



EMPLOYMENT TRIBUNALS

Claimant: Mrs K O'Brien

Respondent: Mitchells and Butlers Retail Limited

Heard at: Liverpool **On:** 30 March 2022

Before: Employment Judge Ord

Representation:

Claimant: In person
Respondent: Ms S Laughton (solicitor)

JUDGMENT

1. The claimant's complaint of unauthorised deductions from wages from 14 October 2020 is not well founded and fails.
2. The tribunal does have jurisdiction to hear the claimant's complaint of unauthorised deductions from wages prior to 14 October 2020 as it is out of time.

REASONS

The Complaints and Issues

1. The claimant's **complaint** is:

That she was underpaid her allocation of PDQ card machine tips from the time she returned to work in July 2020 (after being on furlough) to July 2021.

2. The **issues** for the tribunal are:

Deductions

3. Did the PDQ tips constitute wages?

4. If so, did the respondent make unauthorised deductions from the claimant's wages?
5. If so, how much was deducted?

Time

6. Was the complaint relating to the period 10 July 2020 to 14 October 2020 made within the time limit in section 23(2) of the Employment Rights Act 1996? The tribunal will decide:
 - a. Was the claim made to the tribunal within three months (allowing for any early conciliation extension) of the date of payment of the wages from which the deduction was made?
 - b. If not, was there a series of deductions and was the claim made to the tribunal within three months (allowing for any early conciliation extension) of the last one?
 - c. If not, was it reasonably practicable for the claim to be made to the tribunal within the time limit?
 - d. If it was not reasonably practicable for the claim to be made to the tribunal within the time limit, was it made within such further period as the tribunal considers reasonable?

Evidence

7. The tribunal had before it the following:
 - a. A joint electronic bundle of 135 pages and separate bundle index;
 - b. From the claimant:
 - i. Claimant's witness statement
 - ii. Witness statement of Jodie Heard (former shift supervisor at the Stretton Fox)
 - c. From the respondent:
 - i. Witness statement of Marie-Anne Stack (Employee Relations Manager)
 - ii. Witness statement of Michael Newton (General Manager at the Stretton Fox)
8. It heard evidence on oath from the claimant and from the respondents' witnesses, Marianne Stack and Mike Newton.

Findings of Fact

9. The respondent is a hospitality chain and runs The Stretton Fox public house where, at all material times, the claimant worked as a Front of House (FOH) team member.

10. Throughout this period the respondent had a tips policy, which provided for team members deciding on how tips would be allocated. There were essentially two types of tips, namely those given in cash by customers and those paid by card through a PDQ (Process Data Quickly) machine. The latter were collected and then paid to staff via the payroll.
11. Prior to Covid lockdown on 23 March 2020, cash tips were taken individually by the FOH team member who served the table that paid the tip, and PDQ tips were allocated to the FOH team member who had served the table. For each shift, FOH team members contributed a sum of money to Back of House (BOH) team members.
12. The pub re-opened on 4 July 2020 and the sharing of tips was reviewed. The General Manager, Mike Newton, sent a WhatsApp message to team members suggesting that cash and PDQ tips be pooled, and asked for comments. There were no objections and so Mr Newton trialled a change in the tips arrangement so that cash and PDQ tips were pooled and distributed on a ratio of 80% to FOH staff and 20% to BOH kitchen staff.
13. On 10 July 2020 the claimant returned to work and was told that the tips arrangement had changed. She complained to Mr Newton that she would be worse off earning less in tips than before, thereby causing her financial hardship. She was also concerned that the change was a breach of the "Tips for Tips" Policy.
14. The claimant did not agree to the change and she kept all the cash tips she collected from her tables for herself. She refused to pool them. This was on top of her share of cash and PDQ tips which she was allocated in accordance with the new arrangement.
15. Consequently, with respect to cash tips, the claimant gained by keeping her own tips and also taking a share of her colleagues' tips. With respect to PDQ tips, she was allocated her share in the same way as others in accordance with the new arrangement. This was all to the other team members' financial detriment.
16. The relevant parts of the Tips for Tips policy state as follows:

Process:

[The Manager] will need to hold a short team meeting (15 mins). At the meeting [he] will need to: 1) Ask the team to decide how they wish to allocate PDQ tips and service charge (if applicable).

