



# THE EMPLOYMENT TRIBUNALS

**Claimants:** Mr R Dos Santos (1)  
Mrs M Dos Santos (2)

**Respondent:** 808 Leisure Limited

**Heard at:** North Shields Hearing Centre   **On:** 6 August 2019

**Before:** Employment Judge Morris (sitting alone)

***Representation:***

**Claimants:** Mr R Dos Santos  
**Respondent:** Mr M Howson, Consultant

## RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimants' applications to amend their claims so as to add new complaints that the respondent did not pay either of them in lieu of their entitlements to paid holiday that had accrued during 2018 but had not been taken by them is refused.
2. As was conceded on behalf of the respondent the complaints of each of the claimants that the respondent made unauthorised deductions from their respective wages, contrary to section 13 of the 1996 Act, in that it did not pay to them wages in respect of their employments from 1 January to 8 January 2019, is well-founded.
3. By consent, in respect of those deductions the respondent is ordered to pay to Mr Dos Santos the agreed sum of £646.15, and to Mrs Dos Santos the agreed sum of £600.00.
4. As was conceded on behalf of the respondent the complaints of each of the claimants that the respondent did not pay either of them in lieu of their entitlements to paid holiday that had accrued during that week of 1 January to 8 January 2019 but had not been taken by them is well-founded.

5. By consent, in respect of those non-payments in lieu of their holiday entitlements the respondent is ordered to pay to Mr Dos Santos the agreed sum of £69.58, and to Mrs Dos Santos the agreed sum of £64.61.
6. The complaint of Mr Dos Santos that the respondent made an unauthorised deduction from his wages, contrary to section 13 of the 1996 Act, in that it did not pay to him the wages due to him in respect of his employment during June and July 2018, is well-founded.
7. By consent, in respect of that deduction the respondent is ordered to pay to Mr Dos Santos the agreed sum of £3,166.66.
8. The complaints of both the claimants that the respondent was in breach of their respective contracts of employment in that it gave neither of them the 8 weeks' notice of termination to which they were entitled in accordance with those contracts are well-founded.
9. By consent, in respect of those breaches of contract the respondent is ordered to pay to Mr Dos Santos the agreed sum of £3,449.69, and to Mrs Dos Santos the agreed sum of £3,240.57.
10. Each of the above sums has been calculated by reference to the gross pay of the respective claimants and any liability to income tax and employee national insurance contributions shall be the liability of the respective claimant alone.

## REASONS

### Representation and evidence

1. Mr R Dos Santos appeared in person and also represented his wife, Mrs M Dos Santos. Both claimants gave evidence.
2. The respondent was represented by Mr M Howson, consultant, who called Mr PJ Brown, a director of the respondent to give evidence on its behalf.

*[Note: At the time relevant to these proceedings, there were two directors of the respondent called Mr Brown: Mr PJ Brown and Mr L Brown. In these Reasons references simply to "Mr Brown" are references to Mr PJ Brown; any references to Mr L Brown will use that description.]*

3. The Tribunal also had before it an agreed bundle of documents, which was added to at the commencement of the hearing, comprising some 165 pages.

### The claimants' complaints

- 5 The claimants' complaints are as follows:

- 5.1 Neither of them had been given by the respondent the 8 weeks' notice of the termination of their respective employments as is provided for in their contracts of employment.
- 5.2 Neither of them had been paid by the respondent in respect of the work they had each undertaken in the first week of January 2019.
- 5.3 Neither of them had received from the respondent compensatory pay in lieu of holiday accrued but untaken as at the termination of their respective employments.
- 5.4 Mr Dos Santos had not been paid the wages due to him for his employment by the respondent during June and July 2018.

### Procedural points

- 6 At the commencement of the hearing, it was conceded on behalf of the respondent that it owed each of the claimants the following:
  - 6.1 wages in respect of their employments from 1 January to 8 January 2019, and it would pay to them the agreed amounts as follows: Mr Dos Santos £646.15; Mrs Dos Santos £600.00;
  - 6.2 pay in lieu of untaken holiday during that same week, and it would pay to them the agreed amounts as follows: Mr Dos Santos £69.58; Mrs Dos Santos £64.61.
- 7 Also at the commencement of the hearing, Mr Dos Santos applied to amend each of the claimants' claims to add a claim for pay in respect of holiday accrued but untaken during their respective employments in 2018. Mr Howson objected to the amendments. After a short adjournment I announced my decision in relation to this application in the following terms:

In accordance with relevant case law, particularly Selkent Bus Company Limited v Moore [1996] ICR 836 and relevant parts of the Presidential Guidance on Case Management I have to balance relevant factors having regard to, first, the interests of justice and, secondly, the relative hardship to all the parties of allowing or not allowing the amendments.

The nature of the amendments sought is not to provide further detail; they are new claims and are claims that Mr Dos Santos clarified at a previous hearing were not to be pursued by the claimants. Further, if the claimants are allowed to pursue these claims the respondent will be required to make new and additional enquiries to enable it to respond, which it would not be able to do immediately and a further adjournment of the hearing of these claims would therefore be required.

