SJC-13039

KHRIS HOVAGIMIAN & another[1] vs. CONCERT BLUE HILL, LLC,[2] & others.[3]

Norfolk. March 1, 2021. - August 23, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Georges, JJ.

Tips. Labor, Wages. Statute, Construction. Practice, Civil, Judgment on the pleadings. Words, "Service charge."

Civil action commenced in the Superior Court Department on May 7, 2018.

The case was heard by Elaine M. Buckley, J., on motions for judgment on the pleadings.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Paul Holtzman for the plaintiffs.
Paul G. King for the defendants.

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[1] Dilma Silva. Both plaintiffs bring the action individually and on behalf of all other persons similarly situated.

[2] Doing business as Blue Hill Country Club.

[3] Peter Nanula, Gregg Deger, Bryan Elliott, Francisco Ventura, and Tom Gibson.

Shannon Liss-Riordan & Tara Boghosian, for Massachusetts Employment Lawyers Association, amicus curiae, submitted a brief.

GEORGES, J. Under G. L. c. 149, § 152A, commonly known as the Tips Act (act), an employer or other person who collects a service charge or tip, as defined by the act, is required to remit the total proceeds of that charge to wait staff and service employees in proportion to the services provided. The plaintiffs, Khris Hovagimian, Dilma Silva, and other individuals (collectively, plaintiffs), worked as service employees for Concert Blue Hill, LLC, doing business as Blue Hill Country Club, and its managerial staff (collectively, Blue Hill or the club).[4] The plaintiffs allege that Blue Hill violated the act by failing to remit to them charges identified as a "service" charge on invoices sent to patrons, but previously described as an "administrative" or "overhead" charge in initial documents. Blue Hill maintains that the term used on the invoices was simply poor drafting and that, pursuant to the "safe harbor" provision of the act, G. L. c. 149, § 152A (d), second par., the club is permitted to retain the disputed charges.

[4] Defendants Peter Nanula, Gregg Deger, Bryan Elliott, Francisco Ventura, and Tom Gibson acted as managerial staff for Blue Hill Country Club at various times during the period at issue in the complaint.

We conclude that the plaintiffs' interpretation is correct and consistent with our rules of statutory interpretation. The term "service charge" is a defined term in the act. See G. L. c. 149, § 152A (a). Pursuant to that clear definition, we hold that the disputed charge is properly characterized as a "service charge" and, further, that the safe harbor provision does not apply in these circumstances. Accordingly, the order allowing Blue Hill's motion for judgment on the pleadings and denying the plaintiffs' cross motion must be reversed.

Background. 1. Factual history. Blue Hill owns and operates an establishment that hosts banquets and other events requiring food and beverage services. When a patron hosts an event using Blue Hill's facilities, the transaction is processed through three steps. At the initial step, patrons are required to execute an "Event Contract" with the club. This threshold contract details, among other things, deposit and payment schedules, event hours, menu selections, and pricing. The contract contains a provision stating that the patron will be charged a ten percent gratuity that is remitted to wait staff employees, as well as an additional ten percent "administrative" or "overhead" charge that is retained by the club, on all food and beverage purchases.[5]

[5] Under a section entitled "Menu Selections & Pricing," the contract provides:

Once the contract has been signed, and prior to the event itself, the second step is that the patron executes a "Banquet Event Order Invoice." The order invoice details, among other things, the number of anticipated guests, the patron's specific food and beverage choices, and instructions for the management of the event. The monetary charges on the order invoice are organized into three categories: "charges," "taxes," and "service charges and gratuities." The ten percent administrative charge described in the contract is not

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> "All food and beverage is subject to ten percent (10%) gratuity which is distributed one hundred percent (100%) to the wait staff employees, service employees and service bartenders working on the function and an overhead charge of an additional ten percent (10%) administrative charge is also added on all food and beverage purchases which is held by the [defendant] to be used for administration and other overhead costs and does not represent or constitute any form of gratuity to the wait staff, service employees and service bartenders working on the function."

