# EMPLOYMENT TRIBUNALS

**Claimant**: Mr M Palanki

**Respondent:** The Big Table Group Limited

**Heard at**: Watford Employment Tribunal

**On**: 23-25 September 2024

**Before:** Employment Judge Smeaton

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mr P Gorasia (counsel), Mr C Devlin (counsel)

# RESERVED JUDGMENT

1. The Claimant's claim for unpaid holiday pay succeeds.

2. The Claimant's claim of unauthorised deductions from wages succeeds.

# REASONS

Introduction

1. By two claim forms dated 16 December 2022 and 27 April 2023, following a period of Acas early conciliation between 10 November and 25 November 2022, the Claimant brings complaints of unpaid holiday pay under the Working Time Regulations 1998 ('WTR 1998') and unauthorised deductions from wages under s.13 Employment Rights Act 1996 ('ERA 1996').

2. The Claimant's case is that the discretionary service charge payments, which are paid to the Respondent by customers via credit or debit cards and then paid out to him by the Respondent, should be taken into account when calculating his average

weekly pay for the purpose of holiday pay. The Respondent says that such payments should be excluded from that calculation.

3. For the purpose of this judgment, the word 'tips' is used throughout to refer to these discretionary service charges.

4. The Claimant claims the sum of £5,444.40 together with an uplift of up to 25% for an alleged failure to follow the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code').

Hearing

5. The Claimant appeared unrepresented. He attended with his father as support.

6. The Respondent was represented by Mr Gorasia and Mr Devlin.

7. I was provided with a joint bundle of documents comprising 553 pages and a bundle of witness statements containing the Claimant's statement and three statements on behalf of the Respondent. The Claimant also produced an updated schedule of loss (with accompanying payslips) and a skeleton argument.

8. During the evidence given by the Respondent's General Manager, Claudia Tudor, reference was made to a spreadsheet used to record data relevant to the payment of tips. No such spreadsheet had been included in the bundle. Mr Gorasia indicated that examples could be produced. Two examples were produced and shown to the Claimant. After some discussion with the parties, I allowed the Respondent to include those documents in the bundle. Ms Tudor was recalled so that she could answer questions about them from the Claimant.

9. The evidence was heard over one a half days. Mr Gorasia and Mr Devlin produced a written closing argument on the afternoon of the second day. The Claimant produced additional authorities in support of his case. Oral submissions were made on the third day. I reserved my decision.

Claims and issues

10. At the outset of the hearing, I confirmed with the parties that the issues were as per the Case Management Order of Employment Judge ('EJ') Bennett dated 17 July 2023. Upon further consideration, I suggested to the parties that some of those issues might be re-worded in order properly to reflect the key issue in dispute. The issues were discussed in detail with the parties in advance of oral submissions and agreed as set out below:

**11. Holiday Pay (regulation 16 WTR 1998)**

11.1. Did the Respondent fail to properly calculate holiday pay due to the Claimant under regulations 13 and/or 13A of the WTR 1998? In particular:

11.1.1. should the discretionary service charge be taken into account when calculating the Claimant's average weekly remuneration under s.224 ERA 1996?

The Claimant says it should be because either (a) s.224 ERA 1996 should be interpreted to include any payments received by him in connection with his employment, whether from the Respondent or not or (b) the tronc system (as to which see paragraph 31 below) in place was not comparable with that in *Revenue and Customs Commissioners v Annabel's (Berkeley Square Ltd) and others* [2009] ICR 1123, CA so that any service charge paid by the customer to the Respondent became the Respondent's property and formed part of his pay.

The Respondent says it should not be taken into account because (a) the Claimant's interpretation of s.224 ERA 1996 is wrong and his average weekly remuneration only consists of amounts *payable by the employer* (emphasis added) and (b) the tronc system in place was comparable to that in *Annabel's* such that the service charge was not payable by the Respondent to the Claimant in the sense required by s.224 ERA 1996.

11.1.2. If not, in respect of the four weeks' leave guaranteed under EU law, should regulation 13 WTR 1998 be construed to encompass the discretionary service charge as part of the Claimant's 'normal remuneration'?

The Claimant says it should because all elements of his 'normal remuneration' must be taken into account and that includes the service charge.

The Respondent says it should not because the Court of Justice of the European Union ('CJEU') authorities relied on by the Claimant concerned payments to which the employees were contractually entitled and the Claimant is not contractually entitled to a service charge payment.