Policy: 3 PDQ (Credit/Debit Card) Tips/Service Charge:

3.1: All PDQ tips received by team members will be paid to team members through the payroll. Where team members are liable to pay tax, this will be deducted by the Company and the net amount paid to them with their pay.....

3.2 The basis on which tips/service charge are allocated is a decision for team members to make at the annual "PDQ tips allocation meeting". The

decision of the team members is final and must be recorded on the "PDQ Tips Allocation – Decision Making Record Sheet".

3.3 On the basis that the Kitchen Team make a significant contribution to the level of service given to our guests..., we believe FOH team members should consider sharing a portion of PDQ tips/service charge received with their BOH colleagues. However, as stated above, the decision whether to share PDQ tips/service charge received is for the team to make, and the team's decision is final.

3.4 It is the role of the Manager to facilitate the "PDQ Tips allocation meeting". It is acceptable for the Manager to put forward various suggestions for methods by which team members allocate PDQ tips/service charge received, but must not dictate or insist on a basis for allocation – the final decision must always rest with the team...

17. It is common ground that the July 2020 change in tip allocation arrangements was not done in accordance with the policy.
18. In September 2020 Mike Newton sent a WhatsApp message to all staff attaching an image of a notice he was putting on the notice board at work. The notice set out options for sharing tips and the procedure for making adjustments and requested all staff to sign against their preferred option. The following extracts from the WhatsApp message are of note:

"Hi guys. So this sheet has been put on the wall in kitchen and needs to be signed by EVERYONE that receives tips, (foh and boh). This is regarding tips so that there is a fair vote, and this will lead to a final decision and everyone has had a say. Can everyone please sign by week today. If you are not in, message me your vote and I will put it down."
19. It also proposed that a meeting be held with staff representatives from all areas to make a final decision. Due to Covid restrictions it was agreed with staff that this meeting with Mike Newton be attended by representatives of all team members, rather than the full team.
20. The meeting took place on 14 October 2020 and eight agreed team members attended, two from each of the four areas of the business, thereby representing the whole team. The claimant did not attend, although she was represented by Emma Tasker, who had similar views to the claimant. The representatives of the FOH team agreed by a majority to pool all tips rather than take their own cash and PDQ tips.
21. There was then an anonymous vote of all team members and the majority voted to pool tips. The claimant chose not to participate and did not vote.
22. As a result of the majority's preferred option being declared, the pooling of tips continued and employees signed a declaration recording the agreement that had been reached. The claimant refused to sign and continued to take and keep both her own cash tips and her allocation of pooled tips.
23. Another team meeting took place on 3 July 2021 and the team decision was again to continue with pooling tips. Employees again signed a

declaration to this effect and the claimant again refused to do so. Despite colleagues' disapproval of her actions and Mike Newton telling her to pool her own cash tips, she refused to do so. She continued to keep the full amount for herself as well as taking her pooled allocation.

24. The claimant submitted a grievance in December 2020. In essence, the relevant complaints were over Mike Newton having no right to change the tips allocation in July 2020, and the meeting in October 2020 not being properly constituted because it was not a meeting of all team members.
25. Further to a grievance meeting held on 30 June 2021, the outcome letter of 7 July 2021 explained that:

The company faced unprecedented challenges in 2020.....The reason the "Tips Policy" was changed without a meeting was because Mike genuinely believed he could assist all his team by sharing tips with the kitchen team. He now realises that the decision was the wrong one. Having reviewed the process that took place...I am confident that the team were able to decide upon their preferred method of tip allocation. This was decided by a majority vote."

The meeting attended by eight people, to discuss tips was representative of the team and was kept to a small number due to COVID restrictions.the representatives of the Front of House team agreed their preferred method of tip distribution which was then opened to all team members to vote anonymously. The majority agreed upon a method."

26. The claimant did not accept the explanation and on 7 July 2021 commenced ACAS conciliation followed by submission to the tribunal of a claim form on 17 August 2021.

Evidence at the tribunal

27. In cross-examination the claimant said that she did not put her claim in earlier because she wanted to first exhaust internal procedures. She agreed there was no other reason for the delay. She confirmed that she had a computer and access to the internet and government information on making a tribunal claim. The tribunal accepts this evidence as a true factual account of the situation.

