



EMPLOYMENT TRIBUNALS

Claimant: Mr G Ardito

Respondent: The Agile Rabbit Limited

Heard at: London South Employment Tribunal (by CVP)

On: 11 December 2023

Before: Employment Judge T Perry

Representation

Claimant: in person

Respondent: Mr T Hussain (Litigation Consultant)

RESERVED JUDGMENT

1. The Claimant's claim for deduction from wages in respect of salary and tronc in May 2022 is well founded and succeeds. The Respondent is ordered to pay the Claimant the gross sum of £4,416.66. The Claimant may be liable to tax on this sum.
2. The Claimant's claim for deduction from wages in respect of salary in June 2022 is well founded and succeeds. The Respondent is ordered to pay the Claimant the gross sum of £2,961.42. The Claimant may be liable to tax on this sum.
3. The Claimant's claim for deduction from wages in respect of tronc in June 2022 is not well founded and is dismissed.
4. The Claimant's claim for deduction from wages in respect of bonus in January 2022 and April 2022 is well founded and succeeds. The Respondent is ordered to pay the Claimant the gross sum of £2000. The Claimant may be liable to tax on this sum.
5. The Claimant's claim for deduction from wages in respect of overtime is well founded and succeeds. The Respondent is ordered to pay the Claimant the gross sum of £6,547.50. The Claimant may be liable to tax on this sum.

REASONS

Evidence

1. I was provided with a bundle from the Respondent running to 142 numbered pages.
2. The Claimant did not have a written witness statement but rather gave oral evidence in response to my questions and cross examination. Mr Naresh Kumar gave evidence for the Claimant from a short written witness statement. There was a further short witness statement from Mr Salvatore Polizzotto who did not attend to give evidence. I gave this statement no weight.
3. For the Respondent Mr Victor Greetham gave evidence from a written witness statement.
4. I heard oral submissions from Mr Hussain. The Claimant had nothing further to add by way of submissions.

The issues

5. At the start of the hearing, I confirmed with the parties that they were happy for me to hear the case. There had been a previous attempt to conduct the hearing by EJ Nash on 15 February 2023, which had been abandoned due to technical issues. It appeared from the file that the relisting had been for a part heard hearing but it had not been reserved to EJ Nash. Mr Hussain confirmed that the previous hearing before EJ Nash had not made substantial progress due to the technical issues. Both parties were happy to start again.
6. Mr Hussain confirmed that the Respondent was not currently in insolvency proceedings but likely soon would be. Again, there was no objection from Mr Hussain to proceeding with the hearing.
7. Mr Hussain advanced and the Claimant accepted that he had confirmed before EJ Nash that his claim did not include a claim for holiday pay.
8. The Claims before me today were for unlawful deduction from wages under section 13 Employment Rights Act 1996.
9. The sums alleged to have been deducted from wages were:
 - a. £3050.78 from the Claimant's May 2022 payslip (net);
 - b. £2170.81 from the Claimant's June 2022 payslip (net);

- c. £300 as tronc due in June 2022 (gross);
 - d. £2000 in bonus payments due in January and April 2022 (gross); and
 - e. £5,855.10 in unpaid overtime between 25 October 2021 and 17 May 2022 (gross).
10. The Respondent accepts these sums were not paid but says it had a contractual right to deduct sums improperly paid by the Claimant to himself in his capacity as tronc master. The Respondent also essentially disputes that the Claimant had the right to be paid overtime and suggests the Claimant did not work all the hours claimed.
11. There is a factual dispute to be resolved between the parties as the date of the end of the Claimant's employment. The Claimant says it was 16 June 2002. The Respondent says it was 29 May 2022.