12. **Unauthorised deductions of wages (s.13 ERA 1996)**

12.1. Did the Respondent make unauthorised deductions from the Claimant's wages contrary to s.13 ERA 1996? Specifically:

12.1.1. when calculating holiday pay should the Respondent have taken into account the discretionary service charge received by the Claimant?

13. **Remedy**

13.1. If the Claimant succeeds in either of his claims, what amount should be awarded to him for unpaid holiday pay?

13.2. Did the Respondent unreasonably fail to comply with the Acas Code (it is not in dispute that the Code applies)? The Claimant says that the Respondent:

13.2.1. failed to engage with or respond to the legal issue that constituted the substance of the grievance:

13.2.1.1. during the grievance meeting; and/or
13.2.1.2. during the appeal.

13.2.2. proceeded with the grievance procedure despite knowing that the Respondent would be unable/unwilling to determine the legal issue.

13.3. If so, is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?

The law

14. The right to paid holiday in the UK is set out in the WTR 1998. Regulations 13, 13A and 16 set out the rules in respect of the full statutory entitlement of 5.6 weeks of paid holiday. Four weeks of that entitlement is guaranteed under EU law and granted by regulation 13. The UK also provides for an additional 1.6 weeks of holiday under regulation 13A WTR 1998.

15. By regulation 16 WTR, a 'week's pay' is calculated in accordance with s.221-224 ERA 1996.

16. Determining an employee's 'normal working hours' is the first stage in calculating the employee's weekly pay. The normal working hours may be stipulated in the employee's contract or may be determined by reference to the number of hours actually worked.

17. The parties agree that the Claimant had no normal working hours. Accordingly, his weekly pay must be calculated by reference to the average remuneration over the previous 52 weeks in respect of which he received remuneration (s.224 ERA 1996).

18. A week's pay is calculated by reference to gross pay, before deduction of tax or national insurance.

19. The second step is to determine the employee's 'remuneration' payable in respect of the relevant hours or reference period. 'Remuneration' is not defined in the ERA 1996 but in most cases will be that payable under the contract of employment over the calculation period. It can also include contractual bonuses and allowances.

20. The statutory method of calculating remuneration under the ERA, which may exclude payments such as non-contractual commission, has been held to be not fully compliant with the Working Time Directive ('WTD') (2003/88/EC) (see *British Airways plc v Williams and others* [2012] ICR 847, ECJ and *Lock v British Gas Trading Ltd* [2014] IC 813, ECJ).

21. Accordingly, when calculating average weekly pay for the purposes of the four weeks' holiday guaranteed by Article 7(1) of the WTD (reg 13 WTR 1998), all

elements of a worker's 'normal remuneration' must be taken into account (*Bear Scotland Ltd v Fulton and anor* [2015] ICR 221, EAT and *British Gas Trading Ltd v Lock and anor* [2017] ICR 1, CA). The purpose of payment for annual leave under the WTD is to put the worker in a position, as regards his or her salary, comparable to that enjoyed during periods of work. Workers should not be deterred from taking their full holiday entitlement by being financially disadvantaged as a result.

22. Supplementary payments (beyond the worker's wage) should therefore be maintained during annual leave to the extent that they are '*intrinsically linked to the performance of tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided'* (*British Airways Plc v Williams*). This is now codified in reg 16(3ZA) WTR 1998 for the purpose of assessing entitlement under reg 13 WTR 1998, but does not apply when considering reg 13A WTR 1998.

23. To the extent that the domestic provisions in s.222-224 ERA 1996 provide otherwise, they must be construed to achieve compliance with the WTR 1998.

24. Sections 221-224 ERA 1996 continue to apply without modification to the 1.6 weeks additional leave due under regulation 13A WTR 1998.

25. If an employer has failed to properly calculate the amount of holiday pay due to an employee, the employee can either bring a claim under the WTR 1998 or a claim for unlawful deductions from wages (s.27 ERA 1996).

Findings of fact

26. The Claimant has been employed by the Respondent since 31 August 2015. At all material times for the purpose of this claim, he has been in a Front of House role at the Respondent's Las Iguanas restaurant/bar in Wembley. He remains employed.

27. The parties agreed during the hearing that the relevant contract of employment was the one produced in the bundle which was signed and dated on 10 October 2018, notwithstanding that the Claimant was working at a different restaurant at that time.

28. In accordance with his contract of employment, the Claimant is paid on a hourly basis (which was equivalent to the National Minimum Wage ('NMW') at the date the contract was signed).

