



EMPLOYMENT TRIBUNALS

Claimants: Miss Chloe McCarthy
Mr Sam Bridges

Respondent: The Puckersley Inn Limited

HELD AT: Manchester by CVP **ON:** 5 6 & 7 February 2023

BEFORE: Employment Judge Fearon

REPRESENTATION:

Claimants: Miss McCarthy and Mr Bridges in person

Respondent: Mr Paul Clarke, representative

JUDGMENT

The judgment of the Tribunal is that:

1. Miss McCarthy's complaint of unfair dismissal is not well founded and is dismissed.
2. Mr Bridge's complaint of unfair dismissal is not well founded and is dismissed.
3. Miss McCarthy's claim for holiday pay is not well founded and is dismissed.
4. Mr Bridge's claim for holiday pay is not well founded and is dismissed.
5. Miss McCarthy's complaint of breach of contract is not well founded and is dismissed.
6. Mr Bridge's complaint of breach of contract is not well founded and is dismissed.
7. Miss McCarthy's claim for unauthorised deductions from wages is not well founded and is dismissed.

REASONS

Introduction

1. Miss McCarthy was employed by the respondent as a front of house team member from 5 January 2019 until 17 August 2022. Miss McCarthy presented a claim on 11 December 2022.
2. Mr Bridges was employed by the respondent as a front of house team member from 20 April 2019 until 17 August 2022. Mr Bridges presented a claim on 11 December 2022.
3. Both claimants present claims for unfair dismissal, wrongful dismissal (notice pay) and holiday pay.
4. Miss McCarthy presented a claim for wages not paid due to two shifts being cancelled.
5. The respondent disputes each claimants' claims for unfair dismissal and wrongful dismissal on the basis that both claimants resigned and were not dismissed.
6. The respondent denies the claims for holiday pay on the basis that sums were overpaid to Mr Bridges and regarding Miss McCarthy on the basis that all sums due for holiday pay have been paid to her.
7. The respondent denies Miss McCarthy's claim for shift pay on basis that notice was given of the shift cancellation and her contract deals with such situations arising and alternative work was offered.

The Issues for the Tribunal to decide

8. At the outset I discussed with the parties the issues in the case and the list of issues to be determined was agreed as follows:

Unfair dismissal

1. Was the claimant dismissed.
2. If the claimant was dismissed, what was the reason or principal reason for dismissal?
 - 2.1 Was the claimant dismissed for a potentially fair reason?
 - 2.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:
 - a) Were there reasonable grounds for that belief?
 - b) At the time the belief was formed, had the respondent carried out reasonable investigations and reached its conclusions based on reasonable investigations?

3. had the respondent otherwise acted in a procedurally fair manner;
4. was dismissal was within the range of reasonable responses

Remedy for unfair dismissal

1. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 1.1 What financial losses has the dismissal caused the claimant?
 - 1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 1.3 If not, for what period of loss should the claimant be compensated?
 - 1.4 Is there a chance that the claimant would have been dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 1.5 If so, should the claimant's compensation be reduced? By how much?
 - 1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 1.7 Did the respondent or the claimant unreasonably fail to comply with the code? The claimants say the respondent failed to comply with the code at all.
 - 1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - 1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 1.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?
2. What basic award is payable to the claimant, if any?
3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Breach of contract (Notice pay)

1. What was the claimant's notice period?

2. Was the claimant guilty of gross misconduct? It is for the respondent to prove that the claimant committed an act of gross misconduct.

Holiday Pay (Working Time Regulations 1998)

1. What was the claimant's leave year?
2. How much of the leave year had passed when the claimant's employment ended?
3. How much leave had accrued for the year by that date?
4. How much paid leave had the claimant taken in the year?
5. Were any days carried over from previous holiday years?
6. How many days remain unpaid?
7. What is the relevant daily rate of pay?

Unlawful deductions from wages

1. In relation to the cancelled shifts on 21 and 25 July 2022, were the wages paid to the first claimant less than the wages she should have been paid?
2. Was any deduction required or authorised by a written term of the contract?
3. How much is the first claimant owed?

Evidence

9. I considered the main bundle of evidence of 338 pages including the index, and the supplementary bundle of evidence comprising 43 pages including the index.
10. I considered the statements of the first and second claimant. I considered statements provided on behalf of the two claimants from the following: Ms Samantha Scoltock, Ms Caitlin Scoltock, Ms Sarah Chipchase, Mr Luke Byron, Ms Aimee Greaves and Mr Paul Borduik.
11. I considered the witness statements provided on behalf of the respondent from the following: Miss Jessica Brady and Ms Claire Robinson.
12. I heard sworn evidence from each claimant and on behalf of the claimants from Ms Samantha Scoltock, Ms Caitlin Scoltock, Mr Byron, Ms Chipchase and Mr Borduik.
13. I heard sworn evidence on behalf of the respondent from Ms Brady and Ms Robinson.

Findings of fact

14. Miss McCarthy was employed by the respondent as a front of house team member at the Puckersley Inn from 5 January 2019 until 17 August 2022.
15. Mr Bridges was employed by the respondent as a front of house team member at the Puckersley Inn from 20 April 2019 until 17 August 2022.

16. The respondent company runs the Puckersley Inn public house. It is a family run business. Miss Jessica Brady was the General Manager and lived on premises with her family, including her partner, Mr Kernaghan, who was also employed by the respondent. Ms Claire Robinson is employed by the respondent as Assistant Manager. Her role was to manage the restaurant side of the business, oversee staff and office matters and to look after the business in Ms Brady's absence.

Late July 2022 and shift cancellations and pay

17. Miss McCarthy claims for pay totalling £73.44 for loss of shifts cancelled at late notice, being 5 hours on 21 July 2022 and 3 hours on 25 July 2022. Miss McCarthy was on the rota to work in the restaurant on those dates.

18. In late July 2022 Miss Brady was on leave and Miss Robinson was managing the business in her absence. Due to issues with kitchen staff and very high temperatures the kitchen was closed from Monday 18 July 2022 to Friday 22 July 2022 inclusive. This meant the restaurant could not open and shifts had to be cancelled. The kitchen and restaurant again had to close on 25 July 2022 due to issues with the chefs.

19. Texts were sent on a group chat notifying staff that the kitchen and restaurant would be closed Wednesday 20 July and Thursday 21 July and no payments would be made in respect of those shifts.

20. By text on 24 July 2022 Miss Robinson told Miss McCarthy she should still attend her shift on 24 July to do other tasks and she offered Miss McCarthy cleaning work in place of the restaurant shift cancelled on 25 July 2022. Miss McCarthy did not respond to that offer of work.

21. Miss McCarthy texted Miss Robinson saying she thought she should still be paid for cancelled shifts even though the kitchen/restaurant was closed. On 20 July 2022 Miss Robinson told Miss McCarthy she would discuss pay relating to cancelled shifts with Miss Brady once Miss Brady returned from holidays. Miss Robinson texted Miss McCarthy on 26 July confirming she had relayed Miss McCarthy's concerns to Miss Brady. By group chat message on 26 July 22 Miss Brady invited staff to come for a chat with her, saying she had heard lots of different things. Text messages between Miss McCarthy and Miss Brady on 26 and 27 July confirm a meeting was arranged between them and Miss McCarthy asked to rearrange it due to having migraine; there is no evidence of Miss McCarthy following that up and meeting Miss Brady nor chasing up about pay for cancelled shifts at that time.

22. Miss McCarthy's employment contract at the hours of work section provides: "*To deal with the changing needs of the Pub and our customers it is necessary to maintain a flexible approach to your hours of work. Therefore, the Company reserves the right to increase/decrease your basic hours of work, following*

negotiations with affected individuals and to determine the appropriate days or times when work shall be undertaken, in accordance with operational requirements. If for any reason work is not available, for example due to pub closure, the Company will offer you the opportunity to work at another Pub (if there is work available). Where this is not possible you may be required to take some or all of your accrued holiday entitlement.”

23. Miss McCarthy's employment contract at the Flexibility section provides: *“The title of the job in which you are employed is outlined on the Schedule of Information. Whereas it is our policy to endeavour to continue to provide the type of work for which you are engaged, occasions may arise when it is not possible to carry on doing so. We reserve the right to change the type of work provided and/or the shift pattern being worked, and therefore you may be required to undertake any job/duties within your existing or potential capabilities, between and within associated departments and/or companies, as and when requested to do so by us.”*
24. The contract provides for situations such as those arising when the kitchen and consequently the restaurant had to close unexpectedly in July 2022.