Additionally, under a section entitled "Schedule of Charges and Fees -- Event," the contract enumerates the following categories of charges the patron can expect to incur:

> "A 10% gratuity and a 10% overhead charge are applied to all food and beverage charges together with the 7% Massachusetts Meals and Sales Tax. The 10% gratuity is distributed 100% to the wait staff employees, service employees and service bartenders serving the function. The overhead charge is retained by [the defendant] for administrative and overhead costs only. The 10% overhead charge does <u>not</u> represent a gratuity or tip to wait and service staff" (emphasis in original).

specifically labeled or identified in the order invoice but is equal to the ten percent "service" charge in the final bill.

After the event has been held, the third and final transactional step takes place; the patron receives a second invoice from Blue Hill that operates as the final bill and describes the charges the patron incurred. In this invoice, under a heading labeled "Service & Tax Charges," three separate categories of charges are listed: "tax," "gratuity," and "service." The ten percent administrative charge described in the contract again is not specifically labeled or identified in the final invoice. The charge described as an "administrative" or "overhead" charge in the contract, but labeled as a "service" charge in the final bill, is the disputed fee at issue here.

2. Prior proceedings. In May of 2018, the plaintiffs commenced an action in the Superior Court against Blue Hill, seeking to recover under the act the full proceeds of the "service" charges listed in the order invoices and final invoices that the club collected from its patrons and retained for itself rather than remitting to wait staff employees. The plaintiffs also sought damages for the club's violation of minimum wage laws, as well as class certification, treble damages, injunctive relief, and attorney's fees. Blue Hill moved for judgment on the pleadings, pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), as to all of the plaintiffs'

claims, arguing that the complaint failed to state a claim for violation of the act and requesting judgment in the club's favor. The plaintiffs filed a cross motion seeking judgment in their favor as to their claim under the act.[6] In March 2019, a Superior Court judge granted Blue Hill's motion for judgment on the pleadings, denied the plaintiffs' cross motion, and entered a judgment of dismissal.

The plaintiffs appealed, and a majority of the Appeals Court affirmed the judge's order, on the ground that the safe harbor provision of the act, G. L. c. 149, § 152A (d), second par., allowed Blue Hill to retain the proceeds from the disputed "service" charge. See Hovagimian v. Concert Blue Hill, LLC, 98 Mass. App. Ct. 69, 73-74 (2020). We allowed the plaintiffs' application for further appellate review and now conclude that the plain meaning of the act requires the club to remit the disputed charge to the plaintiffs.

Discussion. 1. Standard of review. We review a decision affirming or denying a motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c), as well as questions of

[6] The parties argued, and the motion judge agreed, that the dispositive issue raised in the cross motions was whether the disputed charge is a "service charge," which the act requires that the club remit to the plaintiffs, or is a "house or administrative fee," which the act permits Blue Hill to retain. The motion judge did not address the plaintiffs' other claims.

statutory interpretation, de novo. See Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013); Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600-601 (2010). We base our review on the allegations contained within the complaint.[7] Kraft Power Corp., supra.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). "Where possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction." DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009). "[O]ur respect for the Legislature's considered judgment dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the

[7] As discussed infra, the parties disagree on whether we should consider the contract in determining whether the disputed charge constitutes a "service charge" within the meaning of the act. In reviewing an affirmance or denial of a motion for judgment on the pleadings, we review the same pleadings presented to the motion judge, which here included both the contract and the invoices included with Blue Hill's answer to the plaintiffs' complaint. See Mass. R. Civ. P. 10 (c), as amended, 456 Mass. 1401 (2010) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). See also Pilch v. Ware, 8 Mass. App. Ct. 779, 780 (1979) ("Everything which was presented to the . . . judge [below] is in the record before us . . .").

clear meaning of the language requires such an interpretation." Meshna v. Scrivanos, 471 Mass. 169, 173 (2015), quoting Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806, 811 (2011).

2. Classification of disputed charges. The act "applies to tips, gratuities, and fees that are called 'service charges' in aid of a clear purpose: letting employees keep these payments." Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632, 638 (2007). Specifically, if an employer "submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip," the service charge or tip must be remitted to the employee for the services he or she rendered. G. L. c. 149, § 152A (d). The act, as amended in 2004, St. 2004, c. 125, § 13, defines the term "service charge" as

> "a fee charged by an employer to a patron in lieu of a tip to any [protected employee], including any fee designated as a service charge, tip, gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a [protected employee] in lieu of, or in addition to, a tip."