29. His contract also provides:

'*Your restaurant may operate an optional service charge; this along with non-cash gratuities will be shared out amongst staff participating in the Tronc in accordance with the Tronc rules in force at your restaurant'.*

30. Las Iguanas Wembley applies a discretionary 12.5% service charge to all customers' bills. Payment is taken by card or cheque (not cash). Payments of those

tips are credited to the Respondent's bank account and paid out of that same account to employees, together with their wage.

31. Las Iguanas Wembley purports to operate a tronc system for agreeing the distribution of tips taken by card. A tronc is an organised arrangement, commonly used in the hospitality industry, in which employees receive distributed cash tips, gratuities and/or service charges paid by customers. A tronc system requires a designated individual to be the 'troncmaster' responsible for organising the arrangements under which tronc payments are allocated. Where a genuine tronc exists, tronc payments will not attract National Insurance Contributions ('NIC').

32. The Respondent has a written tronc policy ('the Policy') which applies to all of its restaurants, although the exact tronc system is different in each establishment. The Policy is expressed to be non-contractual and states that the Respondent is not responsible for the tronc or the allocations/distributions made from it.

33. The Policy provides that the troncmaster will generally be the General Manager of the restaurant. That was the case for Las Iguanas, Wembley. Save for a short period between 1 May 2023 and 30 October 2023, when she was on maternity leave and her duties/roles were covered by Ms Nanthakumar, Ms Tudor has been the Respondent's troncmaster at all times material to this claim.

34. Ms Tudor's role as troncmaster is to manage the tronc in accordance with the Policy. She must arrange a meeting of all eligible staff every six months to discuss the distribution and allocation of tips. Eligible staff will make decisions based upon a majority vote, If there is a split decision, the troncmaster will make the final decision.

35. The decision as to distribution and allocation must be recorded by Ms Tudor as troncmaster. She must then ensure that all tips received are distributed in accordance with that agreed allocation.

36. In order to ensure the proper distribution of tips, Ms Tudor uses the Respondent's 'Aztec' till system to generate reports showing what tips have been received. She uses those reports to record information for the tronc on a spreadsheet, identifying the name of the employee, what tips they have collected in the relevant period, their share of the total and the total amount due to them. She uploads those spreadsheets onto the Respondent's 'Fourth' payroll system. Employees then receive their share of the tronc with their normal pay. Their wages and tronc payments are detailed separately but on the same payslip.

37. Ms Tudor does not operate her own bank account, HMRC have not been notified of her position as troncmaster and no separate PAYE scheme has been set up in her name.

38. It was not suggested by the Claimant that, contrary to the Policy, Ms Tudor made her own decisions about allocation/distribution of tronc monies, or that she implemented decisions taken by the Respondent. I accept that she has carried out the role of troncmaster in accordance with the Policy, enabling decisions to be taken by employees about how to distribute tips, recording those decisions, and

implementing them. In carrying out that role, she is acting at the direction of the employees and not the Respondent. The Respondent has no involvement in those decisions.

39. The Claimant participates in the Respondent's tronc system and, accordingly, in addition to his hourly wage, receives a split of all tips received by the Respondent.

40. At some point in 2022, the Claimant took one day of approved annual leave and was paid £67.78 for that day of holiday. The Claimant says this was in September 2022 but the documents suggest that the dispute arose in July 2022. Nothing turns on this date.

41. Upon receipt of his payslip, the Claimant queried the payment for holiday pay. He believed he was entitled to approximately £143.10 and that the Respondent had erred in calculating his average weekly pay by failing to include payments from the tronc.

42. In response, the Respondent referred him to government guidance on the national minimum wage and stated that '*during periods of leave (including annual leave, sick and all other forms of paid leave) you will be paid your basic wage'*.

43. The Claimant was unsatisfied with that response and, on 23 September 2022, sent the Respondent a letter of claim essentially raising the same arguments he has pursued in this claim. This was pursued as a grievance (albeit reluctantly by the Claimant who did not think it would achieve the outcome he desired). The grievance was dealt with by Mr Gibbons (Operational Support Director). Mr Gibbons sent the Claimant an outcome letter on 26 October 2022. Mr Gibbons concluded that payments from the tronc do not form part of the Claimant's remuneration for the purposes of holiday pay. He set out his reasons for that decision in detail.

44. The Claimant appealed against the grievance outcome. The appeal was heard by the Respondent's in-house counsel, Ms Leake. In a decision dated 9 November 2022, she concluded that the nine grounds of appeal were in fact requests for legal opinion and that she was not in a position to provide that opinion. She considered the original grievance outcome to be adequate and dismissed the appeal.

