- Failure to pay wages since the claimants were reinstated on appeal;

- Failure to provide them with work allowing them to discharge their duties;

- Breaching the implied term by ignoring the claimants for months, with no pay, no work and no acknowledgement that they were still employees.

90. He maintained that the actions of the respondent, and Mr Smith in particular, demonstrated that they had no intention of being bound by the contract and providing them with the work that they were reinstated to do.

91. The last straw upon which the claimants rely is the respondent's email of 25 July 2022, in which the respondent stated that they understood that the claimants were off sick, and had been paid all monies due, a statement which Mr Lawson described as "so false and based on no fact that it severed the last ounce of trust and confidence the claimant's (sic) had in the respondent." He criticised the respondent's inaction following the decision to reinstate them.

92. The respondent denies that there were any breaches of contract, and attacks the suggestion that the email of 25 July 2022 could amount to a last straw.

93. Mr MacDougall went on to point out that the original claims raised preceded the claimants' resignations, and that in the respondent's submission they sent the ultimatum letter in order to generate a response from the respondent which they could rely upon as a last straw. He also argued that Ms Stuart's response was a genuine one in which she was seeking information from the claimants.

94. It appears to me appropriate to consider whether the alleged breaches took place, amounted to breaches, and ultimately were the reason why the claimants resigned.

95. It is plain to see that the relationship between the respondent and the claimants was one which was healthy and positive for a number of years, but that something caused that relationship to change prior to the dismissal

of the claimants. This reached its peak when the respondent dismissed the claimants on 14 December 2021.

96. It is worth considering this decision to dismiss the claimants in December 2021. While it is not alleged to have amounted to a breach of contract, either express or implied, it does form an important part of the background to these events.

97. The decision to dismiss the claimants was clearly taken, but by whom is entirely uncertain, on the basis of the evidence. The letter was issued by a Scottish solicitor instructed by the respondent, and included a section in which the claimants were dismissed. That solicitor did not give evidence, understandably, and accordingly it can only be assumed that he acted on the instructions of the respondent. Mr Smith's evidence about this was notably vague. He explained that they normally instructed an English firm of solicitors to give advice on employment law, but that in this case they were terrified of the potential differences between Scots and English law, so they sought to involve a Scottish solicitor. He indicated that he understood that the Scottish and English solicitors would communicate with each other. He also seemed to suggest that he did not communicate directly with the Scottish solicitor.

98. It was a consistent theme in Mr Smith's evidence that if there were a problem with the respondent's actions, it was not his fault but someone else's. It is very unlikely that a solicitor would act without instructions in sending the letter of dismissal to the claimants. It is not appropriate to speculate about how this came about, either.

99. Whatever the reason for it, the letter of 21 December 2021 was ostensibly written on the instructions of the respondent, whether Mr Smith admits that or not, and as a dismissal was carried out quite unfairly. There was no warning to the claimants that their employment was about to be terminated, there was no hearing before the decision was issued, no right of appeal was set out and the reason for dismissal itself was entirely unclear. It was a precipitate and unwise act by the respondent.

100. The claimants were shocked and upset to have been dismissed in such a peremptory manner, and it was right that they decided to submit an appeal; it was also right that the respondent conducted its own investigation at the appeal stage and concluded that the dismissal had been procedurally unfair. The claimants were therefore reinstated.

101. Having endured that unpleasant process, the claimants believed that their reinstatement would supersede the unfair procedure which had been followed, and understood that their reinstatement meant that they were reinstated to their positions as joint managers of the Cramond Inn. The appeal letter merely states that *"your employment with the company is reinstated with immediate effect".*

102. It is what followed that comes sharply into focus in determining this claim. The claimants complain that the respondent failed to pay them following reinstatement, and also failed to provide them with work, and that both failures amounted to breaches of contract.

103. There was a lengthy period following reinstatement in which the parties did not communicate with each other. Each party firmly blames the other for failing to be in touch. Even when Mr Smith attended at the pub in order to consider its readiness for reopening, neither party took the opportunity to broach the subject of reinstatement, pay or work.

