



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr W Tsang

**Respondents:** (1) Mighty Rhino Limited  
(2) Spoon Basildon Limited

**Heard on:** 28<sup>th</sup> June 2019 at Ashford  
and 21<sup>st</sup> January 2022 by video

**Before:** Employment Judge Pritchard

**Representation**  
Claimant: In person  
Respondent: Mr J McCracken, counsel (on 28<sup>th</sup> June 2019)  
Mr Z Shen, director (on 21<sup>st</sup> January 2022)

## JUDGMENT UPON A PRELIMINARY HEARING

1. As at 2 August 2017 the Claimant was employed by the Second Respondent.
2. The First Respondent is dismissed from these proceedings. Henceforth Spoon Basildon will be the only Respondent to these proceedings.
3. The date of commencement of the Claimant's continuous employment by the Second Respondent was 9 March 2015.

## REASONS

### The issues for determination

1. This case was listed for a preliminary hearing to determine:
  - 1.1. Whether as at 2 August 2017 the Claimant was employed by the First Respondent or the Second Respondent;
  - 1.2. The date of commencement of continuous employment by that employer for purposes of sections 210 to 219 of the Employment Rights Act 1996.

## History of the proceedings

2. These proceedings have a long and unfortunate history.
3. Following ACAS Early Conciliation, the Claimant presented his claim to the Tribunal on 29 November 2017. He claimed unfair dismissal, redundancy payment, unpaid wages, notice pay, and holiday pay. He named Mighty Rhino Limited, now the First Respondent in these proceedings, as the Respondent to the claim.
4. By emails dated 5 February 2018 and 9 February 2018, the Respondent's solicitors informed the Tribunal that the Claimant had issued proceedings against the wrong defendant. They enclosed wage slips to show that from January 2017 the Claimant had been paid by Spoon Basildon Limited, now the Second Respondent in these proceedings, and maintained that the Claimant had been employed by that company.
5. Because the Respondent had not presented an ET3 response within the applicable time limit, Employment Judge Baron issued liability judgment for the Claimant under Rule 21 in respect of all his claims.
6. The Respondent's solicitors promptly made an application for reconsideration of that judgment and presented an ET3 in which it resisted the claims. The Claimant objected to the judgment being revoked and a therefore a hearing took place on 14 May 2018 to consider the application. The outcome was that the judgment was revoked, the Respondent's ET3 accepted, and Spoon Basildon Limited added as Second Respondent.
7. The Second Respondent presented its ET3 in which it resisted the claims on 4 July 2018.
8. Correspondence between the Tribunal and the parties failed to resolve the dispute between them as to the correct identity of the employer and on 1 November 2018 Employment Judge Baron issued a case management order and gave instructions for a preliminary hearing to be held to consider the issues set out above.
9. That preliminary hearing came before me on 28 June 2019. It had been listed with an allocation of three hours commencing at 2.00pm. There was insufficient time to consider the issues within the time available and the preliminary hearing went part-heard. I immediately drafted a case management order requiring the Respondents to provide further documents and for the parties to provide dates to avoid so the hearing could be re-listed promptly. On the same day I gave instructions for the case to be re-listed before me before the end of the year. Unfortunately, my instructions were not actioned.
10. It was not until May 2021 that this case was brought to my attention when I was asked whether the case should be re-listed. I gave instructions for enquiries to be made of the parties to see whether the case remained live or whether perhaps it had settled. It was not until September 2021 that I was informed that the Tribunal had received correspondence from the Claimant in February 2021 and from ACAS in August 2021 enquiring about the status of the proceedings. I gave instructions that the case must be re-listed as soon as possible.

11. I also asked whether the case management order I had issued immediately after the preliminary hearing on 28 June 2019 had been sent to the parties. I was informed that it had not been sent. Therefore, I redrafted the order with amended dates. I was later informed that my original case management order had in fact been sent to the parties and that the Respondents had complied with it.

### **Evidence before the Tribunal**

12. The Tribunal heard evidence from the Claimant and from the Respondent's witnesses: Zhiqiang Shen (Kevin), Andrew Kong and Jiajun Yang. The Tribunal was provided with bundle of documents and further documents provided by the Respondent pursuant to my case management order of 28 June 2019 (sent to the parties on 2 August 2019).

13. Although they did not attend the hearing to give evidence, the Claimant put in evidence signed statements of former colleagues Miao Xian Huang (Amy), Rui Santo, Yuko Lilley, and Wai Hin Leslie Ho.

14. At the conclusion of the hearing on 21 January 2022, the parties made brief oral submissions.

### **Findings of fact**

15. Counsel conceded at the hearing on 28 June 2019 that the two Respondents are associated employers.

16. It is common ground that the Claimant commenced employment with the First Respondent on 9 March 2015.

17. The Claimant's case is that he worked continuously for the First Respondent, transferring from its Chatham restaurant to its newly opened Basildon restaurant on 19 September 2016 until his employment was terminated on 2 August 2017.

18. The Respondent's case is that the Claimant's employment with the First Respondent ended on 6 November 2016 and that he was then employed by the Second Respondent from 2 December 2016 until his employment ended on 2 August 2017. In evidence, the Respondent's witnesses said this was indeed the case.

19. Furthermore, a P45 shows the Claimant's leaving date from the First Respondent as 6 November 2016 (although in a letter to the Tribunal dated 6 March 2018 the Respondents' solicitors mistakenly state that the Claimant was dismissed on 2 December 2016).

20. The first payslip relating to the Claimant's alleged employment with the Second Respondent is dated 1 January 2017 and the last payslip dated 13 August 2017.