Holiday pay

25. The holiday year for both claimants, as for the respondent's other employees, began on 1 April and ended on 31 March 31 each year.
26. The claimants' contract confirm all holiday leave must normally be taken within the current holiday year and that payment in lieu will not be made for any leave outstanding at the end of the holiday year. I accept Miss Brady's unchallenged evidence that the respondent does not usually allow holidays to roll over to the following year.
27. Miss McCarthy set out alternative calculations in her schedule of loss for holiday pay but has not provided the supporting evidence as to the carry over contended for. No evidence was presented in Miss McCarthy's witness statement or in her oral evidence about the holidays taken or not taken and the reasons they may not have been taken during the pandemic, nor as to any requests she made to carry over holidays.
28. Mr Bridges had taken 41 hours holiday by the date his employment terminated, he had been overpaid in respect of holiday pay. Messages between Miss Brady and Mr Bridges set out the sums he was to repay the respondent in respect of overpaid holiday pay and those messages clearly show Mr Bridges was concerned about not immediately having the means to pay back sums due.

12 and 17 August 2022, unfair dismissal and wrongful dismissal

29. On 12 August 2022 Miss McCarthy was working a shift at the Puckersley Inn from 7pm for a period of 5.75 hours as is shown on the rota and the pay details and

which Ms Brady agreed during oral evidence. Ms Leanna Powell was working with Miss McCarthy that evening. Ms Powell's shift was rostered to start at 5pm. Mr Bridges was not working that evening but attended the pub for drinks with friends, including Mr Paul Borduik. Miss Robinson was working that evening. Miss Brady and Mr Kernaghan worked that evening as needed to help out in the bar and restaurant, given it was a busy evening. Miss Brady throughout the evening was upstairs and downstairs and when downstairs she was in the bar and restaurant areas and in the cellars.

30. At some point on the evening of 12 August 2022, a female customer told Miss Brady to keep an eye on the two claimants who she suspected were both involved in drinks being served but not paid for. Miss Brady said in her witness statement this customer complaint was made between 6 and 8pm. She was asked on cross examination whether she could be more specific about the time of the customer complaint having viewed CCTV of the evening. She said she could not, as when viewing the CCTV she was focusing on potential thefts throughout the evening and not on the specific time the complaint was made. Miss Robinson's written evidence was that between 5 and 7pm a female customer complained to her and advised that she should keep an eye on the two claimants. I find the customer cannot have complained to Miss Brady about Miss McCarthy prior to 6pm and nor to Miss Robinson prior to 7pm as Miss McCarthy did not start her shift until 7pm. I accept their evidence, however, that on 12 August 2022 a customer said individually to each of them that she had concerns about the two claimants being involved in drinks being served but not paid for.
31. Following the customer complaint, Miss Brady decided to monitor the situation herself. When behind the bar at around 7pm to 8pm she became more suspicious when she offered to serve Mr Bridges but he waited to be served by Miss McCarthy only once Miss Brady had moved away from the bar area.
32. Miss Robinson witnessed Mr Bridges take a bottle from the fridge behind the bar without paying for it. She saw a few bottles of beer, "Desperados" on Mr Bridge's table but did not see him making payment for any of those. On cross examination she said she did not immediately challenge Mr Bridges when she saw this as she did not know then he was most definitely stealing, so she decided to monitor the situation, also taking account of the fact that Mr Bridges was drunk at the time.
33. Mr Paul Borduik is a regular customer at the Puckersley Inn and attended there on the evening of 12 August. He bought drinks for himself and others and his bill total, as is clear from receipts in the supplementary bundle was £44.80. The receipt confirms his orders included Guinness, pinot grigio, Manchester Craft and sauvignon blanc. He purchased drinks for Mr Bridges, namely 3 bottles of beer and asked Ms Leanna Powell to add those to his tab. He believed the drinks he ordered were all added to his tab; he did not make any cash transactions during the evening. He settled his tab with Ms Powell at the end of the evening. Mr Borduik agrees the bar tab does not reflect all the drinks he ordered but he only saw the itemised bill on morning of the final hearing and therefore had not queried

it previously. On the evening of 12 August 2022, he paid the amount he was told was due.