104. It is important, in my judgment, to consider what "reinstatement" means in this context. No evidence was led from the appeal manager as to what he understood the meaning and effect of reinstatement would be. The respondent led evidence from Mr Smith about this, and also Ms Stuart. Both of them were rather reluctant to express a precise definition of reinstatement, but both clearly laid the onus upon the claimants to contact the respondent and ask for work. They both stated clearly that there was no reason why the claimants did not contact Mr Smith or Ms Stuart to clarify the matter.

105. It is my view that reinstatement must be taken to have its ordinary meaning, which is that following their appeal against the decision to dismiss

them, they were placed back in the positions which they would have had, had they not been dismissed.

106. In the case of **Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1843,** the Court of Appeal made reference to the effect of a decision to reinstate an employee on appeal. Neither party referred me to this case, but I consider it to be a well-known authority of assistance in determining this matter.

107. The Court said:

*"By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future. Those terms include the usual implied duty of an employer to maintain trust and confidence. "*

108. Parties did not make submissions about the effect of reinstatement in this case, but in my judgment, the meaning of reinstatement here was to restore the claimants to their positions immediately prior to the decision to dismiss them, with the commensurate effect that they should have back pay paid to them at the rate and sum to which they would have been entitled had they never been dismissed.

109. Firstly, with regard to the assertion that the respondent breached the claimants' contract of employment by failing to pay them both back pay and ongoing pay after they were reinstated, it is necessary to establish whether or not they were entitled to pay at the point when they were dismissed, and at any time thereafter until their resignation.

110. The claimants resigned on 26 July 2022. They had been dismissed on 14 December 2021. Mr Sorrie had been absent from 24 May 2021 due to

ill health. He remained absent from work and unfit to work until 17 February 2022. Mrs Sorrie had been absent from work due to stress on 21 May 2021. She remained absent from work due to ill health until 11 January 2022.

111. It is not disputed by the respondent that the claimants received no pay from the date of dismissal on 14 December 2021 until their resignation on 26 July 2022. The explanation given appears to be that they were not entitled to pay because they were absent and unable to work due to ill health.

112. Clause 23 of the Agreement between the parties (92) provides that any absence due to ill health would be dealt with in accordance with the Company Sickness Absence and Sick Pay Policy, and the Company's Sickness Absence Management Procedure. No copies of those documents were produced to the Tribunal by either party in this case.

113. Some assistance is found in the payslips which were lodged by the parties, in particular from 166ff.

114. It is plain from those payslips, which were not disputed as accurate, that Mrs Sorrie received the following sums on these dates:

- 31 March 2021: Furlough pay: £1,163.33; Top up pay: £376.25; Net pay £1,306.02.
- 30 April 2021: Furlough pay: £1,163.33; Top up pay: £376.25; Net pay £1,308.04.
- 28 May 2021: Furlough pay: £1,163.33; Top up pay: £0; Net pay £1,066.99.
- 30 June 2021: Salary: £1,245.03; Furlough: -£421.86; SSP Adjustment: £272.99; Net pay £1,023.96.
- 30 July 2021: SSP Adjustment: £321.17; Net pay £456.45.
- 30 August 2021: SSP Adjustment: £481.75; Net pay: £488.02.

- 30 September 2021: SSP Adjustment: £465.69; Net pay £465.69.
- 29 October 2021: SSP Adjustment: £433.57; Net pay £433.57.
- 30 November 2021: SSP Adjustment: £401.48; Net pay: £401.46.
- ® 30 December 2021 : Holiday Pay: £1,095.89; Net pay: £1,036.98.

115. The following payments are set out in the payslips in relation to Mr Sorrie:

- 31 March 2021: Furlough pay: £1,163.33; Top up pay: £376.25; Net pay £1,306.02.
- 30 April 2021: Furlough pay: £1,163.33; Top up pay: £376.25; Net pay £1,308.04.
- 28 May 2021: Furlough pay: £1,163.33; Top up pay: £0; Net pay £1,066.99.
- 30 June 2021: Salary: £1,144.69; Furlough: -£306.81; SSP Adjustment: £224.82; Net pay £868.77.
- 30 July 2021: SSP Adjustment: £337.22; Net pay £319.55.
- 30 August 2021: SSP Adjustment: £513.87; Net pay: £461.62.
- 30 September 2021: SSP Adjustment: £369.34; Net pay £345.40.
- 29 October 2021: SSP Adjustment: £481.75; Net pay £435.90.
- 30 November 2021: SSP Adjustment: £369.34; Net pay: £345.40.
- « 30 December 2021: Holiday Pay: £1,095.89; Net pay: £891.37.