As to time limits, the applications to amend are well outside the standard three-month time limit for presenting a complaint to the employment tribunal and although I can extend that time limit if it was not reasonably practicable for the claims to have been made in time, given that the original claim forms were presented in February 2019 it clearly was

reasonably practicable for the claims sought by way of amendment to have been presented then too.

With regard to the timing of the applications, it is clear that they could have been made earlier than at the commencement of the hearing as they do not arise out of new information that has only come to light.

For the above reasons, therefore, I refuse the application is to amend.”

- 8 During the afternoon of the hearing it became apparent that when it concluded insufficient time would remain within which I could consider my judgement, announce it to the parties and, if necessary, proceed to consider remedy. Mr Howson helpfully suggested that if I permitted a short adjournment he thought that the parties might be able to agree figures as to the sums that would be awarded to the claimants if either or both of them were to be successful in their remaining claims and, if agreement could be reached, I could reserve my judgement. I agreed to the adjournment after which Mr Howson informed me that agreement had been reached and the figures, which Mr Dos Santos confirmed he accepted on behalf of the claimants, were as follows:

*Mr Dos Santos*

8.1 Wages due in respect of employment during June and July 2018: £3,166.66.

8.2 Eight weeks' pay in lieu of notice: £3,449.69.

*Mrs Dos Santos*

8.3 Eight weeks' pay in lieu of notice: £3,240.57.

### **The issues**

- 9 Given the concessions made on behalf of the respondent that are recorded above, the issues that remained to be determined by the Tribunal are as follows:
- 9.1 It being accepted that the contracts of employment of the claimants provide for 8 weeks' notice of the termination of their respective employments, did the respondent give each of them all or part of that period of notice to which they were entitled?
- 9.2 As to Mr Dos Santos, was he an employee of the respondent during June and July 2018 and, if so, did he receive the wages that were due to him during that period of employment?

### **Consideration and findings of fact**

- 10 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically

mentioned below), I record the following facts either as agreed between the parties or found by the me on the balance of probabilities.

- 10.1 The respondent is a relatively small business that operates a bar and restaurant in Sunderland. The respondent was incorporated on 26 February 2018 but did not begin trading until 8 August 2018. The intention had been to open the bar and restaurant at the end of June but that was delayed, first to 17 July and then 8 August 2018.
- 10.2 Mr Dos Santos was employed by the respondent as General Manager; Mrs Dos Santos was employed as Bar Manager. Mrs Dos Santos has not brought a claim for unpaid wages during 2018 but Mr Dos Santos maintains that his employment commenced on 1 June 2018 and he was not paid his full wage for the months of June and July. The respondent's position is that his employment commenced on 1 August 2018.
- 10.3 In a typed Statement of Main Terms of Employment for Mr Dos Santos (54) there is a clause recording the commencement of his employment in which, in a space deliberately left to be completed is written, in Mr Dos Santos's handwriting, "1<sup>st</sup> June 2018". That document is signed by Mr Dos Santos and Mr Brown on 17 December 2018 (56) as is a 48 Hour Opt out Agreement (57) and a Form for Existing Employees (58), which refers to the Statement being an "updated statement of main terms of employment". Mr Dos Santos confirmed that he had handwritten that date but explained that that accorded with his role of General Manager and he had similarly written in relevant commencement dates for all employees of the respondent. Mr Brown's evidence was that the document at page 54 was not the original Statement. He had filled out the original one in his handwriting and page 54, which Mr Dos Santos had forged, had been substituted for the original. There was no evidence to support Mr Brown's assertion and I reject that alternative evidence. Thus I find that the written Statement commencing at page 54 is a copy of the original document signed by Mr Dos Santos and Mr Brown on 17 December 2018 at page 56.
- 10.4 There is also a Statement of Main Terms of Employment for Mrs Dos Santos (149) the typed provisions of which appear to be identical to that of Mr Dos Santos and, once more, there is written in manuscript (apparently in the same handwriting) "1<sup>st</sup> June 2018", that statement similarly being signed on 17 December 2018 (151). I do not pursue any findings in this respect further given that Mrs Dos Santos is not making any claim in respect of wages due to her during June and July 2018.
- 10.5 There is no dispute that during June and July 2018 Mr Dos Santos undertook work on behalf of the respondent. The respondent's position is that during those months he was not an employee but, as a parent of one of the respondent's directors, volunteered his time to assist with renovating the premises and building the bar. Other parents had also assisted. Mr Dos Santos was paid £1,500 as a gesture of goodwill and to cover the cost of materials he had bought to assist with the renovation. His contract of employment provided that he would work 48 hours each week but during

these two months of June and July he did nowhere near 48 hours a week but worked very much on an ad hoc intermittent basis.

