



EMPLOYMENT TRIBUNALS

Claimant: Mr B Plant

Respondent: 1. Mexican Express Limited
2. Louie's Bar
3. Ms M Serpes
4. LG Bars Limited
5. Tinga Foods Limited

Heard at: London Central

On: 3 August 2017

Before: Employment Judge Grewal

Representation

Claimant: Ms A Fung, Volunteer Advisor

Respondent: Ms M Serpes

JUDGMENT having been sent to the parties on 9 August 2017 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

1 In a claim form presented on 22 December 2016 the Claimant complained of unauthorised deduction from his wages. That claim was initially brought against the first three Respondents who appear before me today. At a Preliminary Hearing on 12 April this year the Third Respondent suggested that perhaps the Fourth or the Fifth Respondents might in reality have been the correct employer of the Claimant and they were, therefore, added as potential Respondents by the Tribunal.

2 The Responses of all the Respondents were submitted by Ms Serpes, the Third Respondent, and she represented all the Respondents at the hearing before me today. She is the only person amongst the five Respondents who has given any evidence before the Tribunal. None of the Respondents have produced any documentary evidence to support their position in this case.

The Evidence

3 I heard evidence today from the Claimant and from Ms Serpes. Having considered that evidence, and the documents before me, I make the following findings of fact.

Findings of Fact

4 In March 2016 the Claimant, who was then a 21 year old student, saw a “staff wanted” poster in the window of the Mexican Express Restaurant near Old Street Station. He inquired about applying for the job and was told that he should drop his CV into Chilli Nachos as the manager was more frequently based there.

5 Those two restaurants, which are located very close to each other, effectively operated as one business and one restaurant, and the manager and the staff split their time between the two restaurants depending on how busy each one was.

6 The Claimant followed that advice and delivered his CV to the then manager, Juan Cabellos, in the Chilli Nachos restaurant. He was invited to a trial shift and an interview on 31 March 2016. He was interviewed by Juan and a Supervisor named Rinku and at the conclusion of that interview and trial shift, he was offered a job as a waiter/barman to start the following day. The Claimant said that the maximum he could work would be 25 hours a week due to his commitments as a student and that he would not be able to work during weekends. Rinku told the Claimant that they could accommodate that.

7 The Claimant commenced employment with them on 1 April. He normally worked a maximum of 25 hours a week, Mondays to Fridays.

8 On 1 April all the staff at working at Chilli Nachos were asked to sign a document which set out some of their terms and conditions. The Claimant recalls that the document made a reference to the periods of payment, i.e. they would be paid for the hours calculated from the first of each month to the first of the following month, payment would be made on the 7th of the month and that they would be paid the National Minimum Wage. They were all asked to sign the document on the basis that it was unnecessary for them to sign that in order to be paid. They were, however, not given a copy of that document to take away. The Claimant took a picture of it on his mobile phone but no longer has the phone on which the picture was taken. As far as the identity of the employer was concerned, the Claimant could recall seeing Chilli Nachos and the logo for that being on top of their document. He has no recollection of there being any reference to Tinga Foods Limited on that document.

9 Ms Serpes’ evidence was that it was clear to the Claimant and had always been clear to him that Tinga Foods Limited was his employer because that name

appeared on the contract of employment and it appeared on numerous other documents in the restaurant. The Claimant disputed that. His evidence was that the first time he ever heard of Tinga Foods Limited was when it was mentioned at the Preliminary Hearing on 12 April 2017. I thought it significant that none of the Respondents produced any contractual document with the name of Tinga Foods Limited on it, nor did they produce any of the other documents which she says were so freely to be found around the restaurant. If the Claimant had thought at any stage Tinga Foods Limited was genuinely his employer, I would have expected him to have mentioned that to ACAS in Early Conciliation and to have named it as one of the Respondents on his claim form. The fact that he did not do so and the absence of any documents referring to Tinga Foods Ltd leads me to conclude that the Claimant's account is correct and that he was unaware of the existence of Tinga Foods Limited until 12 April this year.

10 Juan Cabellos left around about 8 April 2016. In the course of his work the Claimant filled in timesheets, he wore a uniform, he carried out all his work under the instructions of either his supervisor, Rinku, or Ms Serpes. The Claimant first saw Ms Serpes very soon after he started employment and Juan Cabellos referred to her as being somebody who was very important and "the boss".