116. Essentially, then, the claimants complain that by failing to backdate their pay to the date of dismissal from the date of reinstatement, the respondent fundamentally breached their contract of employment.

117. It is clear that the respondent simply stopped paying the claimants from the date of their dismissal. It is also clear that by the point when they were dismissed, the respondent was not paying them any salary, due to their sickness absence, but was allocating SSP to them, doubtless to be reclaimed by the respondent from the Department of Work and Pensions.

118. It should be borne in mind that at this stage the primary consideration is not whether they were unlawfully deprived of wages (since the unlawful deductions claims made relate to a later period), but whether, by not paying the claimants following dismissal, the respondent acted in breach of contract.

119. What must also be borne in mind is the puzzling (though not unknown) provision in Clause 23 of the Agreement that the Sickness Absence and Sick Pay Policy, and the Sickness Absence Management Procedure, were "not contractually binding".

120. I have reached the conclusion that there is too much uncertainty about the evidence available to find that the respondent breached the claimants' contract of employment by failing to pay them retrospectively from the date of reinstatement to the date of dismissal. If they were entitled to receive any pay during that period, it would have been no more than SSP. No salary had been paid to them up to the point of dismissal from May 2021 due to their absence on the grounds of ill health.

121. I consider that it is too speculative to find that the claimants, or Mrs Sorrie at least, would have been likely to return to work in the period following the dismissal had they not been dismissed.

122. This is not to say that the actions of the respondent were entirely acceptable during this period, as will be seen below; but I am unable to reach the safe conclusion that the claimants would have been entitled to any pay during that period, and therefore cannot find that there was a fundamental breach of an express term of the contract.

123. The second express breach of contract pled related to the failure to provide work to the claimants. Clearly, that cannot relate to the period up to reinstatement, since they had been dismissed (albeit by quite unreasonable means), and therefore it is not surprising that the respondent did not offer them work. In addition, there is uncertainty as to whether or not they would have been available for work during that period.

124. In my judgment, the most serious complaint here is that the respondent's actions amounted to a fundamental breach of the implied term of trust and confidence, acting in such a way as no longer considering themselves to be bound by the material terms of the contract of employment so as to undermine trust on the part of the claimants in them as their employers.

125. There was a period between reinstatement and resignation when there was simply no communication between the claimants and the respondent.

126. The claimants were reinstated on 31 March 2022; they resigned on 26 July 2022.

127. The only communication between the claimants and Mr Smith was on the occasion, on an uncertain date in May 2022, when he attended the pub in order to assess its readiness to be reopened. During that visit, neither party raised with the other the question of reinstatement nor of pay.

128. As I have previously found, both parties blamed each other for the failure to communicate.

129. Having considered the evidence of both parties, I have concluded that this situation was one which was quite capable of resolution, had the parties made any effort at all to open a dialogue about the effect of the reinstatement. It was, in my view, quite bizarre that even when Mr Smith was in the same room with them, none of the individuals concerned thought it appropriate to bring up the obvious question.

130. However, it is my judgment that it was for the respondent to take steps to contact the claimants and discuss with them the next steps to be taken. It was quite insufficient for Mr Smith to take the view that an offer had been made for Mrs Sorrie to take over the management of a pub in Yorkshire when it was clear that the claimants were not minded to accept that offer.

131. The respondent had taken the radical and precipitate step of dismissing the claimants on 14 December 2021 without good reason and in a manner which was quite unreasonable and unfair towards them. Having brought about an entirely unsatisfactory set of circumstances, it was the responsibility of the respondent to explain to the claimants what steps they would be taking in order to restore them to their previous position. Referring back to the offers which had been made was an inadequate response, and in any event, they did not do that. They simply ignored the claimants. They did not, in my judgment, make any efforts to communicate with their newly restored employees to discuss their ongoing employment. The claimants could not act without the initiative of the respondent. They did not know what the respondent wanted to do about this.

132. It is impossible to avoid the conclusion that Mr Smith was very unhappy with the decision to reinstate them, and simply refused to act in accordance with that decision, which was made by another manager. His mind was entirely made up that Mr Sorrie was unable to work, and that they could not be allowed to continue in employment at the Cramond Inn. He made no effort to communicate with them in order to restore the relationship between them, even when he was in the pub itself with them.