- 10.6 Mr Dos Santos maintained, however, that his employment with the respondent officially started on 1 June 2018. He had entered into discussions with the directors around March, which had continued into April and when the commencement date of his employment was agreed he decided to quit his then employment. He handed in his resignation from that employment four weeks before his start date with the respondent on 1 June. He worked during June and July searching for staff, recruiting staff, meeting suppliers setting up financial agreements with suppliers and a leasing company, organising the kitchen (including getting equipment and a pizza oven that had to be lifted into the kitchen) and working on the property. The respondent paid £1,500 to Mr Dos Santos on 2 July 2018, which is shown on his bank statement as a payment in from the respondent, "Ref: Wages" (130).
- 10.7 I shall return to my consideration of this conflict of evidence in my determination below.
- 10.8 In September 2018, Mr Dos Santos was given a loan of £1,000 from Mr Brown personally to help pay for the claimants' honeymoon (131).
- 10.9 The claimants were asked to attend a meeting with Mr Brown on 31 October 2018. The invitation to the meeting was informal in the extreme. It involved one of the respondent's directors, Mr Fryatt, sending a Whatsapp message to another director at the time, Mr L Brown, (who is the son of Mrs Dos Santos and the stepson of Mr Dos Santos) stating, "Tell your mam and roger to come for 6:30 if ya can Loui" (99). Mr Brown's evidence was that that message was "clearly sent on the 30<sup>th</sup> October 2018" but that date is not apparent to me. Be that as it may, there is no evidence that the purpose of the meeting was made clear to the claimants. Mr Brown's evidence was that the purpose of the meeting was to discuss their performance. In his witness statement Mr Brown records that the poor performance of both claimants became apparent to him around 1 September 2018 and that a number of issues had been identified. Being a matter of record I do not need to set out those issues verbatim here, they can be summarised as follows:
- 10.9.1 References not being sought for staff who were not all cocktail trained and did not meet expected standards.
- 10.9.2A lack of teaching staff customer skills and when problem customers had had to be dealt they had hidden out the back.
- 10.9.3 High staff turnover, both claimants having spoken to staff in an aggressive manner and staff finding them unapproachable.
- 10.9.4 Failure to implement budgets or staff rotas to ensure the effective running of the business.

- 10.9.5 Large amounts of wastage meaning that the business was losing money, which was down in part to the claimants.
- 10.9.6 No staff to open the business, a full kitchen team having refused to attend work due to an altercation with Mr Dos Santos resulting in another blame culture.
- 10.9.7 The claimants had taken much longer than anticipated to introduce Sunday Dinners, the Cocktail menu and Wednesday Wings.
- 10.10 Each of the above issues is repeated verbatim in Mr Brown's witness statement as being applicable equally to both Mr Dos Santos and Mrs Dos Santos with only two exceptions. Only in Mr Dos Santos's case is there the reference to a full kitchen team having refused to attend work due to an altercation with him and the matters relating to the introduction of the Sunday Dinners, the Cocktail menu and Wednesday Wings (although appearing in the list of issues applicable to each claimant) are said in Mr Dos Santos' case to have been set by the directors.
- 10.11 Present at the meeting were the claimants and three directors of the respondent: Mr Brown, Mr L Brown, and Mr C Johnston. What occurred at the meeting is again a matter in respect of which there is a significant conflict of evidence. Each of the claimants denied the allegations against them. In this respect, given that Mr Brown's evidence was that he had identified the above issues around 1 September 2018 and the express or implicit references to the business losing money and generally not performing, he was questioned at the Tribunal hearing about how much money had been taken by the business during the first month and answered, "£75,000". Regarding high turnover of staff, he was asked how many had left in August and could only name one (CM) and did not counter Mr Dos Santos' response that she had been a casual worker only working as necessary and, therefore, there had not actually been a high turnover of staff.
- 10.12 In answering questions at the hearing, Mrs Dos Santos stated that the meeting had been about staffing issues and how to change things. As to the specific allegations referred to above, she said that there was no issue about seeking references, she had never hidden out the back in her entire life, had never raised her voice, was not in charge of the budget and had nothing to do with Sunday Dinners or Wednesday Wings. As to wastage, the directors kept going to other suppliers and they drank at the bar without writing things down, and the cocktail menu have been introduced more or less straight away although it had been small because they had been rushed to open. She explained that the context of the meeting was that the business had been open for a couple of months and had started a quiet period. There was a need to reduce staff hours and some staff had lied over their hours so her husband had approached kitchen staff they were leaving. So the meeting was about staffing issues. Mrs Dos Santos accepted that she and Mr Dos Santos were getting the blame for the staff and sales, which did amount to some criticism or blame. Mr Brown had said that they did not want her as management and asked her if she would

work as a member of bar staff under another Bar Manager. He had said she could have a few days to think about it but she had flatly refused. She denied, however, that at that stage the respondent had dismissed her. On the contrary, after the meeting things had just carried on as normal as if nothing had happened.