34. Miss McCarthy served drinks to Mr Borduik and requested that Ms Powell put them on Mr Borduik's tab as she says would be common practice for a Friday night, ie one staff member serving and the other putting transactions through the till and on to tabs. Miss Sarah Chipchase was employed by the respondent at time of material events in August 2022 but was on annual leave on 12 August 2022. She confirms Miss McCarthy's account that the usual process for working behind the bar was that one person dispenses the drinks and the other team member takes payment for the order or adds the drinks to the correct tab.
35. Miss Brady denies this was the respondent's procedure or process for serving and taking payments behind the bar. Miss McCarthy and Miss Chipchase were not challenged about this on cross-examination and I accept the evidence of Miss McCarthy and Miss Chipchase that this is what happened regularly on Friday evenings. Miss Chipchase cannot confirm what process was actually in place on the evening of 12 August 2022 as she was not there. I accept Miss McCarthy's evidence that she was working on this basis with Ms Powell for at least some of that evening.
36. The receipts for Mr Borduik are in Ms Powell's name. I accept Miss Brady's oral evidence that the till can be accessed by fob or by selecting an employee name on the till. The transactions remain in that person's name unless and until another staff member logs that name off the till and enters their own. Throughout the evening on 12 August 2022, Miss Brady, Mr Kernhagan, Miss McCarthy and Ms Powell were all working behind bar and there is no evidence that only Ms Powell was taking payments the whole evening. The receipts in the evidence bundles do not show who was processing which specific payments on the evening of 12 August. Receipts in the supplementary bundle have Ms Powell's name on them and Mr Borduik says it was Ms Powell who took his payment. In all the circumstances where there were numerous staff working but one name on the receipts, I do not find those receipts alone evidence Miss McCarthy undercharging or not charging at all for all the drinks she served to Mr Bridges or Mr Borduik that evening.
37. At 8:30pm approximately Miss Brady met Miss Robinson in the office upstairs and discussed with her what the customer had told her and they shared their concerns. Miss Brady told Miss Robinson she would continue to monitor the situation herself that evening and would review the CCTV and till transactions in the following days and they could then discuss the issue further.
38. After these discussions, at around 9pm, Miss Robinson left the premises. Miss Brady went back downstairs to the bar and had a discussion with Ms Powell who told Miss Brady she had concerns about Mr Bridges and his friends only wanting to order from Miss McCarthy and not from her. Miss Brady told Ms Powell that she was keeping an eye on things, then went back upstairs to watch the live CCTV

footage. Between 22:51 and 22:56 Ms Powell and Miss Brady texted each other about drinks being served.

39. After the pub closed Miss Brady and Mr Kernaghan started to watch the CCTV footage from the evening and cross referenced this with till receipts. Miss Brady considered that there were times when drinks were shown being served on the CCTV footage but there was no corresponding till receipt for those drinks at those times. She made notes of her observations as part of her investigations into the issue.
40. Miss Brady and Miss Robinson subsequently met on 16 August 2022, being the follow up meeting they agreed to have on 12 August. They discussed Miss Brady's finding from her investigations. Miss Brady showed Miss Robinson some of the CCTV footage on her phone as well her notes regarding the CCTV footage and transactions. She did not show Miss Robinson any till receipts at that time. Miss Brady considered the evidence from her initial investigations showed that Miss McCarthy was not charging or was undercharging for drinks on 12 August and that Mr Bridges had taken drinks without paying for them, which amounted to theft. She believed further investigations were needed with Miss McCarthy and Mr Bridges. Miss Brady told Miss Robinson that she intended to call them in to raise the issues with them, that Miss Robinson need not be present at the initial meetings but may need to be involved in any subsequent disciplinary hearings.
41. On 16 August 2022 Miss McCarthy received a text message from Miss Brady sent at 21:23 which said *"Hi Chloe. Please can you come in to have a quick chat with me tomorrow morning at 10am"*. Miss McCarthy texted Miss Brady back asking what the chat was to be about as she was already stressed going to see her Grandad at the funeral directors that day and having his funeral to go to that week. Miss Brady replied to say it was a conversation that needed to be had face to face but did not explain what it was to be about. She said to Miss McCarthy not to stress and she would see her in the morning. Miss McCarthy messaged Miss Brady again to say that 12 months prior to this a similar situation happened where she was asked to go in for a chat and she was accused of stealing and almost lost her job, she again asked what the chat may be about, Miss Brady did not reply to that.
42. On the 16 August 2022 Mr Bridges received a text message from Miss Brady which was sent at 21:58 which said *"Hi Sam. Please can you come in to have a quick chat with me tomorrow morning at 10.15"*. Mr Bridges replied that he would struggle to make it as he was going out before work and asked if he could go in 20 minutes earlier prior to his shift later that day. Miss Brady said that she really needed to see him in the morning and that she had other meetings that morning and offered him 9:45 or 10:15. Mr Bridges asked Miss Brady what the chat was regarding but she did not reply to his query.
43. Miss McCarthy attended the Puckersley Inn on the morning of 17 August 2022 and met with Miss Brady in the restaurant area at 10am. Miss Brady apologised to Miss McCarthy for forgetting her grandad had died and then said *"It's not good I'm afraid"*. Miss McCarthy asked why and Miss Brady told her that a customer had