133. That lack of communication and failure to clarify their roles, their pay and their ongoing relationship with the respondent following their reinstatement amounted to conduct designed to undermine the contractual relationship between the parties. It is reasonable to conclude that Mr Smith was angry with the claimants for having submitted personal injuries claims, and indeed for having sustained any injuries at all, and that as a result he

was unwilling to resume a working relationship with them. His demeanour in the witness box reinforced this conclusion.

134. Finally, it is necessary to consider whether or not the email of 25 July 2023 amounted to a final straw.

135. The respondent argues that there was no act or conduct which is capable of being labelled as "a last straw" in this case. A continuing state of affairs cannot constitute a form of "optional last straw" that can be activated at any time, as there must be something which tips the balance into an irreparable breakdown of trust and confidence.

136. Essentially, they argue that the claimants sent their email of 15 July 2022 (what Mr MacDougall referred to as the "Ultimatum Letter") in order to instigate a response from the respondent which they could argue to be the final straw; and in any event, they argue that the response by Ms Stuart was a genuine one which was seeking further information from the claimants. It was submitted that it was an innocuous act and cannot therefore satisfy the test of being a final straw.

137. They also argue that even if that letter of 25 July were a final straw, it was not causative of the resignations.

138. It is important, then, to analyse the sequence of events which led to the resignation of the claimants, in order to understand what part, if any, the letter played in that decision.

139. The context, which I have already determined, is critical here. The respondent had been behaving in a manner designed to undermine the claimants' trust and confidence in them, by ignoring them following their reinstatement, and taking no steps to act upon their own decision.

140. The respondent accuses the claimants of, in effect, manufacturing a situation whereby they could rely upon an act of the respondent as the basis for their resignations. In my judgment, the letter of 15 July 2022 was a genuine attempt on the part of the claimants, in a state of some frustration, to provoke a response which would enable them to have clarity as to their

future with the company. They had been dismissed some months before, had gone without pay for that period and had no indication as to what the respondent intended to do about restoring them to employment. They had no resigned at that point, but wanted to find a way to move the matter on.

141. I concluded that the claimants were honest in their evidence. I do not accept that there was a contradiction in the evidence of Mr Some as asserted by the respondent's representative, in suggesting that he might have been willing to continue to work for the respondent. My conclusion on this was that both claimants were prepared to continue to work for the respondent in preference to their current circumstances, in which Mrs Sorrie was working in Dundee on reduced hours and Mr Sorrie was signed off sick.

142. I am also prepared to accept that their response to the email by Ms Stuart dated 25 July was genuine. They were entitled to be dismayed that Ms Stuart, having looked into the matter, simply told them that she understood that they had been paid the monies to which they were entitled, and that she would look further into the matter in relation to holiday pay and pension contributions. The respondent had had months to address the employment of the claimants and had failed entirely to do so. It is hardly surprising that the claimants were upset when they received this response, and regarded it as confirmation that the respondent had no intention of reinstating them. Ms Stuart was also vague about whether or not both claimants were absent due to ill health, despite having made no inquiries before having made this assertion.

143. In my judgment, it was a disingenuous and unhelpful response. I do not, ultimately, take the view that Ms Stuart herself was at fault, though it is astonishing that nobody in the respondent's business took the step of seeking to arrange a meeting or a telephone call with the claimants in order to understand what they expected following reinstatement, what monies they considered themselves entitled to and what the next step should be. Further, the letter makes no attempt to address the ongoing relationship between the parties, and fails entirely to provide the claimants with definitive and clear answers to their questions. It seems that the respondent simply

failed to address the fact that the claimants had been reinstated, and took no account of the updated circumstances which may have applied to them at that stage.

144. It is my further conclusion that the respondent's response was causative of the claimants' decision to resign, on the basis that it was an inadequate and unhelpful response, coming on top of a lengthy period during which they failed entirely to address their own decision to reinstate the claimants. I accept that the claimants felt that matters had reached a critical point and that the respondent had demonstrated that they no longer intended to be bound by the material terms of the contract of employment.

