

2018

**LOW PAY**  
COMMISSION

AN COIMISIÚN UM PÁ ÍSEAL

# A Review of Current Practices in relation to Tips & Gratuities

2018

LPC NO. 10 (2018)



## Contents

1	Introduction	1
2	Current Practices	2
3	Current Legislation	6
4	Consultation	10
5	Input from Government Departments/Agencies	15
6	International Perspective	20
7	Literature Review	29
8	Considerations & Conclusions	37

## Appendices



# Chapter 1 Introduction

## 1.1 Background to this Report

A Private Members Bill, entitled the National Minimum Wage (Protection of Employee Tips) Bill 2017, was initiated in the Seanad in 2017 by Senators Paul Gavan, Trevor Ó Clochartaigh and Fintan Warfield (Sinn Féin). The Bill moved to second stage in Seanad Éireann in January 2018 (a copy of the Bill can be found in appendix 1).

The purpose of the Bill is to provide additional protections for employees in the services sector to ensure that they receive tips or gratuities paid by customers, and to provide for related matters. Tips as defined in the Bill include service charges. There has been little representation to Government previously regarding this issue.

The issue is one that is most likely to affect low paid employees in areas such as hospitality, hairdressing and gambling.

Subsequent to the second stage Seanad debate on the Bill, the Minister for Employment Affairs and Social Protection, Ms. Regina Doherty T.D. requested that in order to gain a better understanding of the complexities around tips and gratuities in Ireland and the practices that currently operate in specific sectors, the Low Pay Commission should examine current practices, including whether legislation might impact negatively in tax or financial terms, upon either employees or employers.

The Minister requested that the Commission examine this area as part of its 2018 work programme and report its findings and any recommendations it might consider appropriate.

## 1.2 Consultation and Engagement

The Commission, adhering to its evidence-based approach, instigated a consultation process with relevant stakeholders and also engaged with the Workplace Relations Commission and the Revenue Commissioners. Current practices in other jurisdictions were also examined.

## Chapter 2 Current Practices

### 2.1 Tips and Gratuities:

The practice of tipping has been defined as '*money exchanged from customer to service provider which is not legally required by the agreement for purchase of the service (Casey, 1998).*' Tipping in Ireland is primarily associated with the hospitality sector. However, evidence from submissions and international comparisons suggests that it may extend to a wide range of other professions including taxi drivers, hairdressers, tour guides, croupiers and delivery drivers. While tipping may be relatively widespread in a number of industries, there is nothing in Irish law which states that an employee is automatically entitled to keep their tips.

As an example of how tips are currently viewed in Ireland from a legal/industrial relations standpoint, a complaint was brought before the Workplace Relations Commission (WRC) in November 2017 by a hotel porter who claimed that their employer was not passing on tips and gratuities to staff. The WRC was of the view that the key question to consider was whether tips are considered wages under the Payment of Wages Act. They also pointed to the fact that there was no reference to tips in the complainant's employee contract and that his remuneration was clearly outlined at an hourly rate. The Adjudicator ultimately ruled that tips are not wages payable within the meaning of Section 1 of the Payment of Wages Act and therefore the complaint failed.

Under the National Minimum Wage Act 2000, '*any amount distributed to the employee of tips or gratuities paid into a central fund managed by the employer and paid through the payroll*' is defined as a non-reckonable component when it comes to the calculation of the National Minimum Wage.

While tips cannot be used as a reckonable component for calculating the National Minimum Wage and are not considered wages under the Payment of Wages Act, the ownership of tips is not addressed anywhere in Irish legislation and therefore there is nothing to stop an employer from taking ownership of employee tips.

## 2.2 Service Charges:

Service charges, while often spoken of in the same manner as tips and gratuities, are treated differently under Irish legislation. In contrast to cash tips paid directly to an employee or paid into a central fund, under the National Minimum Wage Act 2000, “*the amount of any service charge distributed to the employee through the payroll*” is considered a reckonable component of pay when calculating the National Minimum Wage.

Similarly, when it comes to Value Added Tax (VAT), the Revenue Commissioners treat service charges differently to cash tips:

*“Where included on the bill, regarded as part of the consideration for the meal (w.e.f. 1/9/08 - previously concession may have applied) and liable at the second Reduced rate (9%VAT). However, voluntary payments (tips) made by customers and not appearing on the bill remain outside the scope of VAT.”*<sup>1</sup>

In the Protection of Employee Tips Bill 2017, ‘tips and other gratuities’ are defined as:

- (a) *A payment voluntarily made to or left for an employee by a customer of the employee’s employer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees,*
- (b) *A payment voluntarily made to an employer by a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees,*
- (c) *A payment of a service charge or similar charge imposed by an employer on a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees.*

No distinction is drawn in the proposed legislation between service charges and cash tips despite there being significant differences in terms of how they are considered for both VAT and minimum wage purposes.

---

<sup>1</sup> <https://www.revenue.ie/en/vat/vat-rates/search-vat-rates/S/service-charge-catering-food-and-drink-for-human-consumption-.aspx>

## 2.3 Tax and Revenue:

In order to get clarification on how tips and gratuities are currently treated by tax legislation in Ireland and to get an understanding of how tips are dealt with in terms of taxation at an operational level, the Commission met with representatives of the Revenue Commissioners in May 2018 (see chapter 5).

## 2.4 Taxation, Tips and Troncs in the UK:

In the UK, employees are required to declare their tips as income for tax purposes. UK Revenue and Customs (HMRC) have also established detailed rules around taxation and tips in relation to Tronc schemes.<sup>2</sup> If a number of employees get payments through a tronc, the person who runs the tronc, called a troncmaster, must run a payroll and report the information to HMRC. The troncmaster is then personally responsible for all aspects of operating the PAYE scheme. A troncmaster with a PAYE scheme may use the employer's payroll to operate PAYE on his or her behalf but the troncmaster's PAYE records must be kept separate from the employer's. The tronc PAYE scheme must be entirely independent of the employer's scheme and must be run as such.

In terms of National Insurance Contributions (NICs), UK legislation provides that any amount paid directly to an employee (i.e. not filtered through an employer), which is a payment 'of a gratuity' or is 'in respect of a gratuity' is exempt from NICs.

With regards to troncs and NICs, tips do not attract NICs if the:

- 1) Troncmaster is allocating money that originally was not paid to the employer and the employer does not pay the money directly or indirectly to their employees.
- 2) Employer does not determine, directly or indirectly, the allocation of those tips.

## 2.5 Data on Tipping

There is currently no available data in Ireland as to the total number of employees who receive tips as part of their income, how regularly they receive them, or what proportion of their income is derived from tips. Furthermore, given that there is no legislation relating to

---

<sup>2</sup> A Tronc scheme is a common fund into which tips and gratuities are paid in order to be divided out amongst staff according to a certain formula.

tips and that it is essentially an informal practice, it is unlikely that such data will become available in the future.

Anecdotal evidence, international research and submissions received by the Commission indicate that the majority of employees who receive tips as part of their income on a regular basis work within the hospitality sector. However, tips are also received by employees in many other industries, such as taxi drivers, employees in the gaming industry and those working in hair & beauty.

According to the latest data available from the CSO Labour Force Survey (LFS), there was an average of 151,200 people employed in the Accommodation and Catering sectors in 2017, of whom 40,300 reported earning the National Minimum Wage. Receiving tips may therefore make up a portion of income for a significant number of employees.

As part of its consultation process, Sinn Fein and the Union of Students in Ireland (USI) submitted the results of surveys they had undertaken which examined practices within the hospitality sector and included data regarding the withholding of employee tips by employers. While the Commission appreciates the work that went into these surveys, the sample sizes involved and methodologies applied mean the results cannot be taken as reliable statistical evidence. As such, while the results of the surveys suggest that the withholding of tips may be an issue for some employees, it is not possible to accurately determine the extent to which this is the case.

The Commission did consider undertaking its own survey into the matter. However, given the time constraints involved and the problem of trying to accurately survey what is, in essence, an informal and undocumented practice, the Commission did not feel such a survey was a practical option. Ultimately, in the absence of reliable data it is impossible to say to what extent employee tips are being withheld by employers.

## Chapter 3 Current Legislation

### 3.1 National Minimum Wage Act 2000

The National Minimum Wage (NMW) was introduced in Ireland in 2000 as a social policy commitment to protect workers considered to be most vulnerable and at risk of exploitation and to protect against poverty.

Prior to the NMW legislation being enacted, a National Minimum Wage Commission was set up in 1997 to advise on the implementation of a NMW and to examine any related issues in relation to low-pay in the economy. The National Minimum Wage Commission reported to Government in 1998 and an Interdepartmental Group was established to undertake a technical assessment of the Commission's recommendations.

The Interdepartmental Group published its final report in June 1999 and recommended that tips and gratuities paid directly to employees in pubs, hotels and restaurants should not count in calculating pay for the purpose of the national minimum wage. However, the Group recommended that where tips are paid into a central fund or a service charge is levied and the proceeds of the fund or charge are subsequently distributed by the employer through the payroll, the amount paid to the employee should be taken into account for minimum wage pay.

### 3.2 Service Charges and Tips as reckonable and non-reckonable pay

As the National Minimum Wage Bill proceeded through the Oireachtas, a clearer distinction was drawn between service charges and other tips which are distributed through the payroll. The Government amended the Bill at Dáil Committee Stage to ensure that tips distributed by the employer through the payroll were not to be a reckonable component in calculating the NMW rate.

It should be noted that at the time of the drafting of the NMW Bill, service charges were a significant proportion of pay in the hotel and catering sector. According to those sectors, the removal of service charges as a reckonable pay component would have had serious negative impact on those sectors.

A service charge, unlike a tip, is not discretionary and customers must pay it as part of the bill. A service charge is paid directly to the employer and may be said to form an element of their operating income. As it is paid to the business and used by the business to pay employees, it was therefore considered as reckonable pay.

The Government opposed any opposition amendments to make service charges non-reckonable.

The National Minimum Wage Act 2000 was commenced 1<sup>st</sup> April 2000. The Act is silent on cash tips paid directly to employees.

### **3.3 Relevant Sections of the National Minimum Wage Act, 2000**

Section 19 of the NMW Act 2000, and the Schedule to which it refers, capture various specific components of an employee's pay that can and can't be included in determining if the employee has been paid at an hourly rate of pay that, on average, is not less than the employee's entitlement under the Act. The schedule includes references to tips and service charges. These sections of the Act are included in Appendix 2.

Section 19(3) of the 2000 Act stipulates that the Minister must consult with such representatives of employees and employers in the State as the Minister considers appropriate before making any amendments to the Schedule to the Act. The reason for this provision was to permit the Schedule to be amended to accord with any future changes that may occur in relation to the pay components of the remuneration of employees brought about by a change in the nature of work or otherwise.