complained she had been giving drinks to family and friends without charging as she should.

44. Miss Brady then explained to Miss McCarthy what the reason and purpose of the investigation meeting was, as is clear from Miss Brady's notes of the meeting. She confirmed she would begin the formal disciplinary process after this initial investigation meeting. Miss McCarthy says she was not shown any evidence during this initial meeting. I accept Miss Brady offered to show Miss McCarthy the CCTV footage and her notes; Miss Brady was able to show the relevant CCTV on her phone. I find that Miss McCarthy declined to view any evidence in circumstances where she was very upset throughout the meeting. Miss McCarthy said that she did not really know what to say as she had a lot going through her mind and was in shock. She said she was aware that other people had handed drinks out and provided some names.
45. I do not accept Miss Brady's evidence that Miss McCarthy held her hands up to the allegations during the meeting. Miss McCarthy was consistent throughout her evidence that she is not a thief and she was consistent in her denial of allegations made against her.
46. I find that Miss McCarthy was worried having previously been accused of stealing in 2021, she was having a very difficult time due to the death of her grandfather, with his funeral being the week of the meeting and her due to visit him in the chapel of rest on the day of the meeting. Miss McCarthy at that time had completed her degree and had applied for a permanent role as a nursing assistant in the NHS. She was made a conditional offer for that role by letter dated 31 August 2022. I find that during the meeting Miss McCarthy said she did not want to become involved in the disciplinary process. I find that she was very upset during the meeting, which is understandable. I find that, taking account of all these circumstances, Miss McCarthy resigned during the meeting on 17 August 2022. The meeting ended at 10.15 and Miss McCarthy left the premises.
47. Mr Bridges attended the Puckersely Inn on 17 August 2022 at 10:15am for his meeting with Miss Brady which took place in the restaurant area. Miss Brady told Mr Bridges it was suspected that on 12 August 2022 he had been getting drinks and not paying for them and that a customer had complained about this on that date.
48. I find Miss Brady explained the purpose of the meeting to Mr Bridges and the process to be followed, as she had done with Miss McCarthy. I find that Miss Brady did not tell Mr Bridges during his meeting that she had sacked Miss McCarthy that morning.
49. In the meeting Mr Bridges said that Mr Bordiuk was paying for quite a few of his drinks on 12 August. Mr Bridges also said to Miss Brady there was not much he could do or say about the evening and the allegations as he was very drunk so did not remember much, Miss Brady agreed with his. I find Mr Brady did not admit to taking drinks without paying. He was drunk and could not remember much which is his honest and response and his evidence was consistent on that.