Findings of fact

12. The Respondent is a restaurant.
13. The Claimant was recruited at the request of the then chef, Mr Polizzotto.
14. There were two meetings with the Claimant before he started employment. At the first of these meetings a draft contract was produced. I was not shown this contract but it apparently did not include any bonus payments. The Claimant was looking for a net salary of £14 an hour or £3000 a month and did not feel what was being offered would reach this level. I find that at neither meeting was there any discussion of the Claimant's entitlement to tronc or service charge. I do not accept that the Claimant was told he had no entitlement to tronc or service charge as tronc master, because it was not proposed that the Claimant would be tronc master.
15. The contract that was included in the bundle was drafted for the second meeting. This provided for the Claimant to work 50 hours a month and to receive for those hours a salary of £35,000 plus a £4000 bonus. This provided for an annualised gross salary of £3,250 a month, which the Claimant felt was still not quite enough to reach his required net salary but was not far off. I do not accept that the Claimant was promised a net salary of £3000 per month. Again, I do not accept that the Claimant was told he had no entitlement to tronc or service charge as tronc master or that the

£1000 bonus was in lieu of tronc, because it was not proposed that the Claimant would be tronc master.

16. The other material terms of this contract were as follows:
 - a. Salary was payable on or around 28th of each month;
 - b. Bonus was stated to be payable every 3 months;
 - c. Where overtime was worked it was to be paid “at your normal rate of pay”; and
 - d. The Respondent had the right to deduct from pay or otherwise require repayment by other means of any sum the Claimant owed the Respondent including without limitation any overpayment of pay or expenses, loans made to the Claimant by the Respondent or any other item identified in that contract or the employee handbook as being repayable to the Respondent.
17. The contract made no mention of tronc or service charge.
18. On 11 October 2021 the Claimant signed this contract to start on 25 October 2021. Mr Greetham signed for the Respondent.
19. The Claimant’s employment started on 25 October 2021 as General Manager. Initially the Claimant’s role was subservient to Mr Polizzotto. The Claimant was not initially in charge of the tronc.
20. The Respondent’s restaurant was card only. Service charge was included as a standard charge on customer’s bills. This money was paid into the Respondent’s company account. A record was kept of the amount of tronc. This was split by the tronc master and then put through payroll and paid by the Respondent directly to staff. The Claimant said in evidence that some was paid cash in hand. The Respondent did not retain the tronc. The Claimant suggested in evidence that tronc was distributed by reference to a points system based on hours worked but I do not accept that this was correct. There was no written policy in relation to tronc and I find that its distribution was essentially at the discretion of the tronc master. This is reflected in the low tronc payments later paid to the new pizza chef after Mr Polizzotto left which seem to have been decided arbitrarily by the Claimant.
21. From the start of his employment the Claimant received tronc. He received £120 for his first week and £550 in his first full month, November. In November, the Claimant received a net salary of £2,718.90, which was less than his hoped for net salary of £3,000.

22. In December 2021 the Claimant received tronc of £430 for a net salary of £2,447.90.
23. In January 2022 Mr Polizzotto left the Respondent. The Claimant appears at this stage to have taken on more responsibility and truly became the General Manger. At this point the Claimant took on the role of tronc master. I do not accept that the Claimant was told at this time that he should not award himself tronc. Mr Nicolae was engaged as a pizza chef. The Claimant had a relatively poor opinion of him as a colleague (although he accepted he was a good chef).
24. I accept the Claimant's evidence that his working hours increased greatly at this time. The Respondent operates a clocking in system. There was only one page of it in the bundle, which showed that from 25 October 2021 to 17 May 2022 the Claimant worked a total of 1,935 hours and 31 minutes and took breaks of 11 hours and 55 minutes. Although one entry on 17 May shows the Claimant clocking in but not clocking out, overall I find that (in the absence of any other evidence to the contrary) the Claimant worked the hours indicated by this system.
25. In January 2022 the Claimant awarded himself tronc of £832.58 for a net salary of £2,770.08. Ms Pinotti, the assistant manager, was paid tronc for the first time of £150. Mr Nicolae received £100 in tronc. The Claimant said in evidence that he paid some staff tronc in cash which he put through his payroll as the only way to ensure tax was paid on it. Mr Kumar's evidence supports that this happened and I accept that it did to a degree. However, I also believe the Claimant was paying himself a higher amount of tronc to get his net salary higher in light of the increased role he was doing.
26. In February 2022 the Claimant awarded himself tronc of £1,380 for a net salary of £3,207.90. Ms Pinotti, the assistant manager, was paid tronc of £200. Mr Nicolae received no tronc.
27. In March 2022 the Claimant awarded himself tronc of £1,400 for a net salary of £2,949.33. Ms Pinotti, the assistant manager, was paid tronc of £229.52. Mr Nicolae received £100 in tronc.
28. In April 2022 the Claimant awarded himself tronc of £1,274.62 for a net salary of £2,915.81. Ms Pinotti, the assistant manager, was paid tronc of £200. Mr Nicolae received £100 in tronc.

29. On 17 May 2022 the Claimant resigned giving one month's notice. The Claimant worked for two weeks and then took two weeks' holiday.
30. The Claimant was provided with a payslip showing payment of tronc of £1,500 for a net salary of £3,050.78. The Claimant was not actually paid any sums via the May payroll.
31. On 5 June 2022 Mr Greetham emailed the Claimant to inform him that he was not being paid due to him having awarded himself tronc. Mr Greetham said that the Claimant's salary was £39,000 and that service charge was not in the contract. Mr Greetham said that the Claimant's bonus "would normally com out of the service charge itself in due course." Mr Greetham stated that the manager had no right to any part of the tips or service charge due to conflict of interest. Mr Greetham said that payments of tronc to the Claimant since January were 70% of the total. Mr Greetham offered the Claimant the chance to explain but otherwise threatened prosecution.
32. The Respondent issued the Claimant a payslip for the month ending 20 June 2022 showing a net salary of £2,170.81. The Claimant was not paid anything in the June payroll.
33. On 24 June 2022 the Claimant attended the Restaurant but was unable to speak to Mr Greetham, who instead emailed the Claimant on 26 June 2022 asking for a reply to his email of 5 June 2022. The Claimant replied on 5 July 2022 to say that he had received payslips but no pay.
34. On 17 July 2022 the Claimant wrote a longer email raising his entitlement to overtime, unpaid bonuses and repeating his request to be paid for May and June.
35. On 27 July 2022 Mr Greetham asked for the Claimant's own time records to compare against his and proof that he was asked to work those hours. Mr Greetham also noted that the Claimant had not queried his pay before.
36. On 28 July 2022 the Claimant commenced ACAS Early Claim Conciliation (ECC). The Claimant received an ECC certificate on 8 September 2022.
37. The Claimant issued his claim on 20 September 2022.
38. At some point after the event, the Respondent sought to reissue the Claimant's payslips excluding the tronc payments and including bonus payment in January and April 2022. I do not accept that these revised payslips reflect the reality of the payments made to the Claimant.

The Law

39. The right not to suffer unlawful deduction from wages is included in section 13 Employment Rights Act 1996, which states

(1) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

40. Wages is defined in section 27 Employment Rights Act 1996 and includes at (a) “*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*”

41. Discretionary payments generally fall outside the definition of wages as there is no legal entitlement to the sum. **New Century Cleaning Co Ltd v Church** [2000] IRLR 27. However, this is subject to two caveats.

42. First is section 27(3) Employment Rights Act 1996, which states

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

43. Second is the EAT's decision in **Farrell Matthews and Weir v Hansen** [2005] IRLR 160, which concerned an employee who had no contractual right to a bonus, although sometimes bonuses were awarded by her employer (a solicitor's firm) on an ad hoc basis, depending on how well the firm and the fee earners were doing. Accordingly, in July 2002 she was told that she would be paid a discretionary bonus of £12,000 in respect of the

financial year 2001/02, to be paid in twelve monthly instalments. When she subsequently received only £3,000 she claimed the remainder as an unauthorised deduction from her wages. The employment tribunal upheld her claim and their decision was in turn upheld by the EAT. Giving the EAT's judgment, Mr Justice Nelson noted that counsel for the employer had conceded that once a discretionary bonus is declared 'it can probably not be withdrawn as once the discretion has been exercised by the employer there is a commitment to pay the bonus subject to its terms.'