145. Accordingly, it is my judgment that the final straw was not an innocuous act, but was in fact the final straw which led to the claimants' resignation.

146. As a result of the respondents' inaction following the reinstatement decision, it cannot be found that the claimants affirmed the breach of contract. The respondent cannot, in my judgment, fairly rely upon their own inactivity to criticize the claimants for not having resigned before they did. It was the fact that they responded so inadequately to the email of 15 July that led to the claimants having some clarity, at long last, as to their attitude and position towards them. In the absence of any indication as to what the respondent intended to do, the claimants were left with nothing to hold on to. Indeed, having heard the evidence in this Hearing, it remains unclear what the respondent might have thought they should be doing about the claimants' contracts of employment. They treated them with disregard. Mr Smith plainly had no intention of encouraging any change in the status quo, and took no action whatsoever to move the relationship forward. I cannot speculate as to what the respondent would have done had they grasped the nettle and contacted the claimants to discuss the matter with them, but Mr Smith's position appeared to be that they had made offers of alternative employment to the claimants and that since those had been rejected they could not be returned to their existing employment. The difficulty with that attitude was that the respondent had ordered that they be reinstated, and

the onus was on the respondent to act in accordance with that decision, as opposed to ignoring it.

147. The questions set out in Issue no 8 appear to be based on a set of facts leading to the conclusion that there was an active decision to dismiss the claimants by the respondent. It is impossible to draw any conclusion as to what reason the respondent had or might have had for dismissing the claimants. The respondent took no steps to investigate the claimants' circumstances and cannot, in my judgment, credibly suggest that the reason for dismissal might have been capacity or performance. Mr Smith's evidence on this point was incoherent. It is impossible to know whether he considered that the claimants - both of them - were unfit to continue their role, were incapable for some reason relating to performance, or should not be permitted to return to their roles because they had the effrontery to submit personal injuries claims against the respondent.

148. As a result, the circumstances of this case do not permit the Tribunal to reach the conclusion that the claimants were dismissed for a potentially fair reason under the Employment Rights Act 1996, and in any event, to do so would run the risk of falling into an error of law. This is a claim brought under section 95(1) of ERA, not section 98, and the respondent is not in a position to argue that there was a potentially fair reason for their dismissal, since they deny that there was a dismissal and took no steps at the time to effect that dismissal or lay the foundation for any potentially fair dismissal. They took no relevant action at all. As a result, the respondent cannot be found to have dismissed the claimants for a reason within the range of reasonable responses open to a reasonable employer in the circumstances.

149. I have therefore concluded that the claimants' claims of constructive unfair dismissal should succeed.

**With regard to the claimants' claims of unlawful deductions from wages:**

a. **Should the respondent have paid backdated pay from the date of the successful appeal to the date of the original termination date of 14 December 2021?**

b. **Should the respondent have paid the claimants from the date of the successful appeal to the date of resignation?**

c. **Were the claimants entitled to any holiday pay in respect of annual leave accrued but untaken as at the date of resignation?**

150. The claimants also make claims of unlawful deductions of wages, and it seems to me appropriate to address those claims in the context of determining what losses, if any, each of the claimants has sustained as a result of having been constructively unfairly dismissed by the respondent. I do so under the Remedy section below.

151. However, the claimants also make free-standing claims of unlawful deductions from wages and I address these claims under Issue no 9.

152. The effect of the successful appeal was to reinstate the claimants to their employment with the respondent. That must be taken to mean two primary things: firstly, that there was no dismissal as a result of the successful appeal against the decision to dismiss the claimants; and secondly, that they were reinstated to the contractual positions which they had held prior to their dismissals on 14 December 2021. That means, in short, that they were reinstated to the positions of joint managers of the Cramond Inn.

153. Neither Mr Some nor Mrs Some received any pay, other than SSP, after 30 June 2021 . The reason for that was that both were signed off work as unfit. The only payments they received other than SSP were holiday pay sums on 30 December 2021 at the point of dismissal.

154. Following their dismissals, they were not paid SSP nor any other payments by the respondent, on the basis that their employments had terminated. After they were reinstated, the respondent did not pay either of them any wages, nor SSP, at all.

155. The effect of reinstatement must be to restore the claimants to the positions which they had held prior to dismissal. Their contracts of employment would be treated as if they had never been interrupted by termination.