50. Mr Bridges at that time was about to complete a Barber's training course and start a new career. His Level 2 Technical Certificate in Barbering is dated 23 August 2022.
51. I find that in all these circumstances, Mr Bridges did not want to go through the disciplinary process and that accordingly he resigned during the meeting on 17 August 2022.
52. I find that Miss Brady accepted the resignations of both claimants on 17 August. I accept her evidence that having started a disciplinary process with the initial investigation meeting, there would be no good reason why she would not conclude the investigation and the whole process unless the employees had resigned.
53. Miss Robinson and Miss Brady met on 17 August 2022 following Miss Brady's discussions with each claimant and Miss Brady confirmed to Miss Robinson both had resigned during their meetings.
54. Throughout the meetings with each claimant on 17 August 2022 Miss Brady did not take any notes. I find that whilst she did not make notes during the meetings, she made notes on the day of the meetings and prior to her discussions with Miss Robinson that day.
55. The claimants contend that they were summarily dismissed by Miss Brady on 17 August 2022, relying on evidence including witnesses and text messages in support of their position. Ms Samantha Scoltock, Miss McCarthy's mother, confirms that at around 10:30 to 10:45am on 17 August 2022, Miss McCarthy arrived home after the meeting with Miss Brady and told her that she had been accused of theft and sacked. Ms Scoltock was not present at the meeting and relied on what her daughter told her was said in the meeting. Mr Luke Byron was not present at the meeting on 17 August. He states Ms Robinson said to him later that day during the course of a discussion about the claimants being dismissed "If this was my business I would have sacked them too". Miss Robinson confirmed in oral evidence that she was working a shift with Mr Byron and the elephant in the room was the rumours going around about the claimants and them possibly having been sacked. She felt she had to address the issue. She emphatically denies telling Mr Byron they had been sacked and says she did not discuss any details. She admits to saying she was gutted about the situation and that she made a general comment if it was her business and someone was stealing she would have sacked them. I accept her evidence in that regard. Neither Ms Scoltock nor Mr Byron were present during the meetings between Miss Brady and the claimants. I do not find their evidence supports the claimants' position that they were sacked by Miss Brady.
56. The claimants also rely on a witness statement from Ms Aimee Greaves who states she overheard the conversation between Miss Robinson and Mr Byron. I attach no weight to Miss Greaves' evidence. She did not attend the hearing to give oral evidence and simply reports what she overheard, she was not present during either of the material meetings between the claimants and Miss Brady.

57. Mr Bridges says his shifts rostered post dismissal were already covered by 17 August, so Miss Brady went into the meeting with a closed mind. The rota, however, was completed before 4 August, prior to the alleged thefts on 12 August. Mr Bridges also relies on a text message between someone called Lilly and Miss McCarthy in which Lilly says she had overheard bits of a conversation and asked about Mr Bridge's shift. Lilly has not provided a witness statement and I have heard no evidence from Lilly. I find on the basis of the evidence presented that Miss Brady had not gone into the meeting with a closed mind.
58. On 31 August 2022 Miss Brady emailed Payroll to ask them to issue P45s for the Claimants. Payroll emailed the P45s to her the following day.
59. Social media posts and information about holiday bookings provided by Miss McCarthy show she was on holiday abroad from the beginning of September 2022 for various periods and then from 23 September 2022 for a further period.
60. The claimants both wrote to Miss Brady on 22 September 2022 to "formally appeal against the disciplinary penalty you imposed on me on 17/08/2022." Both letters say relevant procedures and the ACAS Code of Practice were not followed and both state further evidence has come to light. They do not say what that evidence is, nor was that evidence provided with the appeal letters.
61. Miss Brady replied to each claimant by letter dated 28 September 2022 stating that there was no right of appeal as they had resigned during their meetings on 17 August 2022.
62. To Miss McCarthy she wrote: *"During our meeting on 17th August 2022, we had a conversation to discuss and offer the evidence of my findings where you were witnessed deliberately not charging and undercharging customers, which equates to theft from The Puckersley Inn Ltd. During this meeting, you fully admitted to your actions and seemed extremely remorseful, resulting in us both agreeing that you would leave the business and no further disciplinary or legal action was necessary. As your leaving was a mutual decision there are no grounds for appeal."*
63. To Mr Bridges she wrote: *"During our meeting on 17th August 2022, we had a conversation to discuss and offer the evidence of my findings where you were witnessed deliberately not paying for drinks and refusing to pay your tab, which equates to theft from The Puckersley Inn Ltd. During this meeting, you fully admitted to your actions, resulting in us both agreeing that you would leave the business and no further disciplinary or legal action was necessary. As your leaving was a mutual decision there are no grounds for appeal."*
64. In referencing a mutual decision, this was Miss Brady accepting each claimants' resignation.
65. Both claimants after these response letters took steps to bring their claims.