- 10.13 Mr Dos Santos's evidence was that there had been some questions asked of him at the meeting but they were more questions than criticisms; the questions being in respect of the budget, staff and why things were happening. He accepted that his taking on the alternative role of Head Chef was discussed because of the problems they were having with the then Head Chef; the discussion being whether he would cover the Head Chef vacancy or actually become Head Chef rather than being General Manager. This had only been an idea and he had been asked to go away and think about it. He had said that he did not think it would work out that well, he wanted to be the General Manager and not the Head Chef and told the directors not to worry as he would replace the Head Chef, which he did. The discussion fell short of being told that the respondent was thinking about replacing him or was actually replacing him.
- 10.14 Mr Brown's evidence in his witness statement was that at the meeting he had told both claimants that their roles were not working out but, given their family connection, Mr Dos Santos was offered the role of Chef and Mrs Dos Santos was offered the role of Bar Staff. In answering questions at the hearing he added that he had also told them that he was terminating their respective roles and that this was the start of their notice periods. Also at the hearing, when Mr Dos Santos put to Mr Brown that he did not terminate the employment of the Mr Dos Santos, his initial answer was, "I didn't but I offered a different role". Having said that, when he was then asked a similar question (but now asking whether he had dismissed Mr Dos Santos as opposed to whether he had terminated his employment), Mr Brown answered that on 31 October he had dismissed him from his position as General Manager and given him a couple of days to think about the alternative offer, which he had rejected.
- 10.15 There are some documents that have been submitted as evidence of these events. First, there are what are said to be minutes of the meeting, which in essence set out the seven areas of poor performance that are summarised above (94). The document is actually dated "30/10/18" but the metadata shows that it was created on "31 Oct 2018". Unlike what one would expect to see in minutes of a meeting this document only records the criticisms and not what was discussed in respect of them and, significantly, do not record the outcome of the meeting: namely, as is the respondent's case, that the claimants were both dismissed.
- 10.16 Secondly, there is a message sent by Mr L Brown (it seems to Mr Brown but possibly also to other directors in a Whatsapp group) at 20:40 on Wednesday, 31 October 2018 which states, "Mams gone with immediate effect, Rogers gonna do the handover, but you do realise that we owe them 10k". The claimants' evidence was that after the meeting they had gone home to the house where Mr L Brown also lived. They had been



angry and spoke openly in the presence of Mr L Brown. Mrs Dos Santos' evidence with regard to this message that her son then sent was that it did not confirm that she had been given notice of her dismissal. After the meeting she was fuming and upset given that despite all the work that she had put in they were going to demote her and she had remarked to the effect, "Okay I'll go with immediate effect"; meaning that she would leave her job. It was in the heat of the moment pretty much after the meeting. Mr Dos Santos's evidence with regard to this message was that it was in a private discussion in the family house that he had said that if this was the kind of directors he had to work with he would just leave. Mr L Brown had said that he could not just leave so he replied, in effect, "okay I'll do a handover". Mr L Brown had then become concerned and, in a state of panic, wanted to warn his co-directors that both the claimants were saying that they would leave immediately.

- 10.17 Next, there are letters to each of the claimants that are in very similar terms (96 and 98). The letters record, "Following a meeting with the directors, the decision for a re-structure of the current situation has been agreed" and go on to make to each of the claimants, respectively, the offers of the positions of Head Chef and Assistant Manager, which they are asked to seriously consider. The letters conclude that the decision has been made to alleviate some pressure and stress of the management position that they are each currently in and conclude, "Please consider this the commencement of your notice period". The metadata shows that these letters were created at 21:30 on 31 October 2018. Mr Brown's evidence was that he hand-delivered the letters to the claimants on 1 November 2018. The claimants deny ever having received these letters.
- 10.18 Finally, there are messages and emails commencing 6 January 2019. The first appears to be a Whatsapp message from Mr Brown to Mr Dos Santos telling him that an opportunity had come up with a consultant and a management team to take over the bar and asking him and Mrs Dos Santos to come to the bar for 7pm. He would rather say the rest in person. It was not personal but they were on the brink of needing to shut (101). Mr Brown's evidence was that at this meeting he had repeated that they had served notice, new management was starting and thanked them for what they had done; Mr Dos Santos had responded along the lines that they knew it was coming. Next is an undated letter that appears to have been attached to an email of 7 January 2019 (103 and 102) from Mr Brown to Mr Dos Santos that records, amongst other things, that he had now served his 8 week notice period but the respondent would appreciate an extended paid period of employment until 10 January 2018 to do a hand over to the new management. Mr Dos Santos replied on 7 January stating that he would be able to return to work the following day and work the remainder of the 8 week notice period but by then Mr Brown had stated in a telephone conversation between them that he could not return; Mr Dos Santos continued in his email that if he was unable to work his notice period he would bring claims against the company (105). Within minutes Mr Brown replied stating that the 8 week notice period was already served as it was issued on 31 October (106).

10.19 In respect of the above, it was put to Mr Brown that if the claimants had been served notice on 31 October 2018 that would have expired on 26 December 2018 (which he agreed) and it was illogical that they had not left upon that date and taken their stuff with them. He answered that they had remained because he asked them to extend their notice period and they had agreed. Once more, I do not find that evidence persuasive even to the standard of balance of probabilities. First, it is again not referred to in Mr Brown's witness statement; secondly, it is inconsistent with the claimants' position that if they were to be forced into alternative roles they would simply leave immediately; thirdly, Mr Brown's evidence that he asked them orally to extend their notice period is inconsistent with in then putting that same request in writing on 6 January 2019 (103).

10.20 As with the wages issue, I shall return to my consideration of this conflict of evidence in respect of the notice period in my determination below.

### Submissions

11 After the evidence had been concluded, the parties' representatives made oral submissions, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision. That said, the key points in the representatives' submissions are set out below.

12 The respondent's representative made submissions including as follows:

#### *Notice pay*

12.1 Notice must be unequivocally given, the intent being to terminate the relationship. Mrs Dos Santos confirmed that Mr Brown had discussed replacing her, which strongly infers some form of termination was given. She had also said in evidence that she had said, "I may as well go with immediate effect", which was because her dismissal had been communicated. Mr Dos Santos does not go that far; only that the respondent was thinking of termination but the message from his stepson, "Rogers gonna do the handover" strongly infers that notice was given. It is illogical for the employer to have had concerns, communicated them, raise the issue of termination and offered alternative employment yet when the claimants rejected that, not to have done anything. The logical next step would be to say, "Then you are dismissed". That is what the respondent says happened: the claimants were given notice and the opportunity of alternative employment, which they rejected and therefore their employments were terminated. That is a logical sequence of events. The email from Mr Dos Santos of 7 January 2019 (106) was designed to create confusion when none should exist. Notice was given in October; the vast majority of the evidence supports the respondent's case.

*Mr Dos Santos's wages in June and July*

- 12.2 It is conceded that this aspect is less certain but Mr Dos Santos must establish a deduction from properly payable wages. At common law there must be a contract. The Tribunal should treat with scepticism and caution the contract at page 54 in respect of the events in June and July given that Mr Dos Santos wrote in the date and Mr Brown's evidence is that he filled out a Statement which is not that contained in the bundle.
- 12.3 Other evidence is for and against. There is some evidence of an employment relationship but not that wages were properly payable. Mr Dos Santos has produced emails but only a dozen emails and texts in two months and they did not indicate an employment relationship in totality. When he was asked how the contract had come about he made vague references to discussions in April and May saying that pay was as in the contract and he was to work eight hours a day but he did not answer whether that was every day. There was a vagueness, and terms in a contract require certainty. This was therefore a casual relationship, which fits with the respondent's evidence. As with the other parents, he was pitching in to help. As he was going to be General Manager and doing more than the other parents he was paid £1,500 as a gesture. He was not shy of raising issues but there is no evidence that he had chased for his missing wages despite it being ongoing for several months. Additionally, he took a loan from one of the respondent's directors in September and had agreed that it was illogical to take a loan from someone who owed him money. It is counterintuitive. Also in this respect why had he paid back £1,000 to Mr Brown if he was still owed £3,000 in wages? That does not make sense unless the wages were not properly payable or owed in respect of June and July and the loan issue was separate in September. In summary, the wages were not properly payable and therefore that cannot be a deduction.
- 13 Mr Dos Santos made submissions including as follows:
- 13.1 The claimants had not constructed their case to get more than the money they were owed.
- 13.2 There was a meeting where ideas were bandied about. It was not official and no protocol had been followed in accordance with the respondent's handbook. The claimants had said that they would not change and had not received any official letters to say that their employments were terminated and there was no evidence, such as a receipt, to say that they had. The claimants had not agreed with the respondent's ideas so they carried on as normal with their jobs at work. That is why Mr Brown sent a text message asking for a meeting on 6 January 2019. Notice had not been given, if it had they would have left on 26 December 2018.
- 13.3 He had not tampered with the contract of employment. As General Manager it was he who was in contact with Peninsula to set up the contracts. It had been signed in December because the directors were

delaying because they thought more information needed to be added; then there was, not so they signed it.

- 13.4 The emails written after 6 January 2019 were about picking up their stuff. If they had been leaving on 26 December they would have removed everything. It was not logical that they would have worked beyond that date. Also, the respondent would then have paid them holiday pay in accordance with the handbook but they had not.
- 13.5 The bank statement for July 2018 showing the payment of the £1,500 as “Wages” is the same reference as all the other wages paid during his employment and Mr Brown had agreed that it was a wage. He had produced evidence that the work he had done went beyond renovation: the phone calls, writing menus that take a long time, and in setting up supplies he needed to know what was required and produce a list of equipment, and he had put in quite a lot of time to get the bar open. He would not have left a job at the end of May not to be paid until the end of August. They were due to start in July which is why his employment had started in June to prepare, then they pushed the date back.
- 13.6 There were no messages or evidence to back up the respondent’s complaints against the claimants and it is clear that they were overcome. The reason they had been dismissed was to save the respondent money at the detriment to the claimants. Mrs Dos Santos’ son had sold his shares at the end of December and a week later the claimants got sacked without any prior warning. They had no jobs to go to, which they would have had if their termination had been official.

## The law

- 14 So far as is relevant to these proceedings, the principal statutory provisions that are relevant to the issues in this case are as follows:

### *Notice pay*

- 14.1 Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, with reference to section 3(2) of the Employment Tribunals Act 1996, provides (at the risk of over-simplification) that proceedings can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages for the breach of a contract of employment.

### *Non-payment of wages*

- 14.2 Section 13 of the 1996 Act provides, “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 ....”

### *Standard and burden of proof*

- 14.3 In respect of these claims the standard of proof is the usual civil standard of a balance of probabilities. In relation to whether notice of termination

was given to the claimants on 31 October 2018, the burden of proof is upon the respondent. In relation to Mr Dos Santos' claim for wages properly payable to him during June and July 2018, the burden of proof is upon him.

### **Application of the facts and the law to determine the issues**

- 15 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.
- 16 It is always difficult for any tribunal when seeking to make findings and draw conclusions if there are such conflicts in the evidence before it as there are here, especially in a case such as this where there is such a dearth of reliable corroborative evidence; including, for example, from another director of the respondent who might have given evidence on these matters generally and specifically regarding what occurred at the meeting with the claimants on 31 October 2018.

#### *Notice pay*

- 17 I will address first the complaints that each of the claimants has advanced that the respondent did not give them the 8 weeks' notice to which they were entitled in accordance with their respective contracts of employment.
- 18 The starting point for my consideration of this element is that claimants were invited to attend a meeting with Mr Brown and two other directors on 31 October 2018. As I have found above, that was an exceedingly informal invitation with no indication being given to them as to the purpose of the meeting. Mr Brown's evidence was that the meeting was due to the poor performance of both claimants becoming apparent around 1 September 2018 and he set out in his witness statement the particular issues that I have summarised above. I consider there to be a particular difficulty with regard to those issues in that, apart from the two very limited additional aspects set out above relating to Mr Dos Santos, they are in identical terms and are said to apply equally to each of the claimants. This point was accepted by Mr Brown who explained only that they had generalised in respect of both claimants.
- 19 I did not find that to be a convincing answer even applying the standard of balance of probabilities. If an employer has concerns about an employee, the particular concerns relating to that employee should be made clear. This is particularly so given that Mr Brown accepted that certain of the concerns he had attributed to Mrs Dos Santos were matters that were not within her responsibility such as in relation to the budgets, Sunday Dinners and Wednesday Wings. More particularly, I accepted the evidence of Mrs Dos Santos that she had never been her life "hidden out the back" rather than dealing with customer complaints. Similarly, I was satisfied on the basis of Mr Brown's answers to questions at the hearing, first to the effect that the business had taken "£75,000" during the first month (which he appeared to acknowledge was a fairly significant figure) that it was not accurate to say that the business was not running effectively and was losing money and, secondly, as he could only name one casual worker who had

left during August that it was not accurate to say that there had been a high turnover of staff by 1 September 2018 as he had said in his witness statement.

- 20 Nevertheless, the parties were agreed that concerns were raised at this meeting at least about staffing issues and each of the claimants was asked whether they would step down from the roles they then held to the alternative positions of Head Chef and a member of Bar Staff/Assistant Bar Manager respectively, which they had each declined. They were then given a couple of days to think about the offers that had been made but neither of them accepted the alternative roles. The crucial question, however, is whether either or both of the claimants was told at this meeting (or soon after) that their employment with the respondent was terminated on 8 weeks' notice. The parties' evidence in this respect is directly in conflict. The documentary evidence is not particularly helpful in resolving that conflict. As indicated above, the minutes of the meeting (94) only record the criticisms and not what was discussed and, significantly, do not record the outcome. As such, I find the minutes to be more supportive of the claimant's positions than of the respondent's position.
- 21 A further relevant factor in this connection is that Mr Brown's evidence in his witness statement is limited to him having told both claimants at the meeting that their roles were not working out. It was only when he was being questioned by Mr Dos Santos at the hearing that he added that he had told them at the meeting that he was terminating their respective roles and that this was the start of their notice periods. Those are key points which, if they had occurred, one would have expected to see recorded in a witness statement especially as by at least this time the respondent was in receipt of appropriate advice. Additionally, as recorded above, at the hearing Mr Brown initially answer that he did not terminate the employment of the Mr Dos Santos but then, when asked a very similar question, changed that answer to say that he had dismissed him from his position as General Manager and given him a couple of days to think about the alternative offer.
- 22 In any event, there is no dispute between the parties that the claimants, having rejected the offers of alternative roles, simply carried on as normal in their existing roles. It was put to Mrs Dos Santos that in the context of the respondent having raised concerns about their performance in their present roles it was the illogical that they would be allowed to carry on not doing a good job. Her answer, "Pretty much – but that's what happened" had a ring of truth. Once more, nothing was put in writing by the respondent to the effect that their continuing to do their existing roles was on the basis that, having been dismissed from those roles, they were working their respective notice periods.
- 23 As to the message sent by Mr L Brown, I note that that arose not from a discussion that had occurred in the privacy of the family home. I do not say that the location means that what was said cannot be relied upon, only that if it had arisen from the discussion at the meeting, which was more formal and at which three directors were present, it might have been more reliable. The content of that message, "Mams gone with immediate effect, Rogers gonna do the handover, but you do realise that we owe them 10k" is ambiguous. I can certainly understand the submissions made on behalf of the respondent that the reference to Mrs Dos Santos going "with immediate effect" is a clear indication that she had

been given notice of dismissal but had decided not to work her notice and go immediately. I can also understand his submission that stating that Mr Dos Santos was going to “do the handover” similarly indicates that he too had been given notice of dismissal but had agreed that he would continue in employment at least as long as was necessary to hand over to the new General Manager. Conversely, I found the evidence of Mrs Dos Santos persuasive that it was because she had been told that she was to be demoted despite having worked so hard for the respondent, that she had reacted by saying that she would leave immediately. Likewise, Mr Dos Santos’ explanation that having been offered the role of Head Chef he had realised that he did not want to continue working for directors of that kind and had said that he would just leave but when his stepson had said that he could not simply do that he had replied that he would “do the handover”.