### **3.4 The Payment of Wages Act, 1991**

The definition of wages, as described in section 1 the Payment of Wages Act 1991, is provided in Appendix 3. Tips are not included as wages under the Act.

### **3.5 Industrial Relations (Amendment) Act, 2015**

Under the Industrial Relations (Amendment) Act 2015, Registered Employment Agreements and Sectoral Employment Orders could potentially be useful to regularise current practices relating to tips.

- **Registered Employment Agreements**

An 'employment agreement' is an agreement relating to the remuneration or the conditions of employment of workers of any class, type or group made between a trade union or trade unions of workers and one or more than one employer or a trade union of employers, that is binding only on the parties to the agreement in respect of the workers of that class, type or group.

Under Section 8 of the Industrial Relations (Amendment) Act 2015, any party to an employment agreement may apply to the Labour Court to register the agreement in the Register of Employment Agreements.

- **Sectoral Employment Orders**

Under Section 14 of the Industrial Relations (Amendment) Act 2015, the Labour Court may be requested to examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of the workers of a particular class, type or group in the economic sector in respect of which the request is expressed to apply. This request may be made by;

- (a) A trade union of workers,
- (b) A trade union or an organisation of employers, or
- (c) A trade union of workers jointly with a trade union or an organisation of employers.

The Labour Court can then make a recommendation to the Minister for Business, Enterprise and Innovation, which the Minister may accept, and by order, confirm the terms of the recommendation to make a Sectoral Employment Order (SEO). The SEO could potentially detail the management of tips and gratuities in the workplace and would be sector-specific.

The Industrial Relations (Amendment) Act 2015 is silent on whether or not tips and gratuities can be included in the remuneration of an employee in the context of Sectoral Employment Orders. However, they could be dealt there in the context of conditions of employment.

### **3.8 Codes of Practice**

Section 42 of the Industrial Relations Act 1990 provides for the preparation of draft codes of practice by the Workplace Relations Commission (WRC) for submission to the Minister for Business, Enterprise and Innovation (MBEI). Codes of Practice are written guidelines, agreed in a consultative process, setting out guidance and best practice in regard to industrial relations practice and compliance.

The WRC may prepare draft codes of practice concerning sector-specific industrial relations issues for submission to the Minister, either on its own initiative or at the Minister's request.

Before submitting a draft code of practice to the Minister, the WRC is obliged to seek and consider views of organisations representative of employers and organisations representative of workers, and such other bodies as it considers appropriate.

Once a code of practice is declared by order under the Industrial Relations Act 1990, it is admissible as evidence in any proceedings before the WRC and Labour Court and any provision of the code which appears to the court, body, or officer concerned to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

Failure on the part of any person to observe any provisions of a code of practice shall not in itself render him or her liable to any proceedings. It is clear therefore that the status of codes of practice is purely evidential in any proceedings.

## Chapter 4 Consultation Process

### 4.1 Stakeholder Views

Upon being requested to examine current practices relating to tips and gratuities in Ireland, the Low Pay Commission undertook a targeted consultation process and requested submissions from employer and employee representative groups in sectors where tipping is prevalent, as well as from political parties and experts in employment law. While the Commission received views from a wide range of groups, there were a number of common themes across the submissions. In total, the Commission received 15 submissions from the following groups:

Irish Taxi Federation	Social Justice Ireland
Competition and Consumer Protection Commission	Sinn Féin
The Gaming and Leisure Association of Ireland	TASC
Restaurants Association of Ireland	Union of Students in Ireland
Richard Grogan Solicitors	Green Party
Fianna Fáil	Irish Hotels Federation
Irish Congress of Trade Unions (ICTU)	Irish Hair Federation
Licensed Vintners Association (LVA)	

### 4.2 Current Practices:

There was broad agreement between both employer and employee representative bodies that the majority of tips/service charges are currently distributed by one of three methods:

- 1) The employee receives the tip directly from a customer and keeps the entire tip,

- 2) Tips are pooled into a central fund for re-distribution which may include support staff and management (employee managed troncs may be utilised),
- 3) Tips/service charges are held by management and used to pay for staff parties or events, to make up employee minimum wages (service charges), or to increase profits.

### 4.3 Troncs:

The Restaurants Association of Ireland (RAI) advised that they have recommended to their members that they introduce tronc schemes for the distribution of tips. RAI stated that they believe that the business owner should not be involved in the distribution of tips. Similarly, the Gambling and Leisure Association of Ireland (GLAI) advised that troncs are common in their sector and that support staff who do not deal directly with customers often receive a share of the tronc. In contrast, the Irish Hair Federation advised that in a survey of their members, they did not find any businesses which used a tronc scheme. The Irish Hotels Federation (IHF) stated that troncs have long been in place in their sector, but on a voluntary basis, and they would not agree with regulating to make the system obligatory.

### 4.4 Hospitality Sector:

A number of submissions focused particularly on issues within the hospitality sector, including low pay, precarious hours, and exploitation. Sinn Fein and Social Justice Ireland pointed out that the hospitality sector has the highest proportion of NMW workers in the state, while the Union of Students in Ireland (USI) advised that the majority of students they surveyed are working within the hospitality sector. Sinn Fein contrasted these low rates of pay with the significant growth and profits which the hospitality sector has experienced in recent years. Attention was also drawn by Sinn Fein, the Green Party, Social Justice Ireland and TASC to the low average hours of paid work amongst employees in this sector. A significant proportion of workers within the sector were said to be working precarious hours or 'if and when' contracts and reference was made to the findings of the 2015 University of Limerick report ("*A study on the prevalence of zero hours contracts among Irish employers and their impacts on employees*") on this matter. Given the issues associated with low-pay and precarious work in the sector, these submissions considered that tips may form a considerable portion of the income of many employees working in hospitality.

#### **4.5 Service Charges:**

The RAI and IHF were strongly of the view that given the differences in how service charges and cash tips are treated in legal and tax terms, a distinction must be drawn between them. The IHF stated that a service charge is not a tip or gratuity as it is imposed on the customer by the employer and it is not up to the customer to determine the amount. In the IHF's view, service charges should not be the subject of any legislation pertaining to tips and gratuities as this would be interfering in a contract between a customer and a business. The RAI also felt that a distinction should be drawn between discretionary and non-discretionary payments and that it is impractical to treat service charges and tips as one and the same.

Richard Grogan Solicitors also discussed service charges in their submission. They were of the opinion that the distinction between service charges and tips could be resolved by amending the Principal Act (National Minimum Wage Act 2000) to prevent service charges being used as a reckonable component of pay when it comes to the calculation of the NMW. Failing this, they proposed amending the Principal Act so that an employer would need to include on menus a statement as to whether the service charge is distributed to employees or used to calculate their pay.

#### **4.6 Taxation:**

A number of submissions also drew attention to the possible tax implications of introducing legislation in the area of tips and gratuities. The RAI and IHF confirmed that if tips are issued through the employer, PAYE, USC and PRSI (including Employer PRSI) must be applied. The IHF also stated that this is the case for any credit card tips which pass through the books and records of the business. The RAI further advised that if a *tronc* is paid through the business, it would be liable for VAT.

It was acknowledged by both the RAI and the Green Party that while employees are obliged to declare any tips they receive directly from customers on their tax returns, the reality is that small cash tips are unlikely to be declared by employees for tax purposes in all circumstances. The Green Party was doubtful in their submission that tips can be taxed effectively and pointed out that it would be administratively expensive to regulate the practice, would penalise low-paid workers and would accrue little Revenue benefit. They recommended that tips should be treated as a tax benefit similar to the cycle to work scheme.

#### 4.7 Proposed Legislation:

Given the complexities in legislating for tips and gratuities, it is perhaps not surprising that a wide range of proposals were set out in the submissions the Commission received. The Taxi Federation of Ireland was of the view that as their members tend to be self-employed, their exposure to the practice of employers withholding tips is limited. They did however argue that tips should be exempt from commissions applied by Taxi Apps. It should be noted however that such commissions would not necessarily be covered in the proposed legislation as there may not exist a bona fide employer/employee relationship.

GLAI favoured legislation to ensure employees receive their tips but felt that as tips can be a source of conflict in the workplace, employers should retain a role in adjudicating disputes arising from the distribution of tips. GLAI also stated that behind the scenes staff who do not have the opportunity to receive tips from customers directly should also be allowed to share in tip pools or troncs.

The RAI and IHF felt that a number of provisions contained in the National Minimum Wage (Protection of Employee Tips) Bill are vague, open to interpretation and would not meet the requirements of legal certainty. The RAI also expressed a concern that efforts to introduce legislation are being informed by anecdotal evidence and that there is little quantitative or empirical evidence to suggest that legislation is actually required. The IHF stated that they are fully supportive of the payment of all tips and gratuities to staff but that they cannot support the current Bill which they believe is unworkable and excessive. The Irish Hair Federation was also opposed to the Bill and felt that legislation is not required around tipping in their sector.

The RAI did support the proposal for businesses to display their tipping policy in a prominent place and to clarify for customers what a non-discretionary service charge is being used for. RAI believe that this policy would be beneficial to the customer, employers and employees and would instil greater consumer confidence in the industry. In contrast, the IHF does not support the display of a hotel's tip policy as it may suggest to guests that they are obliged or required to tip.

A code of practice relating to tips and gratuities was recommended by Fianna Fáil. The RAI also think that a code would be a practical solution instead of the proposed legislation. The IHF stated that an internal policy, collective agreement or code of practice is usually agreed in their industry at employment level on how best to share tips paid through the payroll. The IHF further state that if an employer manages the distribution of tips, it would be appropriate

for a clear policy to be available to staff as part of their employment contract. However, the introduction of a code of practice was opposed by Sinn Fein on the grounds that they believe that employers within the hospitality sector are unwilling to engage constructively in the collective bargaining process and therefore such a code would have little or no effect. Sinn Fein believe that the resistance of the hospitality industry to engage in collective bargaining, along with the absence of primary legislation, means that workers are very exposed to exploitation. The Green Party also opposed a code of practice and pointed to the UK case where the code introduced in 2009 has been largely ignored.

TASC and ICTU support legislation in line with what was proposed in the Sinn Fein Private Members Bill and felt that it should be moved through the Dáil as quickly as possible. The USI and Social Justice Ireland were also of the opinion that legislation is required in this area to ensure employees receive their tips. Fianna Fail believe that a thorough analysis of the impact of the proposed legislation is required and that it is essential that more bureaucracy is not created in an area that doesn't warrant it. The Green Party argued that it would be extremely unlikely that the State could provide the level of inspection and enforcement required to make the Bill effective. The Hotels Federation was strongly opposed to the Bill as currently drafted.