G. L. c. 149, § 152A (a). This statutory definition of "service charge" controls, "unless a different meaning is required by the context" to effectuate the legislative intent of securing for employees these types of payments. G. L. c. 149, § 152A (a). See DiFiore, 454 Mass. at 497 (invoking "context" provision to thwart employer's "attempt to avoid compliance with the [a]ct"). If a fee is determined to be a "service charge" under the act,

then, as the statutory language further specifies, the "total proceeds of that service charge . . . shall be remitted only to the [protected employees] in proportion to the service provided by those employees." G. L. c. 149, § 152A (d).

This case centers on contractual documents that are inconsistent with one another. The record indicates that all three of these documents -- the original contract and the two invoices -- were drafted by Blue Hill. Under a long-established principle contract law, ambiguities in a contract are construed against the drafter. Costa v. Brait Bldrs. Corp., 463 Mass. 65, 76 (2012). See 2 Restatement (Second) of Contracts § 206, at 105 (1981). Although the plaintiffs are not parties to the agreements between Blue Hill and its patrons, the rationale of this rule nonetheless is applicable here. In light of the clear protective purpose of the act, Blue Hill appropriately should bear the responsibility of its choice of labels in its contracts. Indeed, the record suggests that Blue Hill clearly is aware of these label distinctions given its multiple sets of contracts, some of which use the correct language that would permit the club to retain the fee. All Blue Hill (or any employer) must do to avoid liability to its wait staff employees for an amount labeled as a "service" charge that the employer intends to retain is to be conscientious and consistent in its drafting.

Here, the Blue Hill contract describes the disputed fee as an "administrative" or "overhead" charge, which is to be retained by the club, and lists a separate fee as a "gratuity" that is to be distributed entirely to wait staff. Were this the only language to consider, we comfortably could conclude that the disputed charge does not fall within the definition of a "service charge" under G. L. c. 149, § 152A (a). In both subsequent invoices that Blue Hill sent to its patrons, however, it clearly listed the disputed fees as a "service" charge. Contrast Norrell v. Spring Valley Country Club, Inc., 98 Mass. App. Ct. 57, 67-68 (2020) (disputed fees were not "service charge[s]" under act where invoices to patrons labeled fees as "house charge[s]"). Blue Hill's invoices informed patrons that they were being billed for "service charge[s]," a term specifically defined in the act as proceeds payable to the protected service employees.

The phrase "service charge" is also a term that a person reasonably would assume refers to proceeds that would be paid to an employee for "services" rendered. See Black's Law Dictionary 1644 (11th ed. 2019) (defining "service charge" as "[a] charge assessed for performing a service, such as the charge assessed by a restaurant for waiters"). Cf. United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 601 (1984), quoting G. L. c. 4, § 6, Third ("words and phrases shall

be construed according to the[ir] common and approved usage"). Accordingly, the disputed fee is characterized most appropriately within the meaning of G. L. c. 149, § 152A (a), as a "service charge" that must be paid to the plaintiffs. See DiFiore, 454 Mass. at 491 (act's terms evince Legislature's intent that "service employees receive the tips, gratuities, and service charges that customers intend them to receive"). The use of "service charge" in this limited context, which would render the employer liable to pay service employees the designated amount, also conforms with ordinary experience.

In our prior jurisprudence construing the act, we consistently have held that its unambiguous terms impose liability on employers who fail to remit employer-designated "service" charges to their employees. See, e.g., Meshna, 471 Mass. at 175 ("if payment of a tip or service charge is made to an employer, the statute requires that the proceeds be remitted to the [covered] employees" [quotation and citation omitted]); Cooney, 69 Mass. App. Ct. at 637 ("the statutory language reflects legislative intent to regard any fee that the invoicing entity chooses to call a 'service charge' on an invoice for food or beverage service as being the functional equivalent of a tip or gratuity, thereby subjecting the fee to the statute"). As we have previously noted, "[t]he Legislature intended to ensure that service employees receive all the proceeds from service

charges, and any interpretation of the definition of 'service charge' must reflect that intent." DiFiore, 454 Mass. at 493. A plain reading of the language of the final invoice, labeling the disputed fee as a "service" charge, accomplishes this purpose.