Conclusions

(1) S.224 ERA 1996

(a) The correct interpretation

45. Remuneration is that which an employee receives as a reward for the work he has done. As such, it includes tips (*Nerva and others v RL&G Ltd* [1997] ICR 11, CA). For the purpose of s.224 ERA 1996, however, remuneration must be payable '*by the employer to the employee'*.

46. The Claimant argued that, on a proper construction of s.224 ERA 1996, there was no requirement for the remuneration to be payable '*by the employer to the*

*employee'*. Accordingly, he said, any amount he receives as a reward for work done ought to be included in the calculation of his weekly pay.

47. In support of that proposition, he submitted that, whilst the phrase '*by the employer to the employee'* does appear in s.222 and s.223 ERA 1996, it is omitted from s.224. He said that that is a deliberate omission, and that Parliament intended to offset or reduce the risk to an employee of not having normal or fixed working hours, by allowing for monies payable other than by the employer to be taken into account when calculating remuneration for such employees.

48. That argument is fundamentally undermined by the reference at s.224(3) ERA 1996 to the phrase '*payable by the employer to the employee'*. That phrase is used in the same way in s.222(3)(b) and s.223(2) ERA 1996. There is no rational basis for placing a different interpretation on the same term (remuneration) in different sub-sections of the same section of the statute (i.e. s.224(2) and s.224(3)).

49. The question for determination is whether the tips were remuneration '*payable by the employer to the employee'*.

(b) <u>Contractual entitlement to tips</u>

50. The Claimant's contract of employment provides for payment at a set hourly rate for hours worked. It also refers to the operation of a tronc scheme.

51. The Claimant maintains that he has an express contractual entitlement to be paid tips in accordance with the Policy in place at Las Iguanas, Wembley. He relies on the wording within the 'Rate of Pay and Tronc' section of his contract and, in particular, the words '*will be shared'*.

52. The Respondent maintains that this is a non-contractual benefit. It relies on the more detailed statement of terms and conditions of employment which provides that there is no contractual entitlement to receive any payment by way of tips, non-cash gratuities and service charges.

53. I conclude that, when read together, the references to the tronc in the Claimant's contract and terms and conditions provide him, not with a contractual entitlement to receive any particular guaranteed payment by way of tips, but with a contractual entitlement to receive what the tronc policy (in force from time to time) will give him on any given week. Accordingly, whilst the policy (and accordingly the entitlement) can change, for so long as there is a policy entitling him to payments under the tronc, he is contractually entitled to those payments. If no tips are received by the employer in any given period, the employer will not be required to pay anything to the Claimant in respect of tips.

54. That is entirely consistent with how the Respondent treated the money in the tronc in practice.

55. I will return to the relevance of this conclusion.

56. Generally speaking, where tips are received from the customer directly, they will not form part of the employee's remuneration because, whilst they might be part of the employee's earnings or remuneration, they do not come from the employer, are not the employer's property and are not '*payable by the employer'* (*Palmanor Ltd v Cedron* [1978] ICR 1008, EAT; *Wrottesley v Regent Street Florida Restaurant* [1951] 2 KB 277). *Palmanor* concerned the correct calculation of average remuneration for the purpose of the Employment Protection Act 1975, the precursor to the ERA 1996, and considered the same '*payable by the employer'* phrase as is in dispute in the present case. It is thus clearly relevant to the correct interpretation of 'payable by the employer' in s.224 ERA 1996.

57. This scenario is not directly applicable to the Claimant, however, because he did not receive payment of tips directly from the customer. Tips were paid by card together with the bill for food and drinks.

58. Conversely, where tips are left by customers on cheque or credit card payments, the legal title will have passed to the employer and when the employer pays an equivalent amount to employees through the payroll, it will amount to remuneration pai by the employer rather than a payment paid indirectly by the customer (*Nerva and others v RL&G Ltd* [1997 ICR 11, CA).

59. *Nerva* concerned the correct calculation of remuneration for the purposes of the 'minimum remuneration requirement' in the Wages Act 1986 and considered the phrase '*paid by the employer'.* Accordingly, whilst it is of relevance to the current issue in dispute, it is not directly applicable. It concerns a different test, looking at the actual mechanism of the payment, as opposed to whether there is an obligation to pay. In my view, this is an important distinction.

60. The Claimant said the *Nerva* scenario applies here. He submitted that as the payments are paid to the Respondent and then paid out to him in accordance with his contract, they become payable by the Respondent and thus fall within the definition of remuneration in s.224 ERA 1996.

61. Mr Gorasia accepted the principle in *Nerva,* and did not dispute that it could apply to s.224 ERA 1996 cases generally, but submitted that it does not apply here. He said that the current case was an exception to the rule in *Nerva* and more properly fell within the *Palmanor/Wrottesley*-type cases.

62. Mr Gorasia relied on *Revenue and Customs Commissioners v Annabel's (Berkeley Square Ltd) and others* [2009] ICR 1123, in which the Court of Appeal held that payments to employees from a tronc are not '*paid by the employer'* and therefore fall outside of regulation 30 of the National Minimum Wage Regulations 1991.

63. In *Annabel's*, the employer operated a tronc scheme whereby tips received by the employer by cash or card payments were paid by the employer into a designated bank account held by a senior manager acting as the troncmaster. The troncmaster subsequently distributed those payments to staff according to an agreed formula. The troncmaster operated a payroll system for tronc money and deducted PAYE separately.

64. The Employment Appeal Tribunal and the Court of Appeal concluded that, in the particular circumstances of that case, the tips did not amount to '*money payments paid by the employer to the worker*'.

65. As in *Nerva*, which *Annabel's* considered and applied, the relevant wording was different to that in the present case. *Annabel's* concerned the NMW Regulations 1999 and the requirement for money to be '*paid by the employer'*, not the ERA 1996 and the requirement for money to be '*payable by the employer to the employee'*.

66. Accordingly, whilst I accept that it is relevant to my determination, it is not determinative of the issue in dispute in this case.

67. Given my findings on the contractual entitlement, above, I conclude that the tips (when paid by the customer) were 'payable' by the Respondent to the Claimant in accordance with the arrangement agreed via the tronc system. Accordingly, they fell within s.224 ERA 1996.

(c) <u>The *Annabel's* exception</u>

68. In case I am wrong about that, and the Respondent is correct that the matter turns on the applicability or otherwise of *Annabel's,* I must consider whether the system in place here fell within what has been referred to by Mr Gorasia as the exception to the *Nerva* principle.

69. The Court of Appeal in *Annabel's* held that, whilst the employer initially owned the tips paid into their account by the customer, they ceased to have any legal or beneficial title to, or control over, the money once it had been paid into the tronc. The employers had delegated exclusively to the troncmaster the determination of the scheme, the distribution of the money and accountability for deducting tax. Accordingly, the payments subsequently made by the troncmaster to the employees were not '*paid by the employer to the worker'* and did not amount to remuneration for the purposes of regulation 30 NMW 1999.

70. The parties agree that the tronc system in *Annabel's* is not on all fours with the Respondent's tronc policy. Here, the payments received by way of tips are held by the Respondent and paid out directly to the employees. The troncmaster does not operate a separate PAYE scheme, does not have her own bank account, and tax is deducted on a PAYE basis by the employer.

71. Further, and contrary to the requirements in the Income Tax (Pay As You Earn) Regulations 2003 ('the 2003 Regs'), the Respondent did not give the troncmaster's name to HMRC so that a different PAYE scheme could be set up in the troncmaster's name. Mr Gorasia argued that that was not necessary, since the 2003 Regs provide a caveat to that requirement using the phrase '*unless different PAYE arrangements need to be made'* but I was not taken to any authority on the meaning of that phrase or in what circumstances it might apply.

72. Mr Gorasia argued that the differences between the Respondent's tronc system and that in *Annabel's* are immaterial. He said that the key requirement for the

'exception' in *Annabel's* to apply, is not that the money must be paid by a troncmaster, but that the employer must not have any input or involvement in decisions about distribution of the tronc money. Accordingly, he said, as the Policy is decided independently from the Respondent, the Respondent is no more than a vehicle or conduit for the payment of tips.

73. In support of that argument, Mr Gorasia relied on the HMRC Guidance on tips, gratuities, service charges and troncs ('the HMRC Guidance'). He pointed to a reference in that guidance which says that the employer may act as a payroll agent, operating PAYE on the troncmaster's behalf. He also notes that the HMRC Guidance says that payment of gratuities will be exempt from NIC if *either* (emphasis added):

    73.1. it is not paid, directly or indirectly, to the employer and does not comprise or represent monies previously paid to the employer, for example, by customers; or
    73.2. it is not allocated, directly or indirectly, to the employee by the employer.

74. 'Allocated' is defined in the HMRC Guidance as meaning '*deciding who should receive what amount by way of tips'*.

75. That is confirmed at paragraph 25 of *Annabel's* and means that, even if the tips are held by the employer and distributed to the employees by the employer, NIC contributions will not apply so long as decisions about who should receive what are taken independently of the employer. Consistent with that reading of the HRMC Guidance, the Respondent has not paid NICs on service charges distributed by its tronc and has faced no challenge from HMRC to that practice.

76. The Respondent's submissions proceed on the assumption that, if they are wrong, and tips do fall within the meaning of remuneration, NIC will also apply. In that sense, the Respondent suggests that the HMRC Guidance is determinative of the point.

77. I do not think that can be right. The HMRC Guidance is only concerned with whether NIC is payable. The Social Security (Contributions) Regulations 2001 ('the 2001 Regulations') create an NIC exemption, but it does not follow that that exemption dictates the meaning of remuneration in s.224 ERA 1996. The HMRC Guidance, like *Annabel's*, does not expressly consider the meaning of remuneration in s.224 ERA 1996 nor does it use as one of its examples a tronc policy comparable to the Respondent's.

78. If the Claimant is correct, and the tips fall within the meaning of remuneration or s224 ERA 1996, that could result in a situation where NIC is not due on all money payable by the Respondent to the Claimant, but that is a situation expressly provided for in the 2001 Regulations (paragraph 5 of Part 10, Sch 3).

79. In their closing submissions, Mr Gorasia and Mr Devlin submitted that, in the same way as the troncmaster in *Annabel's* was found to hold the money on trust for the employees (see paragraph 39), when tips were paid by the customer to the

Respondent, they were held by the Respondent '*on a resulting trust for the employees as an agent for the troncmaster'.*

80. I have difficulty with that submission. A resulting trust normally exists for the benefit of the person who declared it/paid the money, not for the intended recipient.

81. In support of his argument, Mr Gorasia pointed to an instance where a customer of the Respondent had paid a tip with his bill but at a later date had demanded its return. The Respondent had returned an amount equivalent to the tip to the customer but had not sought repayment from the Claimant. This, Mr Gorasia said, demonstrates that the Respondent did not consider it to be its own money and, accordingly, that the money was not '*payable by the employer to the employee'* for the purpose of s.224 ERA 1996.

82. A different, and in my view more accurate, way of analysing that situation is that when the money was paid by the customer to the Respondent, it became the Respondent's money. An equivalent amount was paid out by the Respondent to the Claimant, but when the customer demanded a refund, and the Respondent chose to give it without recourse to the Claimant, the Respondent had no right to request an equivalent refund from the Claimant.

83. That is consistent with the analysis in *Nerva* and in *Wrottesley*. The key issue in those cases was whether the employer was paying its own money. The Court in *Nerva* held that it was, notwithstanding that it had been paid to the employer in the belief that they would pass it onto the waiters and on terms that they would do so *(*see *Nerva at 16G* and *H* and *17E).* An argument about agency was rejected by the Court of Appeal in *Nerva* (at 17A-C) and it was conceded that the money was not held on trust by the employer for the employees (at 16F-H). Even though that was not the *ratio* of *Nerva* and is not binding on me, no arguments have been made before me to justify reaching a different view from the Court of Appeal on those points. I do not accept that the money was held on trust by the Respondent for its employees (whether a resulting trust as suggested by the Respondent or otherwise).

84. Consistent with the analysis in *Nerva*, in *Annabel's* it was agreed that when the payments were initially made by the customer to the employer, they became both legally and beneficially the employer's money (see paragraphs 2, 28 and 51). They were not held on trust for the employee. That was the case notwithstanding that the Court of Appeal accepted that the common intention of all concerned was for the tips and gratuities initially paid by the customer to the employer to be used for making money payments to the employees (paragraph 50). I can see no reason to reach a different finding here. No arguments have been advanced to suggest that that proposition, agreed by both parties and consistent with *Nerva*, is wrong. I note that the employees in *Nerva* also had a contractual entitlement to be paid an amount equal to the total of the credit card and cheque tips received by the employers (see *Nerva* at *16G-H)*.

85. The Court of Appeal in *Annabel's*, in concluding that the tips in that case could not count towards the employee's minimum remuneration, distinguished the facts from *Nerva* on the basis that, before it reached the employee, the money was paid by

the employer to an independent troncmaster. At that point, the employer lost all legal and beneficial ownership of the money (see also *Nerva* at 16F, per Staughton LJ referring to *Wrottesley v Regent Street Florida* Restaurant [1951] 2 KB 277, 283). Accordingly, the money was not '*paid by the employer'*. That did not happen here.