## Chapter 5 Government Departments/Agencies

### 5.1 The Revenue Commissioners:

As part of its review of current practices relating to employee tips and other gratuities, the Low Pay Commission liaised with the Revenue Commissioners in order to see if legislation in this area would have an impact on taxation. The Revenue Commissioners confirmed the situation as it currently stands in relation to tips and taxation:

- Tips and gratuities are fully taxable and should be included by employees in their tax returns.
- If an employer is involved in the distribution of tips/service charges through a PAYE scheme, these tips are fully liable for tax purposes.
- If a “troncmaster” is involved in the distribution of tips, they are required to register as an employer and make tax deductions accordingly.

Revenue stated that there is no data available on the total value of tips being declared for taxation purposes. Where tips are included as part of pay, an employer is not required to provide a separate breakdown detailing the tip amounts. Tips declared by employees directly are recorded on the Revenue system under a ‘catch-all’ code (untaxed income arising in the State) which includes any type of untaxed income from any source e.g. government stocks, exchequer bills, credit union dividends or other investments.

Similarly, there is no available data as to the how many troncs are registered for PAYE as this type of information is not captured.

Revenue advised that the taxation of tips is not a particular area of concern for them in an audit context and that for many auditors it has not emerged as an issue at all. On those occasions when it has emerged, the experience of auditors has been that tips are collected by the employer, are passed onto staff and that PAYE is operated on the amounts. If PAYE was not operated it would be addressed as part of the audit settlement.

Revenue also advised that sectors where tipping is common practice are monitored for tax compliance purposes in the same way as taxpayers in all other sectors. The main focus of Revenue’s activity continues to be on selecting cases for intervention based on the presence

of various risk indicators and other information available. Revenue also confirmed that information regarding tax settlements arising from the non-declaration of tips is not available.

## **5.2 The Workplace Relations Commission (WRC)**

The Workplace Relations Commission (WRC) provides information on industrial relations & rights and obligations under Irish employment and equality legislation. The WRC also provides a number of services in the areas of industrial relations and employment rights, including; adjudication, inspection, conciliation and enforcement.

The Low Pay Commission met with representatives of the adjudication and inspection divisions of the WRC in August 2018. Their views on the National Minimum Wage (Protection of Employee Tips) Bill are outlined below.

### **WRC Adjudication Services:**

Adjudication Officers in the Workplace Relations Commission (WRC) are statutorily independent in their decision making duties as they relate to adjudicating on complaints referred to them by the WRC Director General.

The Adjudication Officer's role is to hold a hearing where both parties are given an opportunity to be heard by the Adjudication Officer and to present any evidence relevant to the complaint. The Adjudication Officer will then decide the matter and give a written decision in relation to the complaint. The decision, which will be communicated to both parties and published, may,

- (a) declare whether the complainant's complaint was or was not well founded,
- (b) require the employer to comply with the relevant provision(s),
- (c) require the employer to make such redress as is just and equitable in the circumstances including the award of compensation.

A party to a complaint may appeal to the Labour Court following a decision of an Adjudication Officer.

Section 10F of the National Minimum Wage (Protection of Employee Tips) Bill states:

**“10F.** (1) An employer shall not withhold tips or other gratuities from an employee, make a deduction from an employee’s tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorised to do so under this Part.

(2) If an employer contravenes subsection (1), the amount withheld, deducted, returned or given is a debt owing to the employee and is enforceable under this Act as if it were wages owing to the employee.

(3) (a) A claim by an employee against an employer for redress under this section may be referred by the employee to the Director General and, where such a claim is so referred, the Director General shall, subject to section 39 of the Workplace Relations Act 2015, refer the claim to an adjudication officer for adjudication by that office.”

The WRC have informed the LPC that if a claim under the proposed legislation came before an Adjudication Officer, the officer would require evidence from the claimant and the respondent. In employment rights cases, evidence is usually in the form of a contract, official record or correspondence between the parties. In this case, there would be no official paper record, unless a formal system of recording and distributing tips was introduced. In the absence of paper records, an Adjudication Officer would have to consider the credibility of those giving evidence and judge who they considered to be telling the truth.

The WRC also sees a problem with Troncs and Troncmasters. Employment rights claims are taken against employers by employees, but when a tronc exists, the responsibility for the collection and distribution of tips is taken away from the employer. However, the WRC are of the view that employers may still be liable for prosecution if the Troncmaster is accused of not acting fairly in the distribution of tips. A claim could not be taken against the Troncmaster as they have no standing as an employer. Additionally, the WRC cannot see employees being willing to take on the role of troncmaster if there was a concern that there could potentially be legal action taken against them.

## **WRC Inspection and Enforcement:**

The work of the WRC Inspection and Enforcement Division involves the inspection of employers' statutory employment records for the purposes of checking employers' compliance with the appropriate employment law statutes. Where non-compliance (being a criminal offence) is detected, employers are obliged to rectify the non-compliance issues. Failure to rectify the non-compliance issues detected may result in the prosecution of the employer in the District Court. The Court may apply a Class A fine (up to €2,500) for each offence before the Court.

## **Tips and Gratuities:**

The WRC have advised that since there is no employment statute governing the ownership or the distribution of tips and gratuities, WRC inspectors do not:

- Have any interaction with employers concerning the management and distribution of cash tips, or
- Have powers to, and do not, examine employers' records relating to non-cash (credit or debit card) tips and gratuities.

## **Employer Responsibility for the administration and distribution of tips and gratuities:**

The WRC made the point that although there is no explicit obligation in the proposed Bill making an employer responsible for the administration of tips and gratuities, the Bill still proposes criminal sanction where an employer withholds tips or gratuities.

## **Enforcement:**

The legal proceedings proposed will fall within the remit of WRC Inspectors empowered by Sections 26 and 27 of the Workplace Relations Act 2015.

The WRC have advised that the work of WRC Inspectors is to carry out inspections of employers' employment records – the records required to be kept/provided for in the relevant employment law statute – to prove employers' compliance with the relevant statute.

For the enforcement in section 4 of the Bill to be viable, the Bill requires an explicit statutory obligation on employers to keep a record, for a specified period, of all gratuities received, and in all forms (cash and non-cash), similar to the record keeping obligations in other employment law statutes.

In the absence of same, the WRC state that enforcement is not possible.

### **Equitable Distribution of tips and gratuities:**

The WRC state that for enforcement to be viable and a conviction to be secured, the Bill (or regulations) must establish and clearly quantify the proportion of tips each employee is entitled to.

In the absence of same, enforcement as proposed is not possible.

### **WRC recommendation:**

The WRC has stated that in its view, a better approach than the proposed legislation would be to introduce a Code of Practice on tipping. It could set out the principles underpinning the legislation and also enshrine the proposal that an establishment display to its customers how tips are distributed.

## Chapter 6 International Perspective

In order to better understand tipping practices and the options available to Governments, the Commission has examined select international tipping regimes.

### 6.1 United Kingdom

#### **Minimum Wage Legislation & Code of Best Practice:**

In 2009, the UK Government introduced legislation which made it illegal for service charges, tips, gratuities and cover charges to be used to make up the minimum wage<sup>3</sup>.

Alongside the change in Minimum Wage legislation, the Department for Business, Innovation and Skills (BIS) also introduced a voluntary Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges<sup>4</sup>.

The 2009 Code of Best Practice aimed to improve the information on tipping available to consumers and workers. The Code covers all the major tipping sectors, including hotels and restaurants, gambling and betting outlets, hairdressing and other beauty therapy businesses, and taxi operations. The Code was developed by trade unions, business representatives and consumer groups and is based on four principles to ensure transparency.

The four principles of the Code of Best Practice (2009) are:

- Businesses will clearly display on their premises their policy relating to mandatory and discretionary service charges, tips, gratuities and cover charges, and make this accessible.
- Businesses will have a process in place to deal with requests from customers about how and to whom all service charges, tips, gratuities, and cover charges are distributed, and the level and purpose of deductions.
- Businesses should ensure that workers understand and are able to confidently explain the business' policy on service charges, tips, gratuities and cover charges to customers, or to know where to direct customers for further information.

---

<sup>3</sup> The National Minimum Wage Regulations 1999 (Amendments) Regulation 2009, Section 31 (1) (e)

<sup>4</sup> A Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges (2009)

- All workers should be fully informed on the distribution and breakdown of service charge, tips, gratuities and cover charges and the level and purpose of any deductions. Businesses should seek to reach agreement with workers on any change of policy.

The code also outlines what information should be provided to consumers in sectors where tipping is prevalent (e.g. whether a charge is mandatory or discretionary, whether cash tips and card tips are distributed differently). The Code states that businesses that sign up to the Code must accept its principles in their entirety.

### **Call for Evidence & 2016 Report:**

In the years following the introduction of the Code of Best Practice, it became clear that the Code was not being widely used or adhered to by employers. In 2015, BIS launched a Call for Evidence to investigate some of these issues and concerns. After analysing the submissions provided by various groups, BIS published a report on their consultation<sup>5</sup>. In this report the Government outlined their objectives and proposed various reform options. The Government also sought views on the proposals they put forward and opened up another public consultation between May and June of 2016. BIS has released no further publications since this open call. Campaigners have highlighted the lack of action since this consultation.

The 2015 Call for Evidence aimed to gather responses from stakeholders about current tipping practices and what the role of the Government should be in ensuring the fair treatment of these payments. The call generated 183 responses from various sectors. The responses showed that there was confusion in the UK about the rules relating to tipping and other charges and a clear lack of clarity around which businesses are signing up to the code of practice and how pertinent information is conveyed to employees and consumers.

The general view from the Call for Evidence is that the code does not go far enough and that some Government intervention is required. Following the analysis of the evidence, the British Government indicated that they believed that discretionary payments should be subject to three broad policy objectives.

- Discretionary - clear to consumers that they are voluntary.
- Received by workers; and

---

<sup>5</sup> Government Consultations on Tipping, Gratuities, Cover and Service charges (2016)

- Clear and transparent to consumers and workers in terms of how payments are treated.

The consultation put forward options for reform to achieve these objectives. These options are included in Appendix 4.

The UK Government sought views on their proposals and opened up a public consultation between May and June of 2016. No further publications have emerged since this open call. On 26 April 2018, David Crausby, Labour MP, asked the Secretary of State for Business, Energy and Industrial Strategy when his Department plans to publish its response to the consultation on tips, gratuities, cover and service charges, which closed on 27<sup>th</sup> June 2016. The Department of Business, Energy, and Industrial Strategy responded that *‘The Government’s consultation identified a range of tipping practices used by employers. The Government is considering next steps and reserves the right to take further legislative action if restaurants do not pay their staff fairly. Any action must benefit workers and not place unnecessary burden on those businesses that do pay their staff fairly’*<sup>6</sup>.

On 1 October 2018, the British Government announced a set of new measures to support workers, businesses, and entrepreneurs. One of these measures relates to tipping practices. The UK Government announced plans to ensure that tips left for workers will go to them in full and stated that new legislation, to be introduced at the earliest opportunity, would set out that tips must go to the workers who provide the service. The legislation would ensure that workers get the tips they deserve and give consumers reassurance that the money they leave in good faith to reward good service is going to the staff.

## 6.2 Canada

The National Minimum Wage (protection of Employee Tips) Bill is modelled on a Canadian Bill that was enacted in the Canadian province of Ontario in June 2016, under the Protecting Employee Tips Act 2015. The Act is provided in Appendix 5. The Canadian province of Quebec has a very different tipping regime and the divergent approaches highlight how little consensus there is around how best to regulate tipping practices.

---

<sup>6</sup> <https://www.theyworkforyou.com/wrans/?id=2018-04-18.136514.h&s=gratuities>

## Ontario

Because the Employee Tips Bill is modelled so closely on the Canadian Bill, it is instructive to examine the Canadian Bill closely and to learn from the experience in Canada.

### **The Protecting Employee Tips Act 2015:**

Before June 2016, the Ontario Employment Standards Act, 2000 (ESA) did not address tips and other gratuities and employers were not prohibited from withholding, making deductions from, or making an employee return their tips to the employer. As of June 10<sup>th</sup> 2016, an employer generally cannot withhold, make deductions from, or make an employee return their tips and other gratuities except as permitted by the ESA. If an employer is found to have violated the prohibition against taking an employee's tips and other gratuities, the amount wrongfully kept is considered a debt owing by the employer to the employee and is enforceable under the ESA as if it were wages owing to an employee.

An employee's ability under the ESA to keep tips and other gratuities, except in limited circumstances, is an employment standard. Employees who believe their employer, or former employer, has not complied with the ESA can file a claim with the Ministry of Labour.

Tips and other gratuities (including service charges) are not considered wages for the purposes of the ESA. They are not included when calculating minimum wage, termination pay, severance pay, vacation pay, public holiday pay or the regular rate used for calculating overtime pay.

### **Guidelines for the Act:**

The Ontario Ministry of Labour has published guidelines for the Protecting Employee Tips Act. These guidelines are very useful in the context of the National Minimum Wage (Protection of Employee Tips) Bill as they explain how the Canadian Act has functioned subsequent to it becoming law. There is a likelihood that if the proposed Irish legislation was enacted, similar guidelines would apply. The guidelines are included in full in Appendix 6.

## **ESA treatment of Service Charges:**

It is important to note that service charges are treated differently to other tips under the ESA. If service charges are being added for large parties, included on invoices, etc., employers need to be explicit about who and what that money is intended for (e.g. tips for staff or facilities charges etc.). If an employer is explicit that the full service charge will not be paid to staff, they can legally withhold these tips and not pay the full amount to employees.

## **Withholding of Employee Tips:**

It must also be noted that under section 14(4) of the ESA, *'an employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer, if the employer collects and redistributes tips or other gratuities among some or all of the employer's employees'*. Under the proposed Irish legislation, an employer cannot withhold employee tips under any circumstances.

## **Criticisms of the Protecting Employees Tips Act 2015:**

Criticisms of the Protecting Employees Tips Act 2015 have centred on the prescribed definition of tips and gratuities and the fact that some employers have chosen to reclassify service charges in order to facilitate making deductions from them. It has been reported that the Ottawa Convention Centre, for example, has kept a portion of the 18% service fee it imposes on customers and is able to do so because it has classified its service charge as an 'administrative charge' rather than an actual 'gratuity'. However, as long as the convention centre informs its clients that only a portion of the 18% 'administrative charge' is actually considered a gratuity, it is technically not breaking any rules by taking a cut of that 18% (a 'reasonable person' does not have to make false assumptions as everything is transparent).

It has also been reported that workers in the hospitality industry are reluctant to speak out about employers who are withholding tips unfairly because many workers are not declaring their tips for tax purposes. There is a fear that employers might threaten to report workers to the tax authorities in order to silence them. For this reason, some workers in the hospitality industry are advocating for legislation that requires all tips to be tracked and reported. This is

the system that currently operates in Quebec. Indeed, Arthur Potts, the Liberal MPP who led the Protecting Employees' Tips Act through the Ontario legislature has acknowledged that the Act cannot truly protect hospitality workers if they are not declaring their tips. He states that *'in order to protect your tips, you're probably going to be in a situation where you have to declare them as earnings.'*<sup>7</sup> It has been acknowledged that many workers will not support this idea as it means that all tips income will be fully taxed but it would give workers better protection against unfair employer practices. It would also give employees better access to entitlements based on employment insurance and allow them to contribute more to pension plans and to access increased severance pay.

## Quebec

### Reporting Tips:

In Quebec, tips are the exclusive property of the employees who receive them. Where there is a tip-sharing arrangement, the tips also belong to the employees concerned. An employer cannot, under any circumstances, require an employee to pay credit card costs.

Employees in Quebec who receive tips are also required to report these tips like any other income. In order to do so, they must complete the *Register and Statement of Tips*, or an equivalent document, and submit it to their employer at the end of each pay period.

By filing their statement of tips, employees ensure that they will receive, like other workers, employment-related benefits based on their total remuneration (basic salary or wages, plus tips). Compliance with these measures helps to ensure the fairness of the taxation system and equitable access to social programs.

Employers require the statement of tips from their employees in order to:

- file their employer statement;
- allocate tips, where applicable; and
- calculate their source deductions and employer contributions.

---

<sup>7</sup> <https://tvo.org/article/current-affairs/should-ontario-employers-be-forced-to-declare-tips>

In calculating the source deduction of Québec income tax and the provincial contributions and premiums, employers have to add to the basic salary or wages they pay to their employees all reported tips and any allocated tips.

An employer may also be eligible for a refundable tax credit. The credit is designed to provide compensation to the employer for the additional payroll taxes the employer is required to pay.

### **Advantages of reporting tips:**

Reporting tips at the end of each pay period ensures that employees receive social benefits, including employment insurance and Québec parental insurance plan benefits, based on the employee's total income (wages plus tips). Employee's also benefit from:

- An improved standing with financial institutions;
- The possibility of contributing more to their registered retirement savings plan;
- A pension paid under the Québec Pension Plan which is based on all their income.
- Advantages when calculating statutory holidays, paid vacation leave and family or parental leave.

## **6.3 USA**

Tipping, particularly in relation to the hospitality industry, is deeply ingrained in American culture. In the USA, a tipped employee engages in any occupation in which he or she customarily and regularly receives more than \$30 per month in tips.

In the US, tips are the exclusive property of the employee. The employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum wage obligation to the employee (tip credit) or in furtherance of a valid tip pool. An employer of a tipped employee is only required to pay \$2.13 per hour in direct wages if that amount combined with the tips received at least equals the federal minimum wage (\$7.13). If the employee's tips combined with the employer's direct wages of at least \$2.13 per hour do not

equal the federal minimum hourly wage, the employer must make up the difference. However, many States require higher direct wage amounts for tipped employees.

A compulsory charge for service is not considered a tip. Such charges are part of the employer's gross receipts. Sums distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage. However, this charge on the tip may not reduce the employee's wage below the required minimum wage.

All tips received are income and are subject to federal income tax. Employees must include in gross income all tips received directly, tips paid by an employer, and any share of tips received under a tip-pooling arrangement.

It is the responsibility of employees to keep a daily tips record, to report all tips to their employer and to report all of their tips on their income tax return. These records must be kept for as long as necessary for the administration of federal tax law.

## 6.4 Germany

In 2002, Germany exempted all tips from income tax, the end-point in a process of gradually increasing the tax exemption of tipped income. The logic behind this decision was that those dependent on tips generally work in the low wage sectors of the economy and that the current state of the law only encouraged them to work in the black market. Removing this encouragement would be an incentive for participation in the formal labour market and the change would also eliminate bureaucratic burdens (the difficulties associated with eradicating tax evasion). In 2002, the German Industrial Code was also amended to provide that in no case can the payment of an employee's regular wage be precluded by the receipt of tips paid by a third party. However, tips could be received above the contractual wage, as a supplement to it. In Germany, *Bedienungsgeld* (service money) is a mandatory service fee

that restaurant customers must pay (it is included in menu prices). This service charge is intended to pay a restaurant worker for their services. It is subject to income tax and that tax is deducted/withheld from the food server's pay. On the other hand, Trinkgeld (tip money) is a voluntary 'gift', an extra amount of money willingly given to the food server as a reward for good service, and is not taxable.

In 2015, Germany enacted minimum wage legislation for the first time and the question of how tips are dealt with came under scrutiny. Some observers argued that tips should be able to be used to meet the employer's statutory minimum wage obligation. Others argued that if tips cannot be used by an employer to satisfy its obligation to pay the contractually stipulated 'regular wage', they shouldn't be used to meet the employer's obligation to pay the statutorily required minimum wage. In the absence of a definitive judicial determination, the Ministry of Labour came down in favour of the latter.

## Chapter 7 Literature Review

In order to better understand tipping practices and the advantages and disadvantages of different tipping regimes, the Low Pay Commission has examined the available literature on the subject.

### Tipping Practices Globally:

Tipping is a complex social phenomenon, greatly influenced by local customs and values. Indeed, tipping practices can vary widely in different countries in terms of who it is customary to tip and how much it is customary to tip them. Michael Lynn states that '*a handful of studies in the psychology and hospitality management literatures have attempted to measure these national differences in tipping norms. Research on the predictors of these measures has generally focused on national character – i.e., national values, motives and personality traits*'.<sup>8</sup> Lynn contends that country specific tipping norms are primarily determined by consumers and states that '*consumer acceptance of these norms is theorized to vary with the value that consumers place on the consequences or functions of tipping*' (Lynn, 2006, p.10).

### Social Functions of Tipping:

Ofer A. Azer states that '*Tipping is a phenomenon that illustrates the importance of social norms and psychological reasons in motivating economic behavior. People tip because this is the social norm and disobeying norms results in psychological disutility*'.<sup>9</sup> Tipping is guided by social norms that specify who to tip and how much to tip. This raises a question regarding why tipping norms exist. Lynn states that '*This question is related, but not identical, to the question about why individual consumers tip. Some of the benefits that motivate individuals to leave tips may also induce societies to adopt tipping norms. For example, the desire for status probably affects individual tipping decisions and national tipping custom*' (Lynn, 2006,

---

<sup>8</sup> Lynn, M. (2006). *Tipping in restaurants and around the globe: An interdisciplinary review* [Electronic version]. from Cornell University, School of Hospitality Administration site: <http://scholarship.sha.cornell.edu/articles/99>, p.10.

<sup>9</sup> Azer, O, (2003), The Implications of Tipping for Economics and Management, *International Journal of Social Economics*, p.1.

p.19). People tip mainly because it is the social norm and because stiffing (not tipping) causes negative feelings such as embarrassment and guilt and they derive utility from feeling kind and generous (i.e. tipping is a means of self-signalling and improving one's self-image).