Discussion and conclusions – Shift pay – First Claimant

66. The right not to suffer an unauthorised deduction is contained in section 13(1) of the ERA: "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.”

67. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.
68. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1) or exempt under section 14.
69. Miss McCarthy was on the rota to work in the restaurant on 21 and 25 July 2022. She was informed the shifts would be cancelled and for 21 July 2022 that there would be no pay for the shift. She was offered alternative work for 25 July 2022 but did not accept the offer of alternative work and therefore was not paid for the shift. I find Miss McCarthy's shifts were cancelled on 21 and 25 July 2022 in accordance with the written terms of her contract, as set out above and that she was offered alternative work, in accordance with her contract, which she did not accept. Miss McCarthy's claim for unlawful deduction from wages is therefore not well founded and is dismissed.

Discussion and conclusions – holiday pay

70. The Working Time Regulations 1998 (WTR) provide workers with a guaranteed right to paid holiday. Subject to certain exclusions, all workers are entitled to 5.6 weeks, paid holiday in each leave year beginning on or after 1 April 2009 comprising 4 weeks’ basic annual leave under regulation 13 (1) and 1.6 weeks’ additional annual leave under regulation 13A (2).
71. If an employer denies a worker the entitlement to paid holidays, the worker has the right to complain to an employment tribunal under regulation 30 of the WTR.
72. Regulation 16(1) of WTR provides that a worker is entitled to be paid at the rate of a week’s pay in respect of each week of annual leave to which he is entitled under regulation 13 or 13A WTR. A week’s pay is calculated in accordance with Employment Rights Act 1996 sections 221-224 (“ERA”).
73. The general rule under the WTR is that the worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year: reg 13(9)(a).
74. The Working Time (Coronavirus) (Amendment) Regulations 2020 which came in to effect on 26 March 2020 introduced a temporary relaxation of the rule set out in Reg 13(9) WTR that the 4 weeks’ leave cannot be carried over and taken in a subsequent leave year. Regulation 13(10) provides where it was ‘not reasonably practicable’ for the worker to take some or all of their Regulation 13 leave in the relevant leave year as a result of the effects of COVID-19, they are entitled to carry forward such untaken leave. The ‘effects of COVID-19’ include the effects on the

worker, the employer or the wider economy or society. Reg 13(11) provides that the carried forward leave may be taken in the two leave years immediately following the leave year in respect of which it was due.

75. If the employment terminates before the leave has been taken, the worker can receive a payment in lieu of this carried-over leave: regulation 14 as amended.
76. There is guidance published by the government on 'Holiday entitlement and pay during coronavirus' which suggests certain factors which may be relevant when considering whether it was 'not reasonably practicable' for the worker to take leave for the purposes of Reg 13(10).
77. The guidance provides: When considering whether it was not reasonably practicable for a worker to take leave as a result of the pandemic, so that they may carry untaken holiday into future leave years, an employer should consider various factors, such as:
 78. whether the business has faced a significant increase in demand due to COVID-19 that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures
 79. the extent to which the business' workforce is disrupted by the pandemic and the practical options available to the business to provide temporary cover of essential activities
 80. the health of the worker and how soon they need to take a period of rest and relaxation
 81. the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year
 82. the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the pandemic
 83. the ability of the remainder of the available workforce to provide cover for the worker going on leave.
84. The Guidance further provides workers who were furloughed are unlikely to have needed to carry forward statutory annual leave, as it would have been easier for them to take it during the furlough period (in most cases at least).
85. The claimants' holiday year began on April 1 and ended on March 31 each year. All holiday leave had to normally be taken within the current holiday year and payment in lieu would not be made for any leave outstanding at the end of the holiday year. The respondent does not usually allow holidays to roll over to the following year. Miss McCarthy set out alternative calculations in her schedule of loss for holiday pay. She has not provided the supporting evidence as to the carry over contended for. No evidence was presented in her witness statement or in her oral evidence about the holidays taken or not taken during the pandemic, any reasons as to why holidays were not taken or any requests she made to carry over holidays. I find that Miss McCarthy's holidays were not carried over and that she was paid all the holiday pay due to her, her claim for holiday pay is accordingly not well founded and is dismissed.

86. Mr Bridges had taken 41 hours holiday by the date his employment terminated and he had been overpaid in the circumstances. Messages between Miss Brady and Mr Bridges set out the sums he was to repay the respondent in respect of overpaid holiday pay. As Mr Bridges was overpaid holiday pay his claim for holiday pay is not well founded and is dismissed.

Discussion, law and conclusions – unfair dismissal

87. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he/she was dismissed by the respondent under section 95.

88. Section 95 Employment Rights Act 1996 defines a dismissal for unfair dismissal purposes as follows:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –

(a) The contract under which he is employed is terminated by the employer (whether with or without notice);

(b) He is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract; or

(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

89. I find that the claimants were not summarily dismissed by the respondent and the respondent did not terminate their contracts. I find that both claimants resigned from their employment with the respondent and their resignations were accepted by the respondent.

90. Miss Brady believed from her own observations on 12 August 2022 and her investigations, including considering CCTV footage and comparing till transactions, that both claimants had been stealing from the respondent. I find that given her concerns about potential theft from the respondent by both claimants and following initial investigations Miss Brady called each of them in for an initial meeting on 17 August 2022. This was an initial discussion to raise the issues of concern, to let the claimants put forward their point of view and to start the formal process. It was not a formal disciplinary meeting. I find that Miss Brady properly put the allegations to the claimants and explained the disciplinary process which would follow that initial meeting. Miss Brady had by 17 August, not discussed anything with any staff members, other than Miss Robinson to whom the customer

had also complained on 12 August and Mr Kernaghan who viewed the CCTV footage with Miss Brady.

91. Miss Brady did not summarily dismiss the claimants, or in other words, sack them, on 17 August 2022. Whilst there are text messages after the meetings took place which mention the claimants being sacked and Mrs Samantha Scoltock says Miss McCarthy told her that day she had been sacked, the only people present at the meetings, and from whom I have heard oral evidence, are the claimants and Miss Brady. Miss Brady denied on cross examination that she told anyone the claimants had been sacked. She maintained consistently in her witness statement and oral evidence that they had not been sacked and that they had resigned. That position is supported by her contemporaneous notes and is consistent with her response to the claimants' letters of appeal. Having considered the witness statements of the claimants and Miss Brady and heard oral evidence from them, I prefer Miss Brady's evidence that the claimants were not summarily dismissed.
92. As set out in my findings of fact I do not find that either claimant made any admissions as to the allegations of theft made against them. I find that in each of their specific circumstances existing at the material time: Miss McCarthy being very upset and stressed due to her grandad dying and also in circumstances of looking to start a new permanent job as a nursing assistant in the NHS; Mr Bridges being very drunk and unable to remember much and looking to start a new career as a barber; both claimants decided they did not wish to follow through with the disciplinary process. The notes made by Miss Brady, whilst not made during the meeting, were made contemporaneously and record the resignations. After the meeting neither claimant sought immediately to challenge the termination of their employment. Mr Borduik provided a statement on 28 August 2022 and that was not sent by either claimant to the respondent at that time to dispute the position. It was not provided with the claimants' appeal letters. The claimants appealed 4 weeks after the termination of their employment by letters dated 22 September 2022. Miss McCarthy says the delay on her part was because she was on holiday. The evidence she has provided as to when she was on holiday indicates she was away from the beginning of September and then from 23 September. She has provided no explanation as to why she did not submit her appeal between 17 August and the beginning of September 2022. Mr Bridges provided no explanation for not having raised objection nor made an appeal immediately after 17 August 2022. Messages between him and Miss Brady show he was concerned about the holiday pay he was having to repay but, in those messages, he does not mention any issue about the termination of his employment. The response from Miss Brady to the appeal letters supports the position that both claimants resigned.
93. In all the circumstances I find that there was no dismissal within meaning of section 95 of ERA 1996 and find that both claimants resigned. In the circumstances of there being no dismissal I find that the unfair dismissal claim of each claimant is not well founded and is dismissed.

Discussion and conclusions – breach of contract

94. For the reasons set out above, I find that the claimants both resigned. In the circumstances there is no breach of contract by the respondent. The claims for notice pay are accordingly not well founded and are dismissed.

Employment Judge Fearon

Dated: 4 March 2024

JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON
18 March 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>