86. I do not accept Mr Gorasia's argument that so long as the tronc was operated independently from the employer in the sense that the employer could not interfere with how the money was distributed, it does not matter where the money is held. Although that was an important factor in *Annabel's*, it was also central to the court's reasoning (and common ground) that the money belonged, both legally and beneficially, to the employer *before* it was passed to the troncmaster for distribution to the staff. In my view, that factor was of equal importance in *Annabel's* to the question of how the money was allocated.

87. I also note that, even if I am wrong about that, and the key factor in *Annabel's* was the issue of independent allocation (as opposed to ownership), the tronc system in this case, as described above, had other differences to that in *Annabel's*. Taken together with the fact that the money was paid directly by the employer, this case is very different to *Annabel's.*

88. I do not consider that the introduction of regulation 10(m) to the National Minimum Wage Regulations 2015 (inserted by the National Minium Wage Regulations 1999 (Amendment) Regulations 2009, regulation 5) changes the position. That gives the decision in *Annabel's* legislative effect but does not directly address the broader issue in dispute here.

89. I conclude that, on the basis of the facts as found above and considering the particular system in place at the Respondent, the tips the Claimant received by the Respondent were '*payable by the employer to the employee'* for the purposes of s.224 ERA 1996.

90. Accordingly, I find that the calculation of the Claimant's weekly pay ought to have included those amounts that he received by way of tips.

(2) <u>EU law</u>

91. Given my conclusions above, it is not necessary for me to consider the position under EU law.

92. I note, however, that my conclusions are consistent with what I consider to be the proper interpretation of reg 13 WTR.

93. It is not in dispute between the parties that I must interpret the WTR in accordance with any retained EU law (i.e. the principles and authorities that applied before 31 December 2020).

94. The simple argument made by the Respondent is that retained EU law does not demand the inclusion of the Claimant's tips within his 'normal remuneration' because the Claimant has no contractual entitlement to such payments. Both

*Williams* and *Lock*, according to the Claimant, concerned only *contractual* benefits paid by the employer in exchange for services performed by an employee.

95. *Williams* concerned supplementary payments paid to airline pilots and linked to time spent flying and time spent away from base. The right to receive those supplementary payments was contained in the pilots' terms of employment. They were, accordingly, contractual entitlements.

96. Those payments were made over and above the pilots' fixed annual salary.

97. The CJEU found that the supplementary payments ought to be taken into account in the calculation of the payment to be made during annual leave, noting that the right to paid annual leave of at least four works was to be regarded as a '*particularly important principle of Community social law'.*

98. By contrast, components of the worker's total remuneration which were intended exclusively to cover occasional or ancillary costs, need not be taken into account.

99. *Lock* concerned commission payments to which the employees were contractually entitled in addition to their basic pay. The Court of Appeal (following a reference to the CJEU for a preliminary ruling) held that holiday pay ought to have been calculated so as to include the commission element of remuneration. In *Lock,* the employees had no contractual entitlement to a specific amount of commission, or a guarantee of any payment of commission. That contractual entitlement was to commission on any sales they successfully achieved. If they did not achieve any sales, they would not be entitled to any commission payments (see paragraph 5 of *Lock*). Save for the intermediary step of the troncmaster deciding on distribution, that is comparable to the Claimant's position.

100. The Claimant's tips are '*intrinsically linked to the performance of tasks which* [he] *is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided'* (*British Airways Plc v Williams*). If tips were not included in the calculation of remuneration for the purpose of holiday pay, the Claimant would be deprived of as much as 50% of his normal remuneration during those weeks he is on annual leave. That would clearly act as a significant deterrent to him taking his full holiday entitlement, given the resulting financial disadvantage.

101. Accordingly, and given my analysis above in respect of the Claimant's contractual entitlement, I find that the Claimant's tips fall within the definition of 'normal remuneration'. The Claimant's holiday pay for the four weeks guaranteed in EU law, ought, in addition to his basic salary, to have included an element referable to the tips he ordinarily earned when working. Only then would his holiday pay be comparable to his 'normal remuneration'.

102. In light of the above, the Claimant's claims for unpaid holiday pay and unlawful deductions from wages succeed. The Respondent failed to take the Claimant's tips into account when calculating his average weekly remuneration under s.224 ERA 1996.

(3) Acas uplift

103. The Claimant maintains that, in dealing with the grievance in the way it did, both Mr Gibbons and Ms Leake breached the Acas Code. Both parties accept that the Code applies.