## Individual Motives for Tipping

Tipping is a voluntary activity and although it is a practice guided by social norms, compliance with these norms is not compulsory. Economists have therefore sought to explain why rational people tip and have generated six answers. People tip in order to:

- (1) buy future service from servers they will encounter again,
- (2) increase servers' incomes,
- (3) feel positive feelings like pride or avoid negative feelings like guilt,
- (4) receive social approval/status or avoid social disapproval,
- (5) build an honest character, and
- (6) support the rule of tipping.<sup>10</sup>

## The Economics of Tipping

Tipping has implications for several fields in economics. As tipping is a major source of income for millions of workers, it has clear implications for labour economics. Tipping is also inherently interesting to the fields of social and behavioural economics. Tipping practices also raise significant policy questions for Governments (e.g. Should tipped workers receive minimum wages in addition to their tips? Should income tax and social security payments be imposed on tips in the same manner that they apply to wages? Should tipping be banned altogether in favour of a fair living-wage?, Should Governments legislate to protect employee's tips?).

From an economic standpoint, five key consequences of tipping have been proposed:

- (1) tipping reduces the costs of monitoring and motivating server effort,

---

<sup>10</sup> Lynn, M. (2006). *Tipping in restaurants and around the globe: An interdisciplinary review* [Electronic version]. from Cornell University, School of Hospitality Administration site: <http://scholarship.sha.cornell.edu/articles/99>, p.14.

- (2) tipping provides a non-litigious means of addressing problems that arise from failures in service delivery
- (3) tipping attracts good waiters to the restaurant industry,
- (4) tipping facilitates tax evasion, and
- (5) tipping increases profits through price discrimination.

### Efficient Incentive:

Lynn states that *'The most common economic explanation for the custom of tipping is that it functions as an efficient means of monitoring and rewarding server effort. The highly customized and intangible nature of services means that customers are in a much better position than managers to evaluate and reward server effort, so these tasks are given to consumers via the norm of tipping. This reasoning suggests that tipping reduces transaction costs, motivates servers to work hard, and enables restaurants to provide more customized levels of service'* (Lynn, 2006, p.20). Finkan states that *'by relying on the tip, the staff is motivated to monitor itself. Those more adept, who are rewarded by superior tips for superior service, further the business' end. Those who are less successful – and so less well rewarded – are motivated either to improve or to change careers'*.<sup>11</sup>

However, many studies have pointed to doubts as to whether service quality plays any role in determining tip size. Ozer states that *'Lynn and McCall (2000) found statistically significant and positive relationship between service evaluations and tip sizes; the effect of service on tips was small, however, accounting for less than two percent of the variability in tip percentages. They also discovered that tipping was not significantly related to servers' or third-parties' evaluations of the service. This result is very important as it might drive servers to think that tips are not related to the service quality they provide, eliminating their incentive to exert effort and resulting in inefficiency of tipping as an instrument to improve service quality'*.<sup>12</sup>

---

<sup>11</sup> Finkan, M. (2016) "The Kindness of Strangers": The Tip and the Minimum Wage in France, Germany, and the United States. *International Journal of Comparative Labour Law & Industrial Relations*, Vol 32, p.3-31.

<sup>12</sup> Azez, O, (2002), The Social Norm of Tipping: A Review, *Journal of Applied Social Psychology*, Vol 37, Issue 2, p. 380-402.

## Tax Evasion:

Many economists have argued that tipping is supported in part because it facilitates tax evasion. Tipping allows servers to pay lower income taxes because underreporting of tip income is more difficult for the government to catch than the underreporting of standard wages. Lynn states that *'a study by the Internal Revenue Service found that underreporting of tip income exceeds under-reporting of income from all other legal sources (IRS, 1990).'* (Lynn, 2006, p.22)

## An Economic Defense of Tipping:

In his paper, 'An Economic and Pedagogical Defense of Gratuities', Anthony Gill points to the fact that a number of restaurants in the United States have ended the practice of tipping and are instead relying on a fixed 'living-wage' for their employees. Gill viewed this change in long-established cultural norms as an opportunity to explore a number of economic concepts and ultimately makes the argument that tipping remains an economically efficient way to ensure quality service and that employers, employees, and consumers all benefit from the practice.

Gill contends that tipping is an ingenious institutional mechanism for solving three very common economic problems: the principal-agent problem; capturing gains-from-trade via price discrimination; and promoting cultural trust necessary for anonymous exchange.

## The Principal-Agent Problem:

Gill states that *'the boss can't be everywhere. And when bosses are not around, employees have an opportunity and incentive to shirk. This ubiquitous situation falls under the rubric of a principal-agent problem wherein the interests of an agent (employee) are not fully aligned with those of a principal (boss) who is entrusting the agent to perform some duty on their behalf'*.<sup>13</sup> However, the employee also understands that their ongoing employment depends on the employer having a successful business. Therefore, Gill states that *'the trick to solving a principal-agent problem is to design some self-enforcing or policing mechanism that more tightly aligns the interests of the principal and agent'* (Gill, 2018).

---

<sup>13</sup> Gill, A. (2018), 'An Economic and Pedagogical Defense of Gratuities'. *The Journal of Private Enterprise*, Vol 33, No.1, p.70-102.

For Gill, this mechanism is the tip. In businesses where tipping is prevalent, the customer becomes the policing mechanism for the quality of service and rewards it accordingly, freeing up the manager to perform other tasks. Placing customers in partial control of a worker's compensation also allows them to effectively signal their desired type of service. Eliminating tipping in favour of a flat fee for service reduces the control customers have over the pricing decision and exacerbates the principal-agent problem. Even if staff are paid a higher 'living wage', which may arguably lead to happier employees and better service, the incentive to customize service to each customer is reduced.

### **Reporting Gains-from-Trade and Price Discrimination:**

Gill points to the fact that *'free market economies run on voluntary exchange when individuals who have differing values for goods and services meet to negotiate the terms of trade. This wondrous, decentralized institution matches resources to their higher valued use. Granted, some individuals capture more in the gains-from-trade than their trading partner, but so long as both parties benefit a win-win situation accrues'* (Gill, 2018). That said, everybody would prefer to reap the most in the gains-from-trade relative to the other partner. This is where the concept of price discrimination becomes relevant.

Price discrimination allows a seller of a good to set a price that most closely matches the buyer's reserve purchase price (the maximum price at which the person is willing to exchange). The difficulty with price discrimination is that discovery costs for customer reserve prices can be high. Gill states that *'the maximising calculation is to set the optimal price that captures the widest customer base at the highest profit rate, thus optimising the seller's gains from trade'* (Gill, 2018). In the case of the hospitality sector, there are risks associated with setting menu reserve prices too low and too high. However, with tipping, customers have a mechanism to voluntarily decide upon their own reserve price.

Gill believes that the price discrimination aspect of tipping is a win-win-win for owners, customers and waiting staff. Owners can maintain lower reserve sell prices and attract a potentially broader clientele. Customers also have the ability to set their own prices according to their own preferences, and it also makes dining out more accessible to lower-income individuals. Diners also do better if the waiting staff have an incentive to guess the customer's reserve price and try to earn the extra shared gains-from-trade by providing higher quality service, rather than devolving to standardized service under a 'no gratuities'

policy. Waiting staff also benefit by ensuring that the restaurant attracts more customers and therefore creates more employment opportunities. The most skilled servers will benefit disproportionately by being able to collect gains-from-trade above what the owner's fixed price for wages would be.

### The Moral Economy of Gratuities:

Gill is interested in the reasons why consumers leave tips at the end of a dining experience, when the contracting over the price of the food had already been agreed and it would be easy to 'stiff' the waiter and not pay a tip. This question could equally apply to all the other sectors where tipping is prevalent. One possible answer is that repeat customers want to signal a desire for future high-quality service. However, most people still tip even when they know they will never come across a tipped worker again.

Gill concludes that *'consumers are not merely self-interested in ways that give them immediate payoffs. The presence of uncertainty in transactions makes the creation of, and adherence to, institutions – including social norms – an economically rational and self-interested solution to larger social problems; if adhering to an implicit social contract makes one better off in the long-term, it is entirely rational and reasonable to abide by societal etiquette'* (Gill, 2018). Gill posits that those who don't adhere to these cultural norms and rituals provide clues that they shouldn't be trusted in other social interactions.

### The Case against Tipping:

In his paper, 'The Case Against Tipping', Yoram Margalioth points to reports stating that some restaurants in the US are replacing voluntary tips with service charges. Margalioth believes that this action would significantly improve the service industry for the better. He states that *'under conventional wisdom, tipping is a social norm that promotes social welfare. It is perceived to be an efficient way of monitoring service quality by allowing the customers, the people who are best positioned to assess the quality of the service, to decide how much to pay. Conventional wisdom, however, is likely to be misleading. Researchers have found that service quality has only a negligible effect on the size of the tip, which is mainly related to the size of the bill.'*<sup>14</sup>

---

<sup>14</sup> Margalioth, Y. (2006). The Case Against Tipping. *Pennsylvania Journal of Employment Law*.

### Is Tipping Efficient:

As already outlined in this chapter, tipping allows customers to provide incentives to waiters because they are in a better position than the restaurant owner (the employer) to monitor and reward server effort. Monitoring of service quality is costly to the employer but practically free to the customer. Therefore, tipping may be viewed as an informal service contract between the customer and the waiter, acting as a consumer-monitoring mechanism. Tipping also saves on litigation costs as there is no need for a customer to prove to a restaurant owner that the service was bad and demand a reduction in the service charge. If the service was bad, the customer can simply leave a small tip or no tip at all.

However, Margalioth contends that *'such a consumer-monitoring mechanism is subject to the problem of free riding. Even consumers who do not leave a tip benefit from good service at lower cost, as long as others leave tips according to service quality. Customers who expect to return in the near future to the same establishment may leave a tip to ensure future good service, but all others have an incentive to free ride'* (Margalioth, 2006).

### Tipping as a Social Norm:

Margalioth states that *'since individuals are generally presumed to act in their own self-interest, namely to take advantage of an opportunity to free ride, the widespread phenomenon of tipping poses a puzzle for traditional economics. People tip even though they are not legally obligated to do so'*. However, social norms may provide an enforcement mechanism by weakening the incentive of consumers to free ride. Margalioth states that *'psychological game models show that guilt aversion can induce people to pay in situations where no sanction, legal or social, is available'* (Margalioth, 2006).

It has been suggested by economists that social norms could be reactions by society to compensate for market failures, in the case of tipping, the possibility of free riding. If viewed in this light, tipping is efficient if it saves on service-quality monitoring costs. However, as previously discussed, the argument that tipping is efficient is based on the assumption that customers tip according to service quality, whereas in reality there is only a weak correlation between service-quality and tip size. In addition, tip-pooling arrangements reduce the incentive to provide good service as each server has an incentive to free ride on the efforts of other staff by exerting less effort, with only a marginal effect on tips received.

### **Tipping as a Form of Negative Externality:**

Margalioth believes that people feel pressurised to tip even if they receive bad service. He suggests that *'the social norm of tipping may be inefficient even when people are satisfied with the quality of the service they received. The way I see it, tipping may be a case of a negative externality imposed by wealthy people on the rest of society. Negative externality is the harmful effect of one economic agent's actions on another'* (Margalioth, 2006).

Margalioth points to the fact that in the US, the percentage of tips has increased from around 10-15% of the bill in the 1970s to 15-20% today and that *'it seems plausible to assume that as inequality grew in the United States, affluent people increased the amount they tip in order to improve their relative positioning or their status. This put pressure on those who are somewhat less affluent to increase the amount of tip that they left, beginning a cascade effect to the detriment of all'* (Margalioth, 2006).

### **Tipping May Facilitate Prejudice:**

Margalioth posits that tipping may facilitate prejudice. The switch to a service charge would prevent discrimination against certain categories of service providers, because the decision to pay for service would not be left to the customer. He states that *'research in restaurants suggests that variance in tipping behaviour is influenced not only by perceived differences in service levels, but also by such factors as the ethnicity of the tipper or the server'* (Margalioth, 2006).

### **Tipping Facilitates Tax Evasion:**

Margalioth believes that tipping facilitates significant tax evasion and that at least half of all cash tip income received goes unreported. This costs the US government and taxpayers billions of dollars every year. Margalioth believes that switching to a service charge would significantly mitigate the problem of tax evasion as these service charges would be taxed like any other form of wages.

## Chapter 8 Considerations & Conclusions

The lack of available data or research in Ireland as to how many employees receive tips and the manner in which they are shared or distributed is a significant obstacle to the Commission when it comes to reviewing this matter. Given the fact that no reliable data of any kind exists relating to the practice of tipping in Ireland, it is difficult for the Commission to make a definitive recommendation on the matter.

In the course of its deliberations, the Commission has considered many options and examined the pros and cons of each.

### Legislate for tips to go directly to Employees/Display tipping policy:

Under this option, legislation would be put in place to ensure that employers could not take ownership of any portion of tips intended for employees and that employees would receive the full value of any tip intended for them. The primary advantage of such legislation would obviously be that it ensures that if a tip is left for an employee as recognition of good service, it goes directly to the employee and the employee is protected against exploitation. While legislation of this kind does have some precedence internationally, a number of practical issues would have to be considered if legislation was introduced in Ireland.

If legislation was introduced in this area, what is largely an informal and flexible practice would have to become a formalised practice. If legislation was enacted, precise paper records would have to be maintained, and retained over a number of years, in order for any case brought under the legislation to be ruled upon (see chapter 4). In the absence of such records, adjudicators would essentially be asked to make a ruling in the absence of evidence. If detailed records are to be maintained, this will have to be done by either the employer or a troncmaster. Employees will also have to be given visibility of any records kept to ensure that their tips are being correctly recorded.

Given that the amount of any cash tips would need to be recorded, these tips would then be open to taxation and Revenue inspection. While the Commission is aware that employees are currently required to declare cash tips for revenue purposes, its view is that legislators have to be practical in this regard and acknowledge that there is likely to be a high level of underreporting when it comes to cash sums left for employees by customers. Formalising such an arrangement could end up reducing the take home pay for many low wage

employees when taxation is taken into account. If a troncmaster is set up independent of the employer, the troncmaster will also have to register as an employer for tax purposes and pay employer PRSI. In the event that the Government does choose to legislate in this regard, the Commission is of the view that a system for taxation and troncs similar to that which is currently in place in the UK would need to be considered.

The proposed legislation treats service charges in the same manner as other tips and gratuities. However, as service charges, unlike other tips, are reckonable income for the purpose of the national minimum wage, the National Minimum Wage Act would have to be amended to allow for the Protection of Employee Tips Bill. This would have obvious negative consequences for employers who currently utilise service charges to make up employee pay. It could potentially also have negative financial consequences for employees if employers chose to discontinue the practice of applying service charges and employees lose out on a top up in their wages.

From a consumer protection prospective, the Commission considers that establishments where the benefit of tips does not accrue fully to employees should as a matter of good practice disclose the fact. It would also be important that consumers are made aware whether service charges are treated differently to other tips and gratuities (i.e. not paid in full to employees).

### Introduce a Code of Practice/Sectoral Agreements:

Another option would be to introduce a code of practice for sectors in which the custom of tipping is commonplace. The advantage of such an approach would be that a code of practice could be tailored to the specific requirements of the industry involved. A code of practice could also ensure that both employer and employee interest groups are able to give input into the development of such a code and may therefore be able to take better account of issues as they exist on the ground.

As detailed in chapter 4, the Workplace Relations Commission (WRC) recommended that a better approach than the proposed legislation would be to introduce a code of practice.

However, the Commission is cognisant of the fact that the code of practice which was introduced in the UK in 2009 was found not to be widely in use or adhered to by employers. There is therefore the strong possibility that if a code of practice were to be introduced in

Ireland, it would not have the desired result in terms of ensuring that employees receive a fair share of their tips.

As outlined in chapter 3, under the Industrial Relations (Amendment) Act 2015, Registered Employment Agreements and Sectoral Employment Orders could be used to regularise current tipping practices. However, this approach would require a sectoral appetite for change in particular areas. It is important to note that it is open to either workers or employers (or both jointly) to initiate a request to the Labour Court for the introduction of a Sectoral Employment Order.

### Leave the situation as it currently stands:

Under this option, no legislation or code of practice would be introduced and the tipping practices which have developed over time and are currently in place within various sectors would remain as they are. The Commission has considered that there has not been a great deal of pressure from either employee or employer representative bodies to legislate for tipping or to alter current practices. This may indicate that the systems currently in place are working relatively well and that any attempt to interfere may lead to unintended consequences or legislation which is difficult to enforce.

The Commission has also taken on-board the advice of the Workplace Relations Commission that legislation in this area will be difficult to enforce or adjudicate on. The potential for employee's take-home pay to be reduced by an overly bureaucratic system cannot be discounted. There is also an issue regarding the lack of data relating to tipping and that any legislation which is brought in will be based on anecdotal rather than statistical evidence.

The negative consequence of not legislating in any form for tipping would be that employees would be still left in a position where employers could take ownership of some or all of the tips left for them by customers. While it is difficult to ascertain the extent to which this is currently happening, there have been enough reported cases and anecdotal evidence to suggest that it is certainly an issue for some employees.

## Conclusions

Having considered all evidence, submissions, international reviews and available data relating to current practices, the Commission has reached a number of conclusions in relation to tips and gratuities in Ireland:

- The Commission does not believe that sufficient reliable data exists to prove that the issue of employers withholding employee tips is a significant problem in Ireland. The Commission notes that this issue had received little attention prior to the introduction of the Private Members National Minimum Wage (Protection of Employee Tips) Bill 2017 and that the Government had not received previous representations relating to legislating for tipping practices.
- The Commission does not believe that legislation or regulation should be introduced in this area as the administrative and compliance costs involved would not be justified. The Commission is also concerned that there could be unintended negative consequences such as the reclassification of service charges, leading to a potential reduction in the take home pay of low paid employees.
- Legislation in this area may not be enforceable. The Workplace Relations Commission was clear that from both an adjudication and enforcement point of view, legislation in this area could be unworkable. While the intention of the Bill is undoubtedly honourable, the Commission does not feel that introducing legislation which cannot be applied and enforced effectively is a worthwhile endeavour.
- The majority of submissions which advocated for legislation focussed on the hospitality sector. However, the consultation process has shown that tipping practices are prevalent in a number of other sectors. The Commission is of the opinion that legislation which is geared towards the hospitality sector may not be appropriate for other occupations, and that a one size fits all approach when it comes to legislation is not to be recommended.
- The Commission noted that there was no real consensus amongst the submissions it received as to how or if tips and gratuities should be legislated for. While there was broad agreement that the withholding of tips by employers is wrong, there wasn't agreement as to how this should be addressed. Submissions put forward a range of options, including various forms of legislation or a code of practice, but having considered each of these in turn, the Commission does not believe that any offer a

clear solution to the issue that will be both enforceable and will not lead to unintended consequences.

## Appendices

<b>No.</b>	<b>Title</b>	<b>Page No.</b>
<b>1</b>	National Minimum Wage (Protection of Employee Tips) Bill 2017	i
<b>2</b>	National Minimum Wage Act, 2000 – Relevant Sections.	vi
<b>3</b>	Payment of Wages Act, 1991 – Relevant Sections.	viii
<b>4</b>	UK – 2015 Call for Evidence – Options for Reform.	ix
<b>5</b>	Ontario – The Protecting Employee Tips Act, 2015.	xi
<b>6</b>	Guidelines – The Protecting Employee Tips Act - Ontario	xiv

## National Minimum Wage (Protection of Employee Tips) Bill 2017

### Contents

Section:

1. Definitions
2. Amendment of section 2 of Principal Act
3. Protection of Employee Tips
4. Offences
5. Transitional Provisions – collective agreements
6. Short title, collective citation, construction and commencement

[No. 40 of 2017]

# Bill

### Entitled

An Act to amend the National Minimum Wage Act 2000 to provide for employees in the service sector to ensure they receive tips or gratuities paid by customers and to provide for related matters.

**Be it enacted by the Oireachtas as follows:**

### Definitions

1. In this Act –
  - “Principal Act” means the National Minimum Wage Act 2000;
  - “The Minister” means the Minister for Enterprise, Trade and Employment;
  - “Tronc scheme” means a common fund into which tips and service charges are paid for distribution to staff.

## **Amendment of section 2 of Principal Act**

2. (1) Section 2 of the Principal Act is amended, in subsection (1), by the insertion of the following:

(a) before the definition of “contract of employment” by inserting the following:

“ ‘Act of 2017’ means the National Minimum Wage (Protection of Employee Tips) Act 2017;”,

(b) after the definition of “prescribed” by inserting the following:

“‘tip or other gratuity’ means;

(a) a payment voluntarily made to or left for an employee by a customer of the employee’s employer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees,

(b) a payment voluntarily made to an employer by a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees,

(c) a payment of a service charge or similar charge imposed by an employer on a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be re-distributed to an employee or employees, and

(d) such other payments as may be prescribed by regulations,

But does not mean:

(i) such payments as may be prescribed by regulation; and

(ii) such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges;”,

(c) before the definition of “working hours” by inserting the following:

“ ‘Tronc scheme’ means a common fund into which tips and service charges are paid for distribution to the staff;”.

## **Protection of Employee Tips**

3. Part 3 of the Principal Act is amended by the insertion of the following section after section 10E:

**“10F.** (1) An employer shall not withhold tips or other gratuities from an employee, make a deduction from an employee’s tips or other gratuities or

cause the employee to return or give his or her tips or other gratuities to the employer unless authorised to do so under this Part.

(2) If an employer contravenes subsection (1), the amount withheld, deducted, returned or given is a debt owing to the employee and is enforceable under this Act as if it were wages owing to the employee.

(3) (a) A claim by an employee against an employer for redress under this section may be referred by the employee to the Director General and, where such a claim is so referred, the Director General shall, subject to section 39 of the Workplace Relations Act 2015, refer the claim to an adjudication officer for adjudication by that office.

(b) An adjudication officer to whom a claim for redress is referred under this section shall-

(i) inquire into the claim,

(ii) give the parties to the claim an opportunity to be heard by the adjudication officer and to present to the adjudication officer any evidence relevant to the claim.

(iii) make a decision in relation to the claim consisting of an award of redress or the dismissal of the claim, and

(iv) give the parties to the claim a copy of that decision in writing.

(c) Section 44 of the Workplace Relations Act 2015 shall apply to a decision of an adjudication officer given in respect of a claim for redress under this Act by an employee as it applies to a decision of an adjudication officer given in proceedings under section 41 of that Act.

(4)(a) An employer shall display on menus or in another suitable manner its policy regarding the distribution of tips to employees.

(b) The Minister shall introduce regulations to facilitate the introduction of Tronc schemes to ensure an equitable distribution of tips with the need for employer involvement.

(c) Subject to subsections (d) and (e), an employer or a director or shareholder of an employer may not share in tips or other gratuities redistributed under the section.

(d) An employer who is a sole proprietor or a partner in a partnership may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by-

- (i) some or all of the employees who share in the redistribution, or
  - (ii) employees of other employers in the same industry who commonly receive or share tips or other gratuities.
- (e) A director or shareholder of an employer may share in tips or other gratuities redistributed under subsection (a) if he or she regularly performs to a substantial degree the same work performed by-
- (i) some or all of the employees who share in the redistribution, or
  - (ii) employees of other employers in the same industry who commonly receive or share tips or other gratuities.”.

## **Offences**

4. Part 5 of the Principal Act is amended by the insertion of the following section after section 35:

“**35A.** (1) An employer who withholds tips or other gratuities from an employee, makes a deduction from an employee’s tips or other gratuities or causes the employee to return or give his or her tips or other gratuities to the employer without lawful excuse shall be guilty of an offence.

(2) Where the employer charged is found guilty of an offence under this section, evidence may be given of any like contravention on the part of the employer in respect of any period during the 3 years immediately preceding the date of the offence.

(3) A person guilty of an offence under this section for which no penalty, other than under this section, is provided shall be liable on summary conviction , to a fine not exceeding €2,500 or, at the discretion of the court, to imprisonment for a term not exceeding 6 months, or to both fine and the imprisonment.

(4) Where an offence under this section is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance and approval of, or to have been attributable to any neglect on the part of, a person who, when the offence was committed, was a director, manager, was purporting to act in any such capacity, that person (as well as the body corporate) shall be guilty of an offence and be liable to be proceeded against and punished as if guilty of the offence committed by the body corporate.

(5) Proceedings in relation to a summary offence under this Act may be prosecuted by the Minister.

(6) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, proceedings for an offence under this Act may be instituted within 12 months from the date of the discovery of the offence”.

#### **Transitional Provisions – collective agreements**

5. (1) If a collective agreement that is in effect on the day *section 4* of this Act comes into force contains a provision that addresses the treatment of employee tips or other gratuities and there is a conflict between the provision of the collective agreement and this section, the provision of the collective agreement prevails.
- (2) Following the expiry of a collective agreement described in *subsection (1)*, if the provision that addresses the treatment of employee tips or other gratuities remains in effect, *subsection (1)* continues to apply to that provision, with necessary modifications, until a new or renewal agreement comes into effect.

#### **Short title, collective citation, construction and commencement**

6. (1) This Act may be cited as the National Minimum Wage (Protection of Employee Tips) Act 2017.
- (2) This Act and the National Minimum Wage Acts 2000 and 2015 may be cited together as the National Minimum Wage Acts 2000 to 2017 and shall be construed together as one Act.
- (3) This Act shall come into operation on such day or days as may be fixed therefor by order or orders of the Minister.

## National Minimum Wage Act, 2000

### **Reckonable and non-reckonable pay components in calculating average hourly rate of pay:**

**19.**—(1) Subject to *section 18*, all the pay of an employee in a specific pay reference period shall be included in calculating the employee's average hourly rate of pay in that period for the purposes of determining under this Act whether an employee is being paid not less than the minimum hourly rate of pay to which he or she is entitled in that period.

(2) Any payments or benefits-in-kind listed in *Part 2* of the *Schedule* are not included as pay of an employee for the purposes of *subsection (1)*.

(3) The Minister may, by regulation, add an item to, delete an item from, or otherwise amend, the *Schedule* but only after consultation with such representatives of employers and employees in the State as the Minister considers appropriate.

(4) An employer shall not, for the purposes of this Act, change a payment or benefit-in-kind listed as a non-reckonable component of pay as set out in *Part 2* of the *Schedule* so that its status becomes that of a reckonable component of pay as set out in *Part 1* of the *Schedule* .

(5) For the purposes of this section, the amount, if any, that shall be allowed for board with lodgings, board only, and lodgings only in calculating the hourly rate of pay of an employee in a pay reference period shall be the amount declared as such under *section 11*.

## **SCHEDULE**

### Reckonable and Non-Reckonable Pay Components in Calculating Average Hourly Rate of Pay

#### PART 1 — RECKONABLE COMPONENTS

1. Basic salary.
2. Shift premium.
3. Piece and incentive rates, commission and bonuses, which are productivity related.
4. The monetary value of board with lodgings or board only or lodgings only, not exceeding the amount, if any, prescribed for the purposes of this item.
5. **The amount of any service charge distributed to the employee through the payroll.**
6. Any payments under section 18 of the Organisation of Working Time Act, 1997 (zero hour

protection).

7. Any amount in respect of any of the above items advanced in a previous pay reference period that relates to the specific pay reference period.
8. Any amount in respect of any of the above items earned in the specific pay reference period and paid in the next pay reference period or, where *section 9 (1)(b)* applies, paid in the pay reference period in which the record of working hours is received or due to be received by the employer or the pay reference period immediately after that.

## PART 2 — NON-RECKONABLE COMPONENTS

1. Overtime premium.
2. Call-out premium.
3. Service pay.
4. Unsocial hours premium.
5. **Any amount distributed to the employee of tips or gratuities paid into a central fund managed by the employer and paid through the payroll.**
6. Public holiday premium, Saturday premium and Sunday premium, where any such holidays or days are worked.
7. Allowances for special or additional duties including those of a post of responsibility.
8. Any payment of expenses incurred by the employee in carrying out his or her employment, including travel allowance, subsistence allowance, tool allowance and clothing allowance.
9. On-call or standby allowance.
10. Any payments for or in relation to a period of absence of the employee from the workplace, such as sick pay, holiday pay, payment for health and safety leave under the Maternity Protection Act, 1994, or pay in lieu of notice, but not including a payment under section 18 of the Organisation of Working Time Act, 1997 (zero hour protection).
11. Any payment by way of an allowance or gratuity in connection with the retirement or resignation of the employee or as compensation for loss of office.
12. Pension contributions paid by the employer on behalf of the employee.
13. Any payment referable to the employee's redundancy.
14. Any advance of a payment referred to in *Part 1* of this Schedule in the specific pay reference period relating to a subsequent pay reference period.
15. Any payment-in-kind or benefit-in-kind, except board with lodgings, lodgings only or board only.
16. Any payment to the employee otherwise than in his or her capacity as an employee.
17. Any payment representing compensation for the employee, such as for injury or loss of tools and equipment.
18. An amount of any award under a staff suggestion scheme.
19. Any loan by the employer to the employee, other than an advance payment referred to in *paragraph 7 in Part 1* of this Schedule.

## The Payment of Wages Act, 1991

### **Definition of ‘wages’ in the payment of Wages Act, 1991, Section 1:**

“wages”, in relation to an employee, means any sums payable to the employee by the employer in connection with his employment, including—

- (a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise, and
- (b) any sum payable to the employee upon the termination by the employer of his contract of employment without his having given to the employee the appropriate prior notice of the termination, being a sum paid in lieu of the giving of such notice:

Provided however that the following payments shall not be regarded as wages for the purposes of this definition:

- (i) any payment in respect of expenses incurred by the employee in carrying out his employment,
- (ii) any payment by way of a pension, allowance or gratuity in connection with the death, or the retirement or resignation from his employment, of the employee or as compensation for loss of office,
- (iii) any payment referable to the employee's redundancy,
- (iv) any payment to the employee otherwise than in his capacity as an employee,
- (v) any payment in kind or benefit in kind.

## UK – 2015 Call for Evidence – Options for Reform

<b>Policy Options Put Forward by the British Government</b>	
<b>Option 1.</b> Ensure Transparency to consumers that discretionary payment for service is just that -discretionary	
Option 1A	Government would allow businesses to suggest a discretionary payment amount for service. Any suggestions of a payment (e.g. service charges) for service must emphasise that this is discretionary for the consumer. Under this option, discretionary payments for service would remain as an 'opt out' decision for a better informed consumer. The report outlines various methods to achieve Option 1A such as how the bill is structured and the presence of signage within the premises.
Option 1B	Prevent businesses from suggesting any specific amount of discretionary payment for service. Under this option, any discretionary payment would be an 'opt in' decision of the consumer.
Option 1C	Increase transparency regarding cover charges. The Government is of the opinion that cover charges are payments in addition to the core service (i.e. the price of the menu items) but are part of the contractually agreed price and therefore mandatory to the consumer. A consumer can choose whether to use the service knowing the cover charge will be added to the bill.
<b>Option 2.</b> Ensure workers receive a fair share from discretionary payments for service	
Option 2A	Prevent any employer deduction from discretionary payments for service, except for those required under tax law. Under this option the Government would consider prohibiting employers from charging workers an administration fee or any other deductions beyond those required by tax. Most employers noted that all they deduct is the mandatory amount when dealing with discretionary payments and that their role is unavoidable in administering these payments.
Option 2B	Limit the deductions from discretionary payments for service an employer can make (i.e. specify a percentage limit – for credit card charges etc.)
Option 2C	Ban or restrict the levying of table sales charges on staff.
Option	Incentivise and increase the prevalence of well managed Tronc systems. The

2D	Government want to explore ways to incentivise the use of completely independent Tronc systems that would be administered through an employee representative. The Government put forward two main options: firstly, to update the Tronc guidelines, or secondly, to place Tronc requirements on a statutory footing.
<b>Option 3.</b> Increase transparency for consumers and workers regarding the treatment of discretionary payments for service	
Option 3A	Any application of the Code would be amended to include updated guidance and principles to reflect any of the changes proposed within this consultation.
Option 3B	Apply a Statutory Code of Practice. Making the Code of Practice statutory would not impose specific legal obligations that could be directly enforceable by legal proceedings, but the Code would have an increased status and could be taken into account in court or tribunal proceedings for the purpose of determining liability or sanctions in relation to related legal duties (employment law or consumer law). It may therefore be more effective in encouraging employers to adhere to the provisions of the code.

