



EMPLOYMENT TRIBUNALS

Claimant: Mr J Allin

Respondents: Mr Simon & Mrs Lynda Powell t/a The Oxenham Arms
Hotel and Restaurant

Heard at: Exeter **On:** 20 April 2018

Before: Employment Judge Goraj

Representation

Claimant: In Person

Respondents: In Person

JUDGMENT having been sent to the parties on 21 May 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background Facts

1. This is a claim for outstanding monies in respect of tips. The claim has been considered as a complaint of unlawful deductions or alternatively as a complaint of breach of contract.
2. This is a claim by the Claimant for alleged outstanding tips which were distributed in or around December 2017 following the termination of his employment with the Respondents. The Claimant was unable to quantify the exact amount due but has claimed in his claim form an estimate of his likely entitlement having had regard to the tips which he had received from the Respondents in previous years.
3. The claims are defended by the Respondents who contended, in summary, that there was no contractual or other entitlement to such payments.

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4. It was apparent from the file that there were also County Court proceedings involving the same parties. The county court claim related to an alleged breach of contract by the Claimant for allegedly failing to give sufficient notice of his resignation from the Respondents. The parties confirmed however that the county court claim had been struck out as it was not actively pursued by the Respondents. The Tribunal has therefore not had regard to any such matters when determining this claim.
5. There was also a reference in the papers to an outstanding bar bill on the part of the Claimant. The parties however confirmed that the bill has been paid by the Claimant.
6. The Claimant has helpfully provided the Tribunal with a bundle of documents. The Respondents have also provided the Tribunal with some documents. The Tribunal has also had regard to further documents which were submitted to the Tribunal prior to the Hearing.
7. The Tribunal has received a witness statement from the Claimant who has also provided written statements from other witnesses (who did not attend the Hearing) in support of his case. The Tribunal has also heard oral evidence from the Claimant and the Respondents.
8. The Tribunal explained to the parties that it had placed limited weight on the written witness statements given by people who have not attended the Hearing as their evidence could not be tested on oath.

Findings of Fact

9. The Claimant was employed by the Respondents as variously Head Chef or Chef from 1 July 2014 until the final termination of his employment with the Respondents on 31 July 2017. The Claimant received his last salary payment from the Respondent on or around 28 August 2017.
10. The Claimant was issued with a statement of terms and conditions of employment dated 1 April 2015 ("the terms and conditions") which was signed by him that day.
11. There is a clause in the terms and conditions relating to remuneration which provided for the Claimant to be paid at an hourly rate. There is no reference in the terms and conditions to any entitlement to tips.
12. The Respondents operated/ facilitated a trunc arrangement for tips which were donated by customers. The Tribunal is satisfied from the oral and available documentary evidence that the monies from the trunc were distributed between staff on an annual basis during December. The money was banked for safety reasons by Mrs Powell of the Respondents but the monies were regarded by her as monies belonging to the staff.
13. The tip monies were allocated following consultation/ by agreement with senior staff including in 2015 and 2016 when the Claimant was consulted regarding the distribution of such monies. Following the termination of the Claimant's employment the Respondents consulted with three senior

members of staff who gave their views in December 2017 on the distribution of the tip monies.

14. There was a dispute between the parties as to whether it was normal practice for the distribution of tips to be limited to staff who remained in the employment of the Respondents at the time of distribution. The Respondents contend that this was the case. This is denied by the Claimant. There was limited available documentary evidence to assist the Tribunal in determining this issue.
15. The Tribunal is satisfied, having weighed the conflicting evidence, that the normal practice adopted by the Respondents was that tips would only be paid to staff who were in the employment of the Respondents at the time of the distribution of the relevant monies.
16. When determining this issue the Tribunal has taken into account the evidence of the Claimant that two former employees of the Respondents had allegedly received payment of tips after the termination of their employment namely, Simon Watson and Michelle Holland. The Tribunal has also taken into account the exchange of emails between the Claimant and a former colleague JD in September 2017 regarding such matter.
17. The Tribunal is satisfied having had regard to the available documentation relating to Michelle Holland that the payments that she received after the termination of her employment related to holiday pay.
18. Further, The Tribunal is not satisfied, on the balance of probabilities, that Mr Watson received or was paid any money by the Respondents in respect of tips following the termination of his employment. When reaching such conclusion the Tribunal has taken into account the text message from Mr Watson regarding such matters which was submitted by the Claimant. The Tribunal has however weighed against such evidence the oral evidence of Mr Powell and has also taken into account that Mr Watson has not attended the Tribunal to give evidence in support of his contentions.
19. The Tribunal is satisfied on the balance of probabilities that in December 2017 Mrs Powell consulted / agreed with senior staff, in accordance with the normal procedure, who should be paid tips for that year. The Tribunal further accepts the evidence of Mrs Powell that the staff decided at that time that a payment should not be paid to the Claimant because (a) he was no longer in the employment of the Respondents and (b) the circumstances in which he left their employment.

The Law

20. The Tribunal has considered the Claimant's claim as an alleged lawful deduction contrary to Sections 13,23 and 27 and the associated sections of the Employment Rights Act 1996 which prohibit employers from making unlawful deductions from pay.
21. The Tribunal has also considered the claim as a breach of contract claim pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"). These provisions apply to a

claim for monies which arise or are outstanding on the termination of an employee's contract of employment as provided for in Article 3 of the 1994 Order.

22. Having given very careful consideration to the above provisions the Tribunal is not satisfied as a matter of construction (disregarding for the moment whether there was in any event any contractual entitlement on the part of the Claimant to receive payment of such monies) that the Claimant has a valid claim for unlawful deductions or breach of contract.
23. When reaching this conclusion, the Tribunal has taken into account in particular, that the provisions relating to unlawful deductions, prohibit an employer from making unlawful deductions from "wages of a worker employed by him." It is common ground however that the last salary payment which was made to the Claimant was on 28 August 2017 following the termination of his employment on 31 July 2017 and that he did not thereafter work or receive any further monies from the Respondents. Further the provision of the 1994 Order require any monies to arise or be outstanding upon the termination of employment. The Claimant was however unable to identify any specific sum to which he was allegedly entitled/ which had arisen or was outstanding upon the termination of his employment on 31 July 2017 (or subsequently).
24. Moreover, if for any reason the Tribunal is wrong and either or both of the above provisions potentially do apply the Tribunal is not, in any event, satisfied on the facts of this case that the Claimant has established that he had any contractual (express or implied) or other right to such monies.
25. When reaching this conclusion the Tribunal has taken into account in particular :- (a) that there is nothing in the terms and conditions which entitled the Claimant to any such monies (b) that there is no evidence that there was any agreement/ collateral agreement between the Claimant and the Respondents to pay him any such monies and (c) that the Tribunal is also satisfied on the evidence was that the way in which the trunc operated was that the tips would only normally be paid to employees who were in the employment of the Respondents in December 2017 and that payments were determined in consultation/ with agreement of staff and (d) that the staff with whom Mrs Powell of the Respondents consulted / reached agreement in December 2017 did not, in any event, consider that it was appropriate to make any payment to the Claimant.

26. In all the circumstances the Claimant's claims are dismissed.

Employment Judge Goraj

Date 17 July 2018

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE