

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MAVIS D. OURS
(Claimant-Appellant)

NEW YORK CAL INDUSTRIAL CORPORATION
DBA PEACOCK GAP COUNTRY CLUB
(Employer-Respondent)

PRECEDENT
BENEFIT DECISION
No. P-B-20
Case No. 67-5017

The claimant appealed from Referee's Decision No. SF-5537 which held her not liable for repayment of \$91 which the Department of Employment contended represented benefits overpaid for the seven-week period ended July 29, 1967. The issue of the correctness of a recomputation of the claimant's award by the department was before the referee. However, he did not explore this issue nor did he treat it in his decision. For this reason we remanded the matter to a referee for an additional hearing, which was held on March 14, 1968 in San Rafael, California. Oral argument was also presented on behalf of the claimant in San Francisco on January 26, 1968.

STATEMENT OF FACTS

The claimant has been employed by the above named employer as a waitress on a part-time basis for approximately four years.

Effective June 4, 1967 the claimant filed a new claim for unemployment benefits in the San Rafael office of the Department of Employment. The maximum award on this claim was computed to be \$1,222, payable at the weekly rate of \$47. This amount was based on wages of \$3,150.22 reported paid to the claimant during the one-year period January 1 through December 31, 1966.

In addition to the employer herein, the claimant had worked during the year 1966 for three other employers. However, the withholding tax statement for the year 1966 issued to her by the employer herein showed total wages of \$3,542.98. Because of this the claimant requested that her claim for benefits be recomputed.

The Department of Employment made an audit of the payroll records as they related to the claimant's employment with the employer herein. This audit revealed that during the first two quarters of 1966 the employer reported only the hourly and shift wages paid to the claimant. However, during the last two calendar quarters of 1966 the employer reported not only these wages but also the "tips" received by the claimant. The department considered that the "tips" received by the claimant did not constitute wages and, therefore, these were deleted from the wages reported by the employer. This resulted in a reduction of the claimant's maximum award to \$884, payable at the weekly rate of \$34.

During the period the claimant worked for the employer herein she worked as a dining room server, a cocktail server, and a banquet server. When working as a cocktail server or a dining room server, the claimant was paid \$13.60 per shift and she received tips or gratuities from patrons. Generally speaking, the patron would leave an amount of money on the table when leaving and the claimant would keep this amount of money. It does not appear she reported these sums to the employer. Occasionally, a patron might charge his dining room or cocktail room bill, and when this was done, generally a certain amount would be designated by the patron as a "tip" for the claimant. The amount so indicated would be given to the claimant by the employer at the time she received her bi-weekly paycheck.

The situation was different when the claimant served as a banquet waitress. The claimant was paid at an hourly rate rather than on a shift basis. During negotiations between the restaurant and a patron for a banquet, the catering manager would establish with the patron an overall price for the banquet. This included taxes and tips. The amount of the tip or gratuity would not be decided upon by the customer but, rather, would be arrived at by deducting the price of each dinner from the total amount of money paid for the banquet. From this the taxes would be paid and the remainder divided among the waiters and waitresses who served the banquet. Generally, the catering manager established how much each waiter or waitress would receive as a gratuity or tip, and the amount would depend upon the profit the restaurant made on the banquet.

The amounts the claimant received from the patrons and from banquets were in addition to her regular wages and did not constitute the major portion of her income. The Department of Employment considered all the money the claimant received in addition to her regular wage to be tips or gratuities and not wages to be used in establishing an award.

REASONS FOR DECISION

Section 926 of the Unemployment Insurance Code provides as follows:

"926. Except as otherwise provided in this article 'wages' means all remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable in any medium other than cash."

Section 927 of the code provides as follows:

"927. If tips or gratuities are customarily received and retained by a worker in the course of his employment from persons other than his employing unit, and if such tips or gratuities, or such tips or gratuities plus the excess of the minimum wage required to be paid by law over and above the amount of such tips or gratuities, constitute substantially the only wage payable to the worker, then the tips or gratuities shall be treated as wages paid by his employing unit. The reasonable amount of tips and gratuities may be estimated pursuant to authorized regulations."

The issue to be decided in this matter is the designation to be applied to the monies the claimant received while employed by the employer herein, in addition to the regular shift or hourly wage paid her by the employer. If these amounts are designated as tips or gratuities, then they cannot be considered wages under section 927 of the code because the amounts do not "constitute substantially the only wage payable to the" claimant. If the amounts are designated as something other than tips or gratuities, then they would constitute wages within the meaning of section 926 of the code because the amounts represent "remuneration payable for personal services."

Tips or gratuities are not defined in the Unemployment Insurance Code or in the regulations adopted pursuant thereto. However, these words are of common usage and therefore should be given their usual or ordinary meaning or significance since there is nothing in the Unemployment Insurance Code to indicate that any other meaning is to be attached to them (Crawford Statutory Construction, page 316). Webster's Third New International Dictionary defines "tip" as "a gift or a small sum of money tendered in payment or often in excess of prescribed or suitable payment for a service performed or anticipated."

In Restaurants and Patisserie Longchamps v. Pederick, (1943), D.C.N.Y., 25 F. Supp. 174, the court defined a "tip" as a sum of money given to a servant usually to secure better or more prompt service.

In Herbert's Laurel-Ventura, Inc. v. Laurel Ventura Holding Corporation (1943), 138 P. 2d 43, 58 Cal. App. 2d 684), the California court stated in defining the word "tip":

"A tip is not intended for the proprietor of a restaurant. It is a gratuity, i.e., 'a free gift, a present.' . . . It is intended by the donor to be in excess of the compensation paid to the donee by the latter's employer or a gift where there is neither a consideration for it nor a legal obligation upon the donor to part with it. . . ."

There are certain characteristics of a "tip" or "gratuity" which in our opinion are significant in arriving at the decision in this matter. A tip is money given to an employee by a patron. It is not given to the employee by the employer as part of the employee's wages. The patron who offers the tip decides for himself the amount of the tip and decides for himself to whom the tip should go. Certainly the money left by patrons on tables while the claimant was working as a dining room waitress or a cocktail waitress is properly designated as tips because the patrons decided whether to leave the tip and the amount to be left. The tips were specifically designated by the patrons to be for the claimant.

The money designated by the patron for the claimant when he charged his bill should also be considered as a "tip" because it had all of the above characteristics except that it was not given directly to the claimant by the patron. However, in this instance it can be said that the employer was acting as the patron's agent to deliver the amount designated by the patron to the claimant. Since the tips the claimant received did not represent substantially the only wage paid to her, they cannot be considered to be wages within the meaning of section 927 of the code.

The amounts the claimant received in excess of her hourly wage when performing work as a banquet room waitress are entirely different than the tips or gratuities she received when working as a dining room waitress or a cocktail waitress. When the claimant worked as a banquet waitress, the patron had no choice in the amount of money to be given the claimant in addition to her hourly wage. The patron had no choice in deciding if the claimant should receive any amount in excess of her hourly wage and the amount she did receive was not received directly from the patron but rather

from the employer. As a matter of fact, the employer decided the amount to be given the servers who worked at the banquets and this amount was based on the costs incurred, by the employer. We conclude, therefore, that the amounts the claimant received in excess of her hourly wage when employed as a banquet waitress are not tips or gratuities within the meaning of section 927 of the code, but do represent remuneration payable for personal services and therefore are wages within the meaning of section 926 of the code (see also Beaman v. Westward Ho Hotel Company (1960), 89 Arizona 1, 357 P. 2d 327).

On the basis of the record we cannot establish the amount of wages the claimant received during her base period. Therefore the referee's decision and the notice of overpayment issued by the Department of Employment must be set aside and the matter remanded to the department so that the claimant's award may be recomputed in accordance with the views expressed herein.

DECISION

The decision of the referee is set aside. The Department of Employment's notice of overpayment is set aside. The matter is remanded to the Department of Employment for recomputation of the claimant's benefit award.

Sacramento, California, August 6, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS