Appeal No. UKEAT/0267/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 12 February 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MS A MIGLIACCIO & OTHERS — APPELLANTS

SAMUEL SMITH (SOUTHERN) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS NICOLA STRACHAN (of Counsel) Instructed by: Quercus Law 107-111 Fleet Street London EC4A 2AB
For the Respondent	MR PETER OLDHAM (One of Her Majesty's Counsel) Instructed by: Ward Hadaway Solicitors Sandgate House 102 Quayside Newcastle upon Tyne NE1 3DX

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

Whether, at the time of the Claimants' resignations, it was a term of their contracts of employment that they were entitled to share gratuities left by customers on whom they waited. On the facts it was found that the Employment Judge was entitled to conclude that the arrangement was no longer contractual after 2009. Thus the Claimants were not constructively dismissed in July 2013.

HIS HONOUR JUDGE PETER CLARK

1. The principal question in this case is whether the Claimants before the London (Central) Employment Tribunal, Ms Migliaccio and others, had a contractual right to tips left by customers on whom they waited at the Respondent's George and Vulture pub restaurant in the course of their employment, or whether the distribution of gratuities amounted at the relevant time to an arrangement between the Respondent and the Claimants which fell short of a term, whether express or implied, of their contracts of employment.

2. Employment Judge Wade, sitting alone on 11 and 12 February 2014, held that it was the latter and thus dismissed the Claimants' complaints of constructive unfair dismissal by a Judgment dated 21 February 2014. Reasons for that Judgment were promulgated on 31 March. Against that Judgment the Claimants appeal. At a Preliminary Hearing HHJ Eady QC directed that the appeal proceed to this Full Hearing now before me. The parties are represented as they were below; Ms Strachan for the Claimants, Mr Oldham QC for the Respondent, Samuel Smith (Southern).

The Facts

3. Each Claimant had worked for a long time at the pub restaurant; Mr Middleton for 34 years.

4. Following the introduction of the national minimum wage, in about 2000, the Respondent applied an optional service charge of 12.5% on each customer's bill. The customers nearly always paid and the gratuities received were distributed directly to the waiting staff. There was no tronc system in place. At that time it was thought that such payments

counted towards the minimum wage. Excluding tips, the waiters' basic wage fell below the statutory minimum.

5. A contract issued in 2000 stated the weekly rate of pay, but made no mention of gratuities.

6. In 2005 two written contracts of employment were issued to staff. The first did not mention gratuities. However the second, revised contract, which was sent under cover of a letter dated 19 October 2005, drew particular attention to the inclusion of the payment of gratuity under clause 6.1, which provided, in the case of Ms Migliaccio:

> **"your present rate of pay is £31.93 per 22.5 hour week. … Payment of gratuity is to continue as at present."**

7. In 2009 a new contract was issued. The Judge found (paragraph 8) that at that stage the employer knew that tips no longer counted towards the national minimum wage and it was no coincidence that the new clause 6.1 in that contract provided for an hourly rate of pay of £5.80, the then national minimum wage. There was no mention of gratuities.

8. Nevertheless, the inclusion of an optional 12.5% service charge continued on the restaurant bills, and the tips left were divided up between the waiters as before.

9. In 2011 the Respondent made clear that gratuities received by staff would no longer count towards pensionable salary. So the Judge found (paragraph 10) by the end of 2011 the contract did not include the gratuity as part of the rate of pay, nor did it count as pensionable salary.

10. The distribution arrangement continued as before until 2013 when, as a result of a downturn in trade and the chef resigning, unhappy with his level of pay, the Respondent decided unilaterally to remove the optional gratuity addition from the bills of customers and further, that gratuities which were received would also be shared amongst kitchen staff, who were to receive 20% of the pool.

11. The Claimants raised a grievance. Their total income, including tips, was down about 50%. The grievance was rejected by the Area Manager, Mr Smith, as was a subsequent appeal. The Claimants then resigned on 25 July 2013 claiming that they had been constructively dismissed. These Tribunal proceedings then followed. By their response the Respondent contended that the Claimants had no contractual right to receive gratuities.

The Tribunal Decision

12. Based on the facts found the Judge held:

> (1) That the term contended for by the Claimants, namely an express or implied term of their contracts that they "would be able to add a 12.5% service charge to the bill and would keep those gratuities on tables at which he/she waited" (see paragraph 1) was not capable of incorporation into a contract of employment (paragraph 15).
>
> (2) Applying the Court of Appeal reasoning in **Park Cakes Ltd v Shumba** [2013] IRLR 800, that this was an arrangement too unpredictable and uncertain to constitute a contractual term (see paragraph 16).
>
> (3) The factors set out at paragraph 20, including the removal of any reference to gratuities in the 2009 written contract, which adopted the hourly rate of pay then the statutory minimum and its removal from pensionable pay in 2011, support the

analysis that, at least after 2009, the payment of gratuities amounted to an arrangement, not a contractual term. Thus the Claimants were unable to show any breach of contract such as to support the claim of constructive dismissal and without a dismissal the claim of unfair dismissal necessarily failed.

The Appeal

13. I shall assume in favour of the Claimant's submissions advanced in support of the appeal by Ms Strachan that the inclusion of gratuities in the contractual rate of pay was an express term of the 2005 contract; and it follows was apt for incorporation and not too vague to be a term of the contract. The real question then, it seems to me, is whether the Judge was entitled to conclude that after 2009 gratuities no longer formed part of the Claimant's contractual pay; rather that the old arrangement remained in place until it was unilaterally altered by the employer in 2013. If so, then the claims failed; if not, then the Claimants were constructively dismissed.

14. As to the position in 2009, the Judge accepted the Claimant's evidence as to oral assurances that they would continue to receive gratuities (see paragraphs 8 and 20(b); however, she concluded the omission of any reference to gratuities in clause 6 of the 2009 contract, when compared with the 2005 contract, was not unintentional (paragraph 20(d)). It was explained in the covering letter of 16 October 2009. The company believed that they could no longer rely on tips to make up the national minimum wage figure, then £5.80 per hour. So the basic rate of pay was increased to that level. The contractual right to gratuities was removed. The Claimants accepted that change. It was further evidenced by the alteration to the definition of pensionable pay in 2011, to which objection was not taken.

15. I recognise the strength of the Claimant's counter-argument, that they relied on oral assurances that they would continue to receive their share of gratuities as before. I also note that, again, on 16 October 2009 the Area Manager wrote to, for example, Ms Migliaccio stating that the rate of holiday pay under clause 10.1 would be based on the weekly wage, that is accrual of tips and hourly rate.

16. However, neither of those facts, it seems to me, is inconsistent with the conclusion that the contractual entitlement to tips, if any, was removed by the 2009 contract. The old arrangement continued and was used for calculating holiday pay; it was not to apply to pay for work done.

17. Similarly the reference to reduced hours in the 16 October covering letter referred to at paragraph 20(d) is not inconsistent with the conclusion reached by the Judge.

18. In these circumstances I am persuaded by Mr Oldham that the core finding by the Judge, that from 2009 gratuities did not form part of the contractual work wage bargain, is not one with which I can properly interfere. That was the express wage term from 2009; and it follows that no term to the contrary can be implied.

19. It must therefore follow that this appeal fails and is dismissed.