*Table 1: Policy Options Put forward by the British Government*

## Ontario – The Protecting Employee Tips Act, 2015

The *Employment Standards Act, 2000* is amended by adding the following Part:

### Part V.1 - Employee tips and other gratuities

#### Definition

**14.1** (1) Subject to subsection (2), in this Part, “tip or other gratuity” means,

- (a) a payment voluntarily made to or left for an employee by a customer of the employee’s employer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees,
- (b) a payment voluntarily made to an employer by a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees,
- (c) a payment of a service charge or similar charge imposed by an employer on a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees, and
- (d) such other payments as may be prescribed.

#### Same

(2) “Tip or other gratuity” does not include,

- (a) such payments as may be prescribed; and
- (b) such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges.

#### Prohibition re tips or other gratuities

**14.2** (1) An employer shall not withhold tips or other gratuities from an employee, make a deduction from an employee’s tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorized to do so under this Part.

#### Enforcement

(2) If an employer contravenes subsection (1), the amount withheld, deducted, returned or given is a debt owing to the employee and is enforceable under this Act as if it were wages owing to the employee.

#### Statute or court order

**14.3** (1) An employer may withhold or make a deduction from an employee’s tips or other gratuities or cause the employee to return or give them to the employer if a statute of Ontario or Canada or a court order authorizes it.

### Exception

(2) Subsection (1) does not apply if the statute or order requires the employer to remit the withheld, deducted, returned or given tips or other gratuities to a third person and the employer fails to do so.

### Pooling of tips or other gratuities

**14.4** (1) An employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if the employer collects and redistributes tips or other gratuities among some or all of the employer's employees.

### Exception

(2) An employer shall not redistribute tips or other gratuities under subsection (1) to such employees as may be prescribed.

### Employer, etc. not to share in tips or other gratuities

(3) Subject to subsections (4) and (5), an employer or a director or shareholder of an employer may not share in tips or other gratuities redistributed under subsection (1).

### Exception — sole proprietor, partner

(4) An employer who is a sole proprietor or a partner in a partnership may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or other gratuities.

### Exception — director, shareholder

(5) A director or shareholder of an employer may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or other gratuities.

### Transition — collective agreements

**14.5** (1) If a collective agreement that is in effect on the day section 1 of the *Protecting Employees' Tips Act, 2015* comes into force contains a provision that addresses the treatment of employee tips or other gratuities and there is a conflict between the provision of the collective agreement and this Part, the provision of the collective agreement prevails.

### Same — expiry of agreement

(2) Following the expiry of a collective agreement described in subsection (1), if the provision that addresses the treatment of employee tips or other gratuities remains in effect, subsection (1) continues to apply to that provision, with necessary modifications, until a new or renewal agreement comes into effect.

### Same — renewed or new agreement

(3) Subsection (1) does not apply to a collective agreement that is made or renewed on or after the day section 1 of the *Protecting Employees' Tips Act, 2015* comes into force.

**Commencement**

2. This Act comes into force on the day that is six months after the day it receives Royal Assent.

**Short title**

3. The short title of this Act is the *Protecting Employees' Tips Act, 2015*

## Guidelines – Protecting Employee Tips Act, 2015, Ontario, Canada

### **What are tips and other gratuities?**

Under the [Employment Standards Act, 2000](#) (ESA), a “tip or other gratuity” is:

- a payment voluntarily made or left by a customer to an employee
- a payment voluntarily made or left by a customer to the employer for employees
- a payment of a service or similar charge imposed by the employer

where a reasonable person would believe that the payment would be kept by an employee or shared amongst employees. Examples of tips and other gratuities include:

- payment given to an employee by a customer for a service in any form, including cash or other electronic payments such as debit or credit card
- service charges at banquet halls or other establishments that are meant for employees

### **Are “service charges” considered tips and other gratuities?**

If service charges are being included on invoices, banquet hall rental agreements, etc., employers should be explicit about who and what that money is intended for (e.g., tips for servers or facilities charges). Otherwise, the whole amount of the service charge may be considered to be tips and other gratuities that were intended for employees.

### **Can an employer prohibit tipping in his or her workplace?**

Employers can decide if tipping is allowed in their businesses. If tipping is not allowed, the employer should make it clear to his or her customers that tips and other gratuities will not be accepted by employees or the employer.

### **When and how does an employer have to pay out tips and other gratuities to his or her employees?**

There is no requirement for employers to establish a regular period for paying out tips and other gratuities to their staff. However, it is a good idea for employers to establish and stick to a regular period for paying out tips and other gratuities.

Employers are required to distribute tips and other gratuities to employees in cash, cheque or direct deposit.

### **How should tips and other gratuities be tracked?**

Employers should:

- establish a clear policy for the handling of tips (e.g, how tip jars will be divided, when and how tips paid electronically will be paid out to employees)
- post the policy in the workplace where employees can see it
- track tips and other gratuities paid by electronic methods and the amount given to employees

Employees should also track the tips they receive, including amounts received from a tip pool and how much they pay into tip pools. A number of downloadable mobile apps are available to help track tips and other gratuities.

### **Are employers entitled to a portion of their employees' tips and other gratuities?**

As of June 10, 2016, employers generally cannot withhold, make deductions from, or make employees return their tips and other gratuities to the employer.

Employers are prohibited from withholding or making deductions from his or her employees' tips and other gratuities for such things as spillage, breakage, losses or damage, etc.

Employers are allowed to keep the tips and other gratuities that they receive themselves.

### **What if an employer kept a portion of their employees' tips and other gratuities before June 10, 2016?**

Before June 10, 2016, the ESA did not cover tips and other gratuities. This means that employers were not prohibited from withholding, making deductions from, or making an employee return his or her tips to the employer if the tips were earned and received before June 10, 2016. Note, however, that other laws not administered by the Ministry of Labour may contain prohibitions or restrictions on this, as may an employee's employment contract or collective agreement.

### **Can an employee agree to let his or her employer take a portion of his or her tips and other gratuities?**

An employee's right to keep tips and other gratuities, except in limited circumstances, is an employment standard. An employee cannot contract out of or waive this standard, even if the employee agrees to do so in writing or verbally.

For example, an employee cannot agree to:

- give the employer all of his or her tips and other gratuities in exchange for a higher rate of pay
- waive the right to minimum wage in exchange for keeping all or a higher percentage of his or her tips
- give the employer a certain percentage of his or her tips to cover spillage, breakage, losses or damage, etc.

**Are there any circumstances in which it's okay for an employer to withhold, made deductions from or make an employee return his or her tips and other gratuities?**

Employers are allowed to withhold, make deductions from, or make an employee return tips and other gratuities if they are:

- required by law or court order, or
- administering a tip pool

**What is a tip pool?**

A tip pool is a collection of employees' tips that is redistributed among some or all of the employer's employees. This includes tip-outs, which are payments from one employee to other employees because it is required by their employer's policy.

An employer may withhold, make a deduction or require an employee to give them a portion of their tips and other gratuities if the amount that is collected will be redistributed as part of a tip pool.

**Does there have to be a tip pool arrangement in the workplace?**

No. Employers can decide if there will be a tip pooling arrangement in the workplace, including who will participate in a tip pool and how it will be distributed (e.g., the amount received by employees, when and how shares will be distributed, and how and when to vary or change the arrangement, etc.).

**How should tip pool arrangements be tracked?**

Employers should:

- establish a clear policy for the tip pool and post it in the workplace where employees can see it
- track the amounts collected and redistributed as part of a tip pool

There are a number of online tools available to help employers track and calculate tip pools.

Employees should track how much they pay into and the amounts they receive from a tip pool.

**Do employees have to agree to a tip pool before an employer can make a deduction from their tips and gratuities?**

No. Employers do not need to get their employees' written or oral agreement to take a deduction from their tips and other gratuities if the amount will be redistributed among some or all of the employees as part of a tip pool.

**Can employers keep their tips and participate in tip pools?**

Yes. Employers are allowed to keep the tips they earn themselves. However, an employer cannot share in a tip pool **unless**:

- the employer is a sole proprietor, partner, director or shareholder in the business; **and**
- the employer spends most of his or her time performing the same work as:
  - some or all of the employees who share in the redistribution, **or**
  - employees of other employers in the same industry who commonly receive tips and other gratuities.

**Can managers keep their tips and participate in tip pools?**

Managers can keep their tips and can generally participate in a tip pool.

**What happens if an employer violates the prohibition against taking an employee's tips and other gratuities?**

If an employer is found to have violated the prohibition against taking an employee's tips and other gratuities, the amount wrongfully kept will be considered a debt owing by the employer to the employee. The debt will be enforceable under the ESA as if it were wages owing to an employee.

Remember that the prohibition against taking tips and other gratuities does not apply until on or after June 10, 2016.

Employees who believe their employer – or former employer – has not complied with the ESA can file a claim with the Ministry of Labour. The claim must be submitted on a designated form for the ministry to investigate. The [claim form](#) is available on the ministry's website and at select ServiceOntario Centres. Please be aware that there are time limits that apply to the filing of a complaint.

**Do the new rules about the handling of tips and other gratuities apply to service charges for events that were booked and paid for before June 10, 2016?**

No. The general prohibition against making deductions from, etc., employees tips and other gratuities does not apply to service charges for events taking place after June 10, 2016, that were booked and paid for (either fully or partially) **before** June 10, 2016. Claims for tips and other gratuities are valid only if the tip or other gratuity is paid on or after June 10, 2016, for services performed on or after June 10, 2016. This is because prior to June 10, 2016, there was no general prohibition on an employer making deductions, etc., from employees' tips and other gratuities.

**Can an employee file a claim against another employee for withholding tips and gratuities?**

For example, if a server is required to tip out 2% of sales to the bartender but only tips out 1%, or if a hairstylist is required to put in 5% of her tips into the tip pool but only puts in 2%.

No. Employees can only file claims against their employers. If an employee believes another employee is withholding tips and gratuities, they should speak to their employer about it.

**Can an employer take a portion of tips or other gratuities that are paid by credit card? What about debit card?**

[O. Reg. 125/16](#) excludes a portion of credit card processing fees from the definition of "tips or other gratuity".

Under the regulation, where tips and gratuities are paid by a customer on a credit card, an employer could deduct or withhold a portion of the credit card processing fee from the tip or gratuity provided to the employee. Employers are able to deduct the greater of a flat rate of 1.5% of the tip or the pro-rated share of the processing fee associated with the tip on the specific credit card transaction.

Employers are not able to deduct a portion of debit card processing fees from tips or other gratuities.