44. The question whether tips and service charges constitute wages can be difficult to answer.

45. Where tips and service charges are paid to and distributed by the employer, some such tips and charges may constitute wages within the statutory definition. That is the implication of **Saavedra v Aceground Ltd (t/a Terrazza Est)** [1995] IRLR 198, EAT, a case decided under the antecedent provisions in the Wages Act 1986 where an employer with a compulsory service charge operated by managers on behalf of the employer was found to be making a deduction where an employer sought to retain for itself a portion in circumstances where an employee had a contractual right to pay of '£7.80 per session plus service'. The EAT decided that there had been an unauthorised deduction in these circumstances on the basis that what was 'properly payable' to those who give service is 'that which is paid for service'.

46. However, where there is a discretionary service charge which the customer pays by means of a cheque or card payment and which is distributed to workers by or on behalf of the employer rather than by an independent tronc master, the service charge becomes the property of the employer (*Nerva v RL & G Ltd* [1996] IRLR 461, CA). As a result, unless the employer has a contractual obligation to pass the tips on to its staff, the employer can choose to keep them. In that situation the better view appears to be that such service charges have the character of discretionary payments which do not constitute wages within s 27(1)(a) and workers will be unable to rely on the unlawful deduction provisions if the service charges are not passed on to them.

47. Deductions for overpayments of wages or expenses are excluded by

section 14 Employment Rights Act 1996.

Conclusions

48. The Claimant had agreed in writing in his contract of employment that the Respondent had the right to deduct from pay or otherwise require repayment by other means of any sum the Claimant owed the Respondent including without limitation any overpayment of pay or expenses, loans made to the Claimant by the Respondent or any other item identified in that contract or the employee handbook as being repayable to the Respondent.
49. The question then is whether the tronc payments the Claimant made to himself were an overpayment of pay or expenses or any loan or any other item identified as repayable to the Respondent.
50. I do not accept that they were. There is an absence of any documentation around the operation of the tronc system. I do not accept that before 5 June 2022 the Claimant was told that he was not to pay tronc to himself. As tronc master the Claimant appears to have had an effectively unfettered discretion to pay tronc to whichever staff he wanted for whatever reason he wanted including himself. This can be seen from the decision to start paying the assistant manager tronc and to pay comparatively little tronc to the new pizza chef Mr Nicolae. The tronc payments made from January to April 2022 including to the Claimant were effectively approved by the Respondent as the sums were paid via its own payroll without ever being challenged.
51. Accordingly, I do not find that the Claimant had previously signified in writing his approval to the deduction of his wages in May and June 2022. Failure to pay those wages was an unlawful deduction from wages.
52. The status of the tronc payment shown in the May payslip is more complicated. I consider the operation of the tronc system to be an essentially entirely discretionary process. As an essentially discretionary payment, this would normally not fall within the definition of wages. However, in approving the May payslip showing this amount as payable the Respondent had effectively declared that amount of tronc as payable to the Claimant. At that point it became in line with **Hansen**, properly payable and failure to pay it was an unlawful deduction from wages.

53. By contrast, the tronc payment for which the Claimant claims in June 2023 remains an undeclared discretionary payment which does not amount to wages. There was no unlawful deduction in failing to pay this.

54. As to the January and April bonus payments, the Respondent has advanced no sensible basis for saying that these payments were not made. The April payment would have been due on or around 28 April 2022. It was therefore in time. I consider that the January and April 2022 amount to a series of deductions for the purposes of section 23(3) Employment Rights Act 1996. Failure to pay these bonuses was an unlawful deduction from wages.

55. In relation to the Claimant's overtime, I accept that the Claimant worked 1935 from 25 October 2021 to 17 May 2022. I accept that he was in effect required by the Respondent to work these hours given the opening hours of the restaurant. 25 October 2021 to 17 May 2022 was a period of 29 weeks. The Claimant's contractual hours required him to work 1450 hours in this time. This means he worked 485 hours overtime. Those hours should have been remunerated at his normal rate of pay. The Claimant's monthly wage divided by 216 hours (50 hours x 52 weeks / 12 months) leaves a gross hourly rate of £13.5 an hour. This leaves a gross figure of £6,547.50 in unlawful deductions in respect of overtime.

Employment Judge **T Perry**

Date 20 December 2023