104. The Claimant did not point to any specific paragraph of the Acas Code which he said had been breached. His complaint was not about the grievance process as such but that the Respondent had not produced a legal argument, akin to the Grounds of Resistance produced for this claim.

105. The grievance outcome responded to the Claimant's concerns and provided an explanation for the Respondent's position. Ms Leake's decision was not, in the unusual circumstances of this case, an unreasonable one. The Claimant accepted in evidence that he was seeking a determination of a legal issue. It was not appropriate for Ms Leake to provide that, beyond the analysis already given by Mr Gibbons. The Claimant has failed to establish that the Respondent unreasonably failed to comply with the requirements of the Acas Code in addressing his grievance (or grievance appeal).

106. Even if I am wrong about that, I do not consider that it would be just and equitable to increase any award of compensation made in the Claimant's favour. The Claimant's own evidence was that, even if the Respondent had responded to his grievance or grievance appeal with a document comparable to its Grounds of Resistance, he would have pursued this claim.

Preparation Time Order

107. In his skeleton argument the Clamant sought a Preparation Time Order under rule 76 of the Tribunal Rules 2013 (as amended). I consider that I am able to make a decision on that application at this stage of the proceedings.

108. The grounds for making a PTO are identical to those for making a general costs order against a party under rule 75(1)(a).

109. The Claimant applies for a PTO on the basis that the Respondent has acted vexatiously or otherwise unreasonably and/or that the response had no reasonable prospects of success.

110. In considering whether to make a PTO, I must consider:

(a) whether the Respondent has behaved vexatiously, abusively, disruptively or otherwise unreasonably and/or whether the response had no reasonable prospect of success
(b) whether it is appropriate to exercise my discretion in favour of awarding costs
(c) what the appropriate amount is.

111. I do not consider there to be any basis for making such an award.

112. The Claimant raised eight arguments in support of his claim that the Respondent had acted vexatiously or unreasonably. I do not accept any of those arguments.

113. The first three arguments are vague and not properly explained. I have not seen or heard anything to suggest that the Respondent '*put numerous false material statements before the Tribunal'*, '*failed fully to comply with inspection requests of the Claimant'* or '*failed to engage with the Litigant in Person Claimant to refine the inspection requests'*. To the contrary, the Claimant made an application for specific disclosure which was heard and refused by EJ Warren on 14 March 2024.

114. The Claimant alleges that the Respondent failed twice to disclose plainly disclosable material and threatened him with a costs order leading him to submit a third party disclosure application. The application, however, was made before any orders for standard disclosure were due to be complied with. There was no need for a specific disclosure application at that early stage.

115. I understand that the remaining arguments made by the Claimant relate to a recording which he took of a conversation with Ms Nanthakumar (a recording which was taken without her knowledge or consent). The Claimant placed reliance on this conversation, alleging that Ms Nanthakumar told him that the tronc is '*all worked through the company'*. Ms Nanthakumar denied making such a statement. I did not find it necessary to make a finding on the contents of this conversation. I do not think it is as important as the Claimant considers it to be. As discussed with the Claimant by EJ Warren in March 2024, relevant information as to how tronc payments were paid to him could all be obtained by looking at the Claimant's own PAYE records.

116. The Claimant argues that the Respondent acted unreasonably in dealing with this issue, admitting that payments were made directly to the Claimant only after they were ordered to disclose material and presenting witness evidence contrary to its admission. I do not accept that the Respondent has acted unreasonably in proceeding as it did in relation to this issue. It was in never in dispute that the Respondent was liable for PAYE on the Claimant's tips. The Respondent complied with its disclosure obligations in this regard and called appropriate witnesses to support its argument that its payment of PAYE was not determinative of the issue in dispute.

117. I do not accept that the response had no reasonable prospect of success. This was a novel and complex issue which was fairly argued by both parties. The Respondent's position was far from unmeritorious and required careful analysis. There are no authorities directly determining the point in dispute. That the Claimant was ultimately successful does not detract from that.

118. In the circumstances, I do not consider that the grounds for making a PTO are made out.

119. Unless the parties can agree the sums owed to the Claimant, a remedy hearing will be listed. That hearing may need to consider whether there are any

jurisdictional issues affecting the Claimant's ability to recover the entire amount claimed, given the time period to which those payments relate.

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Employment Judge Smeaton

Date: 19 November 2024

Sent to the parties on: 28 November 2024

For the Tribunal Office

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