- 24 The letters to each of the claimants that are dated 31 October 2018 are again lacking in real precision. There is a reference to the decision “for a restructure” having been agreed by the respondent and the offers of alternative roles but there is nothing expressly to the effect that the claimants had been dismissed from their present roles. Then, almost as an afterthought, the last sentence states, “Please consider this the commencement of your notice period”. I accept that it is a reasonable inference from that that notice of termination has been given but that then raises the question of whether these letters were actually delivered to the claimants as Mr Brown says they were but which they say they were not. Further, when I asked Mr Brown why there was nothing in these letters to the effect that their current employments had ended his answer was that it was because the respondent was hanging on waiting for their decision as to whether the alternative roles would be accepted. I do not consider that that explains the absence of any specific reference to termination. Further, Mr Brown confirmed that having waited the couple of days within which the claimants were say whether they accepted the alternative roles, the respondent had not sent anything in writing to them to emphasise that their employment in those roles was ending in eight weeks’ time.
- 25 Finally, there is the correspondence between the parties commencing with the message from Mr Brown dated 6 January 2019. Again I find it surprising, if the respondent’s case is to be accepted, that there is not even a brief mention in that message to the context that Mr Dos Santos is aware that he had been dismissed from his position of General Manager some nine weeks previously and was now working his period of notice; albeit extended by agreement. Indeed, the opening sentence, “Roger an opportunity has come up with a consultant and a management team to take over the bar”, reads more as if this was the first occasion upon which this proposition had been raised with Mr Dos Santos.
- 26 In this regard also, I have already indicated the reasons why I did not find Mr Brown’s evidence persuasive (in the context of the circumstances, if the respondent position that they had been given notice of termination on 31 October 2018 is to be accepted) that the claimants had agreed to his request to extend their notice periods, of which no corroborative evidence has been provided. Neither did I find Mr Brown’s evidence persuasive that at his meeting with the claimants on 6 January 2019, when he said that he had repeated that they had served notice, new management was starting and thanked them for what they

had done, Mr Dos Santos had responded along the lines that they knew it was coming, which I consider would represent a somewhat meek response in the circumstances.

- 27 In his submissions with regard to Mr Dos Santos claim for wages, the respondent's representative stated that there was evidence for and against. I consider that to be the situation with regard to the claimants' claims for notice pay also. I consider the key indicator in support of the respondent's position is the message sent by Mr L Brown although, as indicated above, it is ambiguous and the claimants' explanation for their remarks could well be valid. The majority of the other of the above points broadly tend to favour the claimants' positions.
- 28 In his submissions the respondent's representative rightly said that notice to terminate a contract of employment must be unequivocally given. As was stated by the Court of Appeal in the decision in Stapp v The Shaftesbury Society [1982] IRLR 326, "notice to terminate employment must be construed strictly against the person who gives it, the employer, and if there is any ambiguity it must be resolved in favour of the person who receives it, the employee". Similarly, in the decision in Hind Gears Limited v McGinty [1984] IRLR 477 it was stated that an un-communicated decision to dismiss an employee is not sufficient to effect a dismissal and that it is essential that there should be communication of the decision to dismiss in terms which either bring it expressly to the attention of the employee or at least give him or her a reasonable opportunity of learning of it.
- 29 In his submissions with regard to Mrs Dos Santos, the respondent's representative suggested that Mr Brown, having discussed with her replacing her, strongly inferred that some form of termination was given. Similarly, he submitted with regard to Mr Dos Santos that the message from Mr L Brown, "Rogers gonna do the handover", strongly infers that notice was given. In each case, however, the representative relies upon inference or implication and the respondent is unable to point to anything that expresses with sufficient clarity for these purposes the decision to terminate the claimants' employments.
- 30 On a different but related point in Morris v London Iron & Steel Co [1987] IRLR 182 the Court Appeal stated that where an employment tribunal is unable to make a decision on the facts as to whether there is a dismissal in law, it is permissible to fall back upon the burden of proof to decide the case. In my personal experience that is a rare occasion indeed.
- 31 In light of this guidance that I draw from the above case law, while it is possibly right that the intention of the respondent's directors at the meeting on 31 October 2018 was to give the claimant's notice of the termination of their respective employments and although I do accept that there is at least some evidence on this element of the claims that can be said to point in each direction, I find that the respondent has failed to discharge the burden of proof upon it to satisfy me, on balance of probabilities, that either of the claimants was given clear and unambiguous notice of the termination of their respective contracts of employment on 31 October 2018 and, further, that such notice was not given to Mr Dos Santos until 6 January 2019 and was not given at all to Mrs Dos Santos other than by implication.



- 32 In these circumstances, I find that the claimants' claims that the respondent failed to give them the 8 weeks' notice of the termination of their respective contract of employment as is provided for in their respective contracts are well-founded.
- 33 As such, as indicated above, by consent, the respondent is ordered to pay to Mr Dos Santos the agreed sum of £3,449.69, and to Mrs Dos Santos the agreed sum of £3,240.57.