Against this ordinary meaning and prior case law, Blue Hill maintains that the statutory definition of "service charge" does not encompass the disputed fee on the patrons' invoices, because G. L. c. 149, § 152A (a), also provides that the term "service charge" may be defined by "a different meaning [if that] is required by the context or is specifically prescribed." In essence, Blue Hill argues that because it "specifically prescribed" in its contracts that the disputed fee is an "administrative" or "overhead" charge, we may disregard the designation of the fee as a "service" charge on the subsequent invoices tendered to patrons. We are unpersuaded.

We previously have explained that "[t]he Legislature . . . made clear . . . that it wished the definitions it enacted to serve [the act's] legislative purpose, not thwart it, and invited courts to revise the definitions if they interfered with that legislative purpose." DiFiore, 454 Mass. at 493-494. We further noted that G. L. c. 149, § 152A (a), "instructs those interpreting the definitions in the [a]ct to give a different meaning to a defined term if necessary to prevent such

disharmony among the provisions of the statute." Id. at 494-495. Thus, in considering the "context" as contemplated by § 152A (a), the Legislature intended reviewing courts to look to the context of the statutory scheme, and not individual transactions between parties.

Blue Hill's interpretation of the act transforms a law that clearly is meant to help employees secure their tips into one that would aid employers in frustrating this purpose. This interpretation is contrary to our settled canons of construction because it requires us to disregard the unambiguous language employed in the invoices, and instead substitute those words for the parties' intent. This we cannot do. See A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 431 (2018) ("we analyze the contract according to the principle that '[w]hen contract language is unambiguous, it must be construed according to its plain meaning'" [citation omitted]).

Consistent with well-established principles of statutory construction, the act requires employers to proceed with due care in drafting bills, invoices, and charges to patrons. Even if an employer's carelessness in drafting were to result in its employees unintendedly acquiring proceeds that the employer planned to retain, that result is mandated by a plain reading of the statute, consistent with the Legislature's intent. Cooney,

69 Mass. App. Ct. at 639 ("To be sure, from time to time service employees may reap seemingly unfair benefits from an invoicing entity's honest misstep, but such situations do not require that the statute be differently construed"). The employer has every opportunity, and every incentive, to designate the categories of charges on its bills and invoices accurately in the first instance and should expect the terms it uses to be understood by its customers in their usual, ordinary meaning. Indeed, "[t]his is not a case where following the statute's literal meaning would lead to a result contrary to legislative intent." Id. at 638, quoting Shamban v. Masidlover, 429 Mass. 50, 54 (1999). See DiFiore, 454 Mass. at 494 ("Because a customer reasonably would expect a fee 'designated as a service charge' to be given to service employees, all, or nearly all, fees designated as service charges would also be fees that customers would reasonably expect to be given to service employees").

Had the Legislature wished to place the burden elsewhere, it could have done so.[8] See Cooney, 69 Mass. App. Ct. at 638

[8] In 2020, the Legislature amended the act, but declined to alter the definition of "service charge," notwithstanding precedent from this court and the Appeals Court interpreting the act to reflect strict liability on the part of the invoicing entity when a fee is designated as a "service" charge, tip, or gratuity. See St. 2020, c. 358, § 77 (amending G. L. c. 149, § 152A, to expand definition of "wait staff employee"). See also Commonwealth v. Montarvo, 486 Mass. 535, 541 (2020), quoting Commonwealth v. Vega, 449 Mass. 227, 231 (2007) ("The

("The Legislature no doubt could have . . . put[] the burden on service employees to prove in each instance that a particular 'service charge' was in fact intended by the 'employer or other person' as a tip or gratuity. Doing so would surely have accorded greater protection to the innocent 'employer or other person' and would have made recovery under the statute more onerous a task. But the Legislature did not strike the balance that way . . ." [footnote omitted]). Ascribing its plain meaning to the term "service charge" settles expectations.[9] Patrons know when they receive a bill whether any portion of the amount billed will be going to the employees, or whether they must be tipped separately.[10] Likewise, if "service charge"

Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of this court").