Submissions

28. In brief, the claimant submitted that Mike Newton's change in the PDQ tips allocation in July 2020 was against policy and therefore ineffective. The meeting on 14 October 2020 was not properly constituted and the outcome to share tips was unlawful.
29. The respondent conceded that the July change in tips allocation was irregular and outside policy. However, it submitted that any claim up to the 14 October meeting is out of time. The 14 October meeting was properly constituted and all team members had an opportunity to have their say. Therefore, from this time, the change in allocation was properly made.

The Law

Unauthorized Deductions from Wages

30. Pursuant to section 13(1) of the Employment Rights Act 1996 (ERA):
“ An employer shall not make a deduction from wages of a worker employed by him unless –
1. 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
 2. the worker has previously signified in writing his agreement or consent to the making of the deduction.”

31. Section 13(3) ERA says:

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

Tips

32. Section 27(1) ERA sets out the meaning of wages. “Wages” means “any sums payable to the worker in connection with his employment”.
33. Whilst it sets out a non-exhaustive list of types of payments which are wages, tips are not included.
34. Only tips and gratuities paid by the employer can be treated as remuneration. A tip given by a customer directly to an employee does not form part of the employee’s remuneration; it is a gift – ***Palmanor Ltd v Cedron 1978 ICR 1008, EAT.***
35. It was held in ***Revenue and Customs Commissioners v Annabel’s (Berkeley Square) Ltd and ors 2009 ICR 1123, CA*** that service charges paid into a designated bank account held by a senior manager acting as troncmaster, who distributed them to staff, were not wages. The money was not held for the employer as agent; it was a fund constituting in equity the employees’ commonly held property.
36. However, in ***Nerva and ors v RL&G Ltd 1997 ICR 11, CA***, the Court of Appeal held that tips paid by cheque and credit card belonged to the employer. If the employer paid an equivalent amount to the staff, this amounted to remuneration rather than a payment indirectly from the customer.
37. Where there is a contractual arrangements under which the employer collects tips or service charges which are then distributed to staff, that element would constitute “wages” ***Saavedra v Aceground Ltd [1995] IRLR 198***

Time Limit

38. Section 23(2) ERA states that, subject to subsection (4), an employment tribunal shall not consider a claim for unauthorised deduction from wages:

“unless it is presented before the end of the period of three months beginning with –

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
- (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

39. Section 23(3) states that:

“Where a complaint is brought under this section in respect of –

1. a series of deductions or payments
2.

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.”

40. Section 23(4) ERA states:

“Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

This is a two stage process whereby the tribunal first decides whether it was reasonably practicable for the complaint to be presented within the primary time limit; if it finds it was not reasonably practicable, it goes on to decide whether the claim was brought within such further period as it considers reasonable.

Reasonably Practicable

41. What is reasonably practicable is a question of fact. In **Wall’s Meat Co Ltd. v Khan 1979 ICR 52, CA** Lord Justice Shaw said that “The test is empirical and involves no legal concept.”

42. The onus of proving that it was not reasonably practicable to present the claim in time rests on the claimant. That imposes a duty on him to show precisely why it was that he did not present his complaint in time - **Porter v Bandridge Ltd 1978 ICR 943**

43. If the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable - **Sterling v United Learning Trust EAT 0439/14**

44. In **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA** when considering whether it was reasonably practicable to present the claim within time, the legislation should be given “a liberal construction in favour of the employee”.

45. **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA** The Court of Appeal concluded that “reasonably practicable” does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like “reasonably feasible”. The fact that an employee is pursuing an internal appeal does not, of itself, mean that it is not reasonably practicable to submit a claim within the applicable time limit, even if this means submitting the claim before an appeal has concluded.
46. Lady Smith in **Asda Stores Ltd. v Kauser EAT 0165/07** explained that “the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.

Within such further period as is reasonable

47. **Cullinane v Balfour Beatty Engineering Services Ltd EAT 0537/10** per Underhill P – Whether the further period between expiry of the primary time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay, and of the period that should reasonably be allowed in those circumstances. This assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.

Discussion and Conclusions

Did the PDQ tips constitute wages?