156. From the claimants' point of view, had they not been dismissed, they would have continued to receive no contractual pay from the respondent, until they were able to demonstrate their fitness to return to work. They never did that, since their employments were terminated by the respondent.

157. What makes this difficult is that there is considerable uncertainty about the respective positions of Mr and Mrs Sorrie following their reinstatement, on the evidence, in relation to their potential to return to work.

158. It seems to me that Mr Sorrie's evidence is clear: he remained unfit to work due to his knee. His medical condition did not improve from the point when he was dismissed, and indeed at the date of the Tribunal he was still awaiting restorative surgery. His position was that he had therefore retired.

159. His position prior to dismissal seems to have been that he was willing to work on, carrying out limited administrative duties which would not have involved him in lifting and moving heavy objects, but the respondent's conduct never allowed him to return. That may be so, but the reality is that he absented himself from work due to injury, and did so over a significant period of time, during which his condition did not improve. As a result, it seems to me that the effect of reinstatement for Mr Sorrie would have been to restore him to a position in which he was not entitled to receive any pay, other than SSP.

160. It is not clearly proved on the evidence, in my judgment, that Mr Sorrie sustained any losses from his contractual pay following his dismissal on 14 December 2023. It follows, therefore, that he was not entitled to receive pay from that date until his retirement, and thus that he has not sustained any deductions from his wages by the respondent.

161. With regard to Mrs Some, the position is more clouded. Again, she was absent from work over an extended period of time from the end of June 2021 until her dismissal. As a result, she received no pay other than SSP until dismissal, and her reinstatement in effect restored her to a position of no pay. Because Mrs Some did not submit fitness notes following her dismissal and reinstatement, there is no evidence which clearly demonstrates when it was that she became fit to return to work.

162. Mrs Some maintains that she would have been willing and able to return to work following reinstatement had the respondent acted in such a way as to enable her to do so, but there was no communication from the respondent about this.

163. There was an offer available to her prior to her dismissal to take over one of two pubs in the Tadcaster area on her own, without the assistance of her husband, but she regarded this as unacceptable, and indeed, took a position in Dundee in preference to waiting for the respondent to take action in relation to her employment.

164. Mrs Some accepts that she did not seek alternative employment following her dismissal and reinstatement, other than to take up the relatively part time work offered in Dundee. This was congenial to her on the basis that it allowed her to move closer to her family. That was a choice which, we shall see, had an inevitable impact upon the Tribunal's deliberations with regard to her efforts to mitigate her losses following her dismissal.

165. It appears to me that had Mrs Some returned to her employment with the respondent, there would have had to be a discussion with the respondent as to what that return would mean. The impasse which had led the respondent to act so unwisely by terminating the contract on 14 December 2021 still remained, and needed to be resolved. The evidence does not persuade me that it is clear when Mrs Sorrie would have returned to business and been able to resume earning a living from the respondent.

As a result, it is impossible to conclude that Mrs Some has suffered an unlawful deduction from her wages from the date of her dismissal onwards.

166. This is not to say that it would not be just and equitable to award compensation to the claimants in respect of the period affected; that is a different matter, which requires the Tribunal to take into account broader considerations.

167. As an aside, the respondent's argument that the claimants were not willing nor able to attend work is not a convincing argument. While I understand their position that the claimants did not put themselves forward to return to work, it is disingenuous to argue that the respondent was in some way detached from this process. The claimants were plainly entitled to await action from the respondent, as I have found above, and had there been some form of contact, it cannot be said that that would have been incapable of resolving the dispute in a more satisfactory manner than the complete inaction of the respondent.

168. Accordingly, it is my conclusion that the claimants have not proved that they have suffered unlawful deductions from wages.

**10. If successful, what remedy should be awarded to the claimants, respectively?**

169. It is necessary, then, to consider what award should be made to the claimants in relation to the finding that they were constructively unfairly dismissed.

170. Firstly, I must consider the basic award to be made to each claimant.

171. Each claimant was employed by the respondent from 18 October 2018 until 27 July 2022, a period of more than 3 years.

172. Mr Some was aged more than 41 as at the date of termination of his employment, having been born on 14 May 1955. His gross weekly wage was £362.92.