21. Payslips for January to March 2017 show wages in the sum of £576.00 for four weeks' work. Thereafter, the payslips show wages payable to the Claimant in the sum of £600 for every four weeks. With regard to these periods of

employment, the Respondent says the Claimant worked 20 hours each week, initially at the rate of £7.20 per hour and thereafter at the rate of £7.50 per hour.

22. However, the Claimant says that when he started work at Basildon he was paid weekly in the sum of £600.
23. The Respondents paid wages in cash. Although payslips were held on a computer in the office, they were not issued to the Claimant.
24. The Claimant referred to a wages summary for the week ending 16 July 2017 which, he says, shows that he was paid £600 for working 6 days in the week.
25. The Tribunal was also referred to staff rotas for two weeks in May 2017 which show the Claimant as on duty, both a.m. and p.m., as Manager seven days each week.
26. In her statement, Miao Xian Huang (Amy) states that, at the invitation of Mr Shen, both she and the Claimant started work at Basildon on 19 September 2016 and worked with the Claimant from that date until she left on 28 May 2017. She refers to the Claimant being the Manager. She also states that the Claimant did not work part-time.
27. Rui Santo states in his statement that when he worked at Basildon in November 2016, the Claimant was already the Manager there.
28. Yuko Lilley states that the Claimant was the Manager at Basildon when she worked there from 23 September 2016.
29. Wai Hin Leslie Ho states that she worked part-time at Basildon from January 2017 to July 2017. Her evidence does not therefore assist as to whether or not the Claimant started work there in September 2016.
30. The Tribunal was referred to an email dated 21 April 2018 to the Claimant from Alina Gilgore, a former colleague at Chatham, said to be a letter of recommendation. Among other things Alina Gilgore states:

*He was a great loss for our team when he left on 18<sup>th</sup> Set 2016 [sic], because the new restaurant in Basildon needed him to organise the place.*

31. The Claimant referred to a number of date stamped photographs taken on his mobile 'phone showing the Basildon restaurant, its Food Hygiene Rating, diners and celebrations on 23 September 2016, 28 October 2016 and 31 October 2016.

### **Applicable law**

32. To qualify for certain statutory employment rights, such as the right not to be unfairly dismissed and the right to receive a redundancy payment, an employee must be able to show they have been continuously employed for a period of not less than two years.
33. Continuous employment is a statutory concept. Sections 210 to 219 of the Employment Rights Act 1996 prescribe what does and what does not count as continuous employment.

34. Section 212(1) provides:

*Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*

35. Section 218(6) provides:

*If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters into the second employer's employment, is an associated employer of the first employer:-*

*(a) the employee's period of employment at that time counts as a period of employment with the second employer; and*

*(b) the change of employer does not break the continuity of the period of employment.*

## **Conclusion**

### Preliminary issue 1

36. The Claimant was not provided with payslips such that he might know that he was being paid his wages by the Second Respondent. Those wage slips make clear the identity of the company making the payments. That company's business is the Basildon Restaurant where the Claimant was working when he was dismissed in August 2017. The P45 dated 11 August 2017 (showing the Claimant's leaving date as 13 August 2018) shows the Second Respondent as the Claimant's employer. The Tribunal finds that as at 2 August 2017 the Claimant was employed by the Second Respondent.

### Preliminary issue 2

37. The last wage slip referring to the Claimant's employment with the First Respondent is dated 2 October 2016. Even on the Respondents' case, it would appear that some payslips have not been disclosed, in particular those relating to the period immediately before the Respondent claims to have dismissed the Claimant on 6 November 2016.

38. The Claimant was a credible witness. He told the Tribunal that his employment with the Respondent was his only employment and that his rent alone was £900 per month. In the circumstances, the Tribunal finds it unlikely that he would have engaged in employment with a salary of just £600 per month.

39. The Claimant's contention that he was employed at Basildon on a full-time basis is supported by the staff rotas showing the Claimant working 7 days each week. The Tribunal notes that those working certain hours have their hours of work set out in the rotas: this is not shown as such for the Claimant which might reasonably be the case if the Claimant worked part-time as the Respondents contend.

40. The Tribunal concludes that the pay records put forward by the Respondents should be treated with some suspicion.

41. Similarly, the Tribunal treats with some suspicion the Respondent's evidence that, having dismissed the Claimant for poor performance in November 2016, within a few weeks they wished to re-employ him to work at their new restaurant in Basildon. The Respondents' evidence that they wished to give the Claimant a second chance was unconvincing.
42. In the Tribunal's view, it is highly unlikely that the Claimant would be taking photographs of the interior of the Basildon restaurant (at a time when the Respondent says he was working in Chatham) unless he was working there. The Tribunal concludes that the Claimant was working at Basildon at the time.
43. Although the Claimant did not call those individuals who provided statements on his behalf to give evidence to the Tribunal, and thus limited weight must be given to that evidence, it nevertheless supports the Claimant's contention that he was employed at Basildon on the date he asserts and that he was employed there continuously until his dismissal in August 2017. They also support the Claimant's contention that he did not work part-time.
44. The Tribunal does not accept that the P45 of 2 December 2016 showing a leaving date from the First Respondent on 6 November 2016 is correct. Nor does the Tribunal accept that the wage slips are an accurate reflection of the wages actually paid to the Claimant.
45. Having regard to section 218(6) of the Employment Rights Act 1996, the Tribunal concludes that the Claimant was continuously employed from 9 March 2015 to 2 August 2017.

Note

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.

Employment Judge Pritchard

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Date: 21<sup>st</sup> January 2022