48. Customers paid PDQ tips by card via the PDQ machine and the tips were distributed via the payroll. Having regard to the caselaw on tips, and in particular **Nerva and ors v RL&G Ltd**, I conclude that the PDQ tips were wages.

Did the respondent make unauthorised deductions?

49. There are two periods to consider. The first is from 10 July 2020 (when the claimant returned to work) to 14 October 2020 (the date of the team meeting). The second is from the 14 October 2020 to 31 July 2021 (date up to which the claim extends).

14 October 2020 to 31 July 2021

50. I will deal with the second period first. The crucial question here is whether the meeting on 14 October 2020 was properly constituted in order to provide authority for the pooling of PDQ tips. If it was, then the change in allocation was lawfully made and the claim fails from this date.
51. The crux of the matter is whether the October team meeting was within policy. The claimant said it was not properly constituted and therefore outside policy for two reasons.

52. Her first argument was that BOH staff should not have attended the meeting. However, she conceded in cross examination that the word “team” in the policy meant the whole team.
53. I have considered the wording of the policy. It uses “FOH” for Front of House members when it refers to them and “BOH” for Back of House members when it refers to them. When it uses the word “team” I interpret it as meaning just that, namely, both FOH and BOH team members. The policy says:
- “3.2 The basis on which tips/service charge are allocated is a decision for team members to make at the annual “PDQ tips allocation meeting.”*
54. There was no requirement to confine the meeting to FOH members and it was perfectly in order for BOH members to attend. Therefore, the claimant’s first argument has no merit.
55. The claimant’s second argument was that the respondent had decided to restrict the numbers in the meeting to team representatives only and this prevented her from having her say.
56. Having considered the policy, I note that nowhere does it say that the entire team has to attend the meeting. The relevant extract says:
- [The Manager] will need to hold a short team meeting (15 mins). At the meeting [he] will need to: 1) Ask the team to decide how they wish to allocate PDQ tips and service charge (if applicable).*
57. In this case, due to Covid issues, the whole team was not invited. Instead eight agreed representatives, two from each section of the business, put forward the team’s views. Emma Tasker, who was present, held a similar view to the claimant and represented her. There was also an anonymous vote on options for allocation, which all team members were invited to participate in, so that each individual was able to have their say. The claimant had the opportunity to vote but chose not to do so.
58. Considering the impact of the Covid pandemic and health and safety issues, it seems to me that Mr Newton chose a reasonable way forward by meeting with team representatives, and then taking a vote of all members. This was a fair. The arrangements made for the meeting were within policy and the decision on tips allocation was properly reached.
59. Therefore, from 14 October 2020, the allocation of tips was within policy and the claimant was paid all that she was entitled to. She was not paid less than the total amount of the wages properly payable to her. Consequently, there were no unauthorised deductions from wages.
- 10 July 2020 to 13 October 2020*
60. The claimant started ACAS conciliation on 7 July 2021 and the primary limitation period is therefore three months prior to this date. I have

considered whether any deductions from July to October 2020 could be classed as part of a series of deductions extending past 14 October 2020. However, as I have concluded that no deductions were made post 14 October, this cannot be the case. Therefore, the claim is outside the primary limitation period.

61. Turning to whether it was reasonably practicable for the claim to have been made within time, I have had in mind the caselaw on taking a liberal approach towards the claimant. However, the burden of proof rests with her and the only reason she has put forward is that she was waiting for internal procedures to be exhausted. Taking account of ***Palmer and anor v Southend-on-Sea Borough Council***, this in itself is not sufficient to demonstrate that it was not reasonably practicable to submit a claim in time. No other reasons were put forward.
62. The claimant admitted that she had a computer and access to the internet and government web sites on employment matters. Therefore, on the facts, it was reasonably feasible for her to make her claim in time, and it was reasonable to expect her to do so.
63. Consequently, I conclude that it was reasonably practicable for the claimant to submit her claim on time. Therefore, the claim is out of time and the tribunal has no jurisdiction to hear it.

Overall Conclusion

64. For the reasons given, the claimant's complaints of unauthorized deductions from wages are not well-founded and are dismissed.

Employment Judge Liz Ord
Date 31 May 2022

JUDGMENT SENT TO THE PARTIES ON
14 June 2022

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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