173. Mr Some is therefore entitled to a basic award of £362.92 x 3 x 1.5, which amounts to £1,471.14.

174. Mrs Sorrie was employed by the respondent for precisely the same length of time as her husband, and accordingly had 3 years' completed service with the respondent.

175. She was aged more than 41 as at the date of termination, having been born on 18 November 1966. Her gross weekly wage was £362.92.

176. Accordingly, Mrs Sorrie is entitled to a basic award of £362.92 x 3 x 1.5, which amounts to **£1,471.14.**

177. Next, it is necessary to consider what compensatory award should be made to each of the claimants.

178. It is crucial to remember that under section 123(1) of the Employment Rights Act 1996, the amount of the compensatory award "shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

179. The Tribunal must consider what losses were sustained by each claimant in consequence of the dismissal in so far as that loss is attributable to the actions of the employer.

180. Firstly, Mr Sorrie. The difficulty for Mr Sorrie is that the evidence does not demonstrate that he would have been in a position to return to work at the Cramond Inn. He speculated that he could have participated in the management of the pub by carrying out some administrative and office duties. The problem with this is that there were duties which he was no longer able to carry out, and which his wife could not supply. The impasse between the parties was real and, to some extent, understandable.

181. Had the respondent grasped the nettle and convened a serious discussion about the future with the claimants, it may have led to a

constructive solution, or it may have simply entrenched the parties. There is no way to discern what would have happened from the evidence.

182. As a result, the Tribunal is left with the reality that Mr Some was unable to work following his departure from work on sickness absence in June 2021, and that his condition did not improve until, on an unspecified date, he chose to retire. In these circumstances, it is not apparent from the evidence that Mr Sorrie sustained any loss in consequence of the actions of the respondent.

183. I am not therefore persuaded that Mr Sorrie should receive any compensatory award in the circumstances of this case.

184. In addition to his basic award, I am prepared to award Mr Sorrie the sum of £500 in relation to the loss of statutory rights.

185. Accordingly, the respondent is ordered to pay to Mr Sorrie the sum of £1,971.14.

186. Secondly, Mrs Sorrie. Mrs Sorrie's circumstances differed from those of her husband in that it becomes clear that following her dismissal but before her reinstatement, she took up alternative employment in a pub in Dundee, at reduced hours and pay. As a result, she was clearly fit to return to work at that point.

187. However, Mrs Sorrie did not take any steps to mitigate her losses, other than to obtain the part time employment in Dundee. She did not continue to apply for work after she took up that position, and that was a conscious decision on her part. Her evidence was that she was content to accept a lower wage for lesser responsibilities, and to live closer to her family.

188. She did say that she was willing to return to work for the respondent after she was reinstated, as it was a more lucrative position than the Dundee job.

189. The determination of an appropriate compensatory award for Mrs Some is difficult, partly because of the different considerations set out above, but also because it is hard to discern when she would have been able to return to work.

190. I do accept, however, that the respondent's failure to engage with Mrs Some at all after her reinstatement, and their assertion that she remained unfit for work despite not having taken any steps to establish whether or not this was true, has led to her making the decision to accept a lesser-paid job elsewhere.

191. Accordingly, I have concluded that Mrs Sorrie has sustained a period of loss of wages following her resignation from the employment of the respondent, which was brought about in consequence of the respondent's fundamental breach of her contract of employment. It is, in my judgment, just and equitable to make an award to her of pay equivalent to that of 3 months, that is 12 weeks, and to reduce that sum by the amount which she was already receiving at that stage from the Dundee position.

192. I calculate, then, that the claimant's net weekly wage was £300.08; and that she received a net weekly wage from her new employment of £137.90. The weekly figure upon which her compensatory award is based is therefore £162.18. Having determined that the appropriate period for compensation is 12 weeks, I am prepared to award Mrs Sorrie the sum of **£1,946.16.**

193. In addition, Mrs Sorrie is entitled to an award in respect of loss of statutory rights, of £500.

194. It is my judgment, then, that the claimants' claim of unfair constructive dismissal succeeds, and that the respondent is ordered to pay to Mr Sorrie the sum of **£1,971.14;** and to Mrs Sorrie the sum of **£3,917.30.**

**Employment Judge: M A Macleod**
**Date of Judgment: 23 August 2023**
**Entered in register:25 August 2023**
**and copied to parties**

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