*Non-payment of wages*

- 34 Mr Dos Santos alone has presented a complaint that he was not paid in respect of his employment during June and July 2018, which amounts to a complaint that the respondent made an unauthorised deduction from his wages in respect of those two months.
- 35 I have found above that the Statement of Main Terms of Employment for Mr Dos Santos on the first page of which is written the commencement date of his employment of "1<sup>st</sup> June 2018" is a copy of the original document signed by Mr Dos Santos and Mr Brown on 17 December 2018 (56). I have also recorded that there is no dispute that during June and July 2018 Mr Dos Santos undertook work on behalf of the respondent. The dispute is whether that was work as a volunteer or as an employee for which a wage would be paid.
- 36 I accept the documentary evidence provided by Mr Dos Santos of the work he carried out during June and July (59 to 83), which includes email correspondence with a company regarding a survey; text messages with two different employees confirming a start date for their employments of 9 July and 17 July; messages with a potential chef and confirmation of him attending for interview on 20 June 2018; email correspondence and obtaining quotations from a supplier of kitchen appliances and equipment in June and July; in this regard liaising with a leasing company in July, obtaining information from company directors to act as personal guarantors and ultimately securing the approval of the leasing application; obtaining product lists from a supplier of bakery products and, in June, setting up an account with that supplier; arranging the installation of flooring in the bar in June and July; discussing with the Head Chef in July the organisation of a visit from an environmental health officer, necessary due diligence and the need for a chemical supplier; further email correspondence and text messages with the Head Chef in July in which the chef set out the work he had done so far including recipes, safe systems of work and allergen information.
- 37 In respect of the above, I accept the point made by Mr Dos Santos to the effect that the documents that he had submitted are themselves evidence that he was undertaking work on behalf of the respondent but were more than that as they also evidenced that he was undertaking other work referred to in the documents such as interviewing staff, producing menus and recipes and meeting with third parties. I also accept that that work amounted to significantly more than the respondent accepted of assisting "with renovating the premises and building the bar". Indeed, I am satisfied that minimising the work undertaken by Mr Dos Santos in that respect damages the credibility of the respondent's alternative account.

- 38 Further factors that I bring into my consideration of this issue include the following:
- 38.1 Mr Brown accepted in answering questions that Mr Dos Santos was responsible for the kitchen, wrote the menus and sought Mr Brown's comments on them.
  - 38.2 Mr Brown also stated that the intention had been to open the bar and restaurant at the end of June and that a general manager would need about four weeks to set up staff training. That timescale is supportive of Mr Dos Santos' account that he commenced his employment with the respondent on 1 June 2018 (ie. some four weeks before the intended opening date) and, had he not done so, he would not have resigned from his previous employment to work as a volunteer for two months.
  - 38.3 As recorded above, the respondent paid £1,500 to Mr Dos Santos on 2 July 2018, which is shown on his bank statement as a payment in from the respondent "Ref: Wages" (130). In his witness statement Mr Brown explained that the payment was made "as a gesture of goodwill and to cover the cost of materials he bought to assist with the renovation". In his oral evidence, however, he answered that the reason it was described as "Wages" was "because it was a wage", adding that there was also some reimbursement for Mr Dos Santos having purchased some glassware (some £30-£40) but it was "predominantly a wage – 99%". The payment of a wage is a concomitant of employment. According to Mr Dos Santos that payment was some £3,000 short of what he earned in June and July. He said that he was always chasing the balance but had been assured that it would be paid to him as soon as the respondent began to earn money from the bar/restaurant and, because his stepson was a director, he did not think that he needed to worry. It is perhaps a small point but Mr Brown's oral evidence that the payment included reimbursement to Mr Dos Santos in respect of his purchase of some glassware is inconsistent with that aspect of his evidence in his witness statement that the payment was made as a gesture of goodwill and "to cover the cost of materials he bought to assist with the renovation"
  - 38.4 The text message exchange between Mr Dos Santos and the head chef (61) shows that Mr Dos Santos told him that his "start date is Monday, 9<sup>th</sup> July and we open the 17<sup>th</sup>". As Mr Dos Santos stated in evidence, if the respondent is correct that he did not commence his employment until 1 August 2018 this would mean that the Head Chef commenced his employment before the General Manager (who had recruited him) commenced his employment. It would also mean that he would not have had the period of four weeks that Mr Brown considered would be necessary to set up staff training; and implicitly to recruit the staff who were to be trained.
- 39 While I accept that the respondent may have decided, for good reason, to delay opening the bar/restaurant, that does not mean that the employment of Mr Dos Santos was similarly delayed. On the contrary, for the above reasons, I accept his evidence that his employment with the respondent commenced on 1 June

2018 as is recorded in the Statement of Main Terms of Employment (54), which I accept is a copy of the original document and in relation to which there has been no forgery or malpractice on the part of Mr Dos Santos.

- 40 In the above circumstances, I find that Mr Dos Santos has discharged the burden of proof upon him to satisfy me, on balance of probabilities, that his employment with the respondent commenced on 1 June 2018, in accordance with his Statement of Terms he was entitled to be paid £28,000 per annum, the respondent did not pay him during the months of June and July 2018 apart from the single payment of £1,500 on 2 July 2018 and, as such, that his complaint that, contrary to section 13 of the 1996 Act, the respondent made an unauthorised deduction from the wages that were properly payable to him is well-founded.
- 41 That being so, as indicated above, by consent, the respondent is ordered to pay to Mr Dos Santos the agreed sum of £3,166.66.

**EMPLOYMENT JUDGE MORRIS**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 15 August 2019**

**Public access to employment Tribunal decisions**

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