[9] As amicus Massachusetts Employment Lawyers Association aptly points out, "[i]nconsistent representations to customers increase the likelihood that waitstaff will lose out on earnings they would otherwise receive." This is so because "[w]hile customers tend to rely on pre-event contracts to budget for how much an event will cost, customers tend to rely on the final invoice to determine whether to add an extra tip for waitstaff." See Robinson, If a Restaurant Adds a Surcharge, Do I Still Have to Tip?, LAist (Aug. 26, 2019), https://laist.com/2019/08/26/restaurant_surcharge_tip_los_angeles [https://perma.cc/59D2-A2EZ] (answering that no tip is required where restaurant includes surcharge).

[10] We note that the redacted sample event contract appended to Blue Hill's answer to the plaintiffs' complaint -- the only document that purported to inform the patron of the ten percent house fee -- was executed two months prior to the date of the scheduled event. We note further that the redacted sample final invoice is dated on the day of the event itself. The length of

appears on an invoice, then employees know whether they are entitled to any portion of the paid bill.

3. Safe harbor provision. Blue Hill argues -- and the Appeals Court agreed -- that despite Blue Hill's use of the term "service charge" on both invoices, the clear language of the contract brings into play the safe harbor provision of the act, which entitles Blue Hill to retain the disputed fee.[11] The safe harbor provision of the act, G. L. c. 149, § 152A (d), second par., provides:

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time between the signing of the event contract and the event further supports our holding, as a patron cannot reasonably be expected to base his or her tipping decision on a contract signed months earlier, rather than on the final invoice tendered on the heels of the event's completion.

[11] Blue Hill argues that G. L. c. 149, § 152A (d), which requires it to remit disputed charges to wait staff employees if it "submit[ted] a bill, invoice or charge to a patron . . . that impose[d] a service charge," should alter our analysis. Blue Hill apparently is suggesting that the inclusion of the word "charge" in the statutory language means the safe harbor provision should not be limited to those documents that have been identified as a "bill, invoice or charge," but, rather, also should be applied to the entirety of the documents that make up the transaction between the employer and the patron. In essence, Blue Hill attempts to circumvent the plain meaning of the statute by contorting the statutory language. This claim is unavailing. We do not look beyond the language of the statute when the plain meaning of the statutory language does not lead to absurd results. See Sullivan v. Brookline, 435 Mass. 353, 360 (2001). We must look to the "charge . . . impose[d]" on the patron, here the final invoice, as it designated a final and identifiable monetary amount the patron was required to pay. That invoice identified the disputed charge as a service charge, not a "house or administrative fee," as set forth in the safe harbor provision, rendering the safe harbor provision inapplicable.

> "Nothing in this section shall prohibit an employer from imposing on a patron any house or administrative fee in addition to or instead of a service charge or tip, if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

Thus, by its own terms, the safe harbor provision permits an employer to "impos[e] on a patron any house or administrative fee in addition to or instead of a service charge or tip," but only so long as the employer give patrons a sufficient "designation or written description" of the fee. G. L. c. 149, § 152A (d), second par. By using different terms to denote the different fees at issue -- "house or administrative fee" as compared to "service charge or tip" -- the Legislature made clear that these terms are independent of each other and refer to different fees. We thus must read "service charge" in light of the plain and ordinary meaning of the words the Legislature chose to use in defining the term. See Beeler v. Downey, 387 Mass. 609, 617 (1982) ("we choose to follow the canon of statutory construction that where words are used in one part of a statute in a definite sense, they should be given the same meaning in another part of the statute"). Accordingly, because Blue Hill denoted the disputed fee in the final invoice as a "service" charge, the safe harbor provision is inapplicable.

Conclusion. The order granting Blue Hill's motion for judgment on the pleadings and denying the plaintiffs' cross motion is vacated and set aside. The matter is remanded to the Superior Court for entry of an order denying Blue Hill's motion for judgment on the pleadings and granting the plaintiffs' cross motion consistent with this opinion and for further proceedings.

So ordered.

KAFKER, J. (dissenting). I respectfully dissent. I would hold that the Tips Act, G. L. c. 149, § 152A, was not violated for the reasons articulated in the Appeals Court majority opinion, Hovagimian v. Concert Blue Hill, LLC, 98 Mass. App. Ct. 69 (2020).