11 Ms Serpes was neither a director nor a shareholder of Tinga Foods Limited at the time, but she was nevertheless very actively involved in the day-to-day running and the management of the business and its staff. There were in the Bundle before me a large number of communications and text messages between her and the Claimant in respect of the shifts he would work, the hours he would work, the times he would start and finish, the closing and the opening of the restaurant, where the keys were to be left, matters relating to order supplies, instructions from Ms Serpes as to how the staff were to do their job, communications in respect of payments, in respect of delays of payments, and other such matters. Melina Serpes was clearly to the Claimant the face of his employer, and appeared to him to be the owner of both restaurants.

12 Ms Serpes' evidence to me was that she was a management consultant who had been employed or engaged by Tinga Foods Limited to oversee its business and for training purposes and various other strategic purposes. However, neither she nor Tinga Foods Limited produced any documentary evidence of the relationship between them. There was no agreement, no invoices and no evidence of payments being made.

13 The Claimant was paid monthly by BACS transfer from Ms Serpes' personal account into his account, and the name of the person making the transfer was shown on his bank statements as "Melina Serpes trading as". Unfortunately, the name of the entity that she was trading as does not appear on his bank statements.

14 Ms Serpes gave contradictory, inconsistent and frankly quite incredible explanations for that. In her witness statement, she had said that she helped to set up an online facility for Tinga Foods Limited, because it was not able to do so, in order to process faster payments to suppliers, agents and possibly workers of the Fifth Respondent and that it in turn would reimburse her for any payment she made. In her oral evidence today she said, for the first time, that she had attempted to set up an account in the name of Tinga Foods Limited but the bank had made an error and set the account up in her personal name and that it was

an error that she had not noticed until she received disclosure of documents in this case. She has not produced any documentary evidence to support either of those versions and there is no documentary evidence to establish that the payments that were made into the Claimant's account in fact originated from Tinga Foods Limited. All the evidence before me indicates that payments were made by Ms Serpes herself personally.

15 The Claimant was away from 20 June to 23 July 2016 and there was some unhappiness on the part of Ms Serpes about him taking an extended leave period. When he returned he contacted her on 2 August to ask if he could return to work. She agreed and he returned to work on 2 August and worked at the two restaurants (Chilli Nachos had by this stage become Louie's Bar). The claimant could work more hours because he did not have study commitments at that time. Between 1 August and 2 September he worked a total of 120 hours. The Claimant was not paid for those hours and he raised it with Ms Serpes on 7 September when he went in to work. He left on that day and did not return to work. The Claimant exchanged a number of text messages with Ms Serpes, the last of which was on 12 September, in which he claimed that he was owed wages for 120 hours. Ms Serpes did not dispute that.

Conclusions

16 It was seriously disputed by any of the Respondents that the Claimant was at the relevant time a worker within the meaning of Section 230 of the Employment Rights Act 1996. As far as the identity of the employer is concerned, none of the Respondents put any evidence before me to show that the Claimant was employed by Tinga Foods Limited. There is absolutely no documentary evidence on the basis of which I could reach that conclusion.

17 In light of the fact that he was paid by Ms Serpes personally, that she was a person who dealt with him on a day to day basis and managed him and there is no documentary evidence to support her assertion that she did that either as an agent or an employee or a management consultant working for Tinga Foods Limited, I am driven to the conclusion that she was acting on her own behalf. It is, therefore, my conclusion that the Claimant's employer was Melina Serpes.

18 The Claimant worked 120 hours in August and the beginning of September and he has not been paid his wages for those hours. He was paid £6.70 per hour and there has, therefore, been an unauthorised deduction of £804 from his wages.

19 I also considered whether I should order an uplift under Section 38 of the Employment Act 2002 for the Respondent's failure to give the Claimant written terms and conditions. Had there been written terms and conditions a number of hearings in this case and possibly the need to determine who the employer was could have all been avoided. I decided to award an uplift of two weeks' wages.

As I have indicated to the parties, in calculating that I will take into account the payment the Claimant received in June, July and September and divide that by 6 to get 2 weeks payment and the sum I get is £321.53.

Employment Judge Grewal on 7 December 2017