EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105737/2016

Held in Glasgow on 1 March and 18 April 2016

Employment Judge: Claire McManus

Mr Anthony Broadway	**Claimant** **Represented by:-** **Mrs S Broadway**
DPD Group UK Limited	**Respondent** **Represented by:-** **Mr Clarke - (Counsel)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

- The respondent has not made an unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 in terms of unpaid wages and the claimant's claim in respect of such unpaid wages does not succeed.

REASONS

Background

1. The claimant makes a claim for unpaid wages. His claim is made under section 13 of the Employment Rights Act 1996 ('the ERA') and is in respect of payments which the claimant claims are due to him in respect of him carrying out work for the respondent driving an 18 tonne vehicle. The respondent denies that the claimant is due any salary or outstanding payments from them. The claimant continues to be employed by the respondent. The ET1 was lodged on 21 December 2016. The ET3 response was lodged on 19 January 2017.

2. The claimant relied on papers included in an inventory with documents numbered 1 – 14. Where papers in that inventory are referenced in this Decision the numbering in shown prefaced with a 'C'. There was some duplication with papers relied on by the respondent, in their consecutively page numbered inventory. Where papers in that inventory are referenced in this Decision, the numbering is shown prefaced with an 'R'.

Issues

3. The Tribunal required to determine whether the claimant was entitled to any payments from the respondent in respect of work done by him in connection with driving an 18 tonne vehicle. If the Tribunal determined that the claimant was legally entitled to such payments then it was agreed that the failure to make these payments would be unlawful in terms of section 13 of the Employment Rights Act 1996 ('the ERA'). The parties helpfully agreed that that if the Tribunal found that the claimant was so entitled, the sum due to be paid to the claimant by the respondent would be £6,699.80.

4. In the event of the Tribunal not upholding the claimant's claim, the respondent sought an expenses award against the claimant.

Findings in Fact

5. The following facts material to the issues were agreed or found by the Tribunal to be proven:-

   (a) The respondent is an international parcel delivery business with approx. 10,000 employees in the UK. It operates from 56 depot sites in the UK, including Glasgow. The claimant is employed as a Collection and Delivery driver based in the Glasgow depot at Tannochside. Scotland is part of the respondent's Region 6 (Aberdeen to Durham). Within Region 6, the respondent employs

approx 800 drivers, together with 2/300 warehouse staff and back office staff.

(b) The respondent employs four different categories of drivers, currently known by various terms, being:-

(i) C & D (Collection and Delivery) Driver, normally carrying out collections and deliveries driving a 3 ½ tonne 'sprinter' type van.

(ii) C & D Driver 7½ tonnes, normally carrying out collections and deliveries driving a 7½ tonne vehicle.

(iii) Class 2, HGV1, 18 tonne or LGVC driver, normally carrying out collections and deliveries driving an 18 tonne vehicle.

(iv) Class 1, HGV1 + E, LGVC +E or 'artic' driver, normally carrying out collections and deliveries driving an articulated vehicle with a trailer.

The differing payments are made to the different categories of driver. The role of Class 2/ HGV1/ 18 tonne / LGVC driver has a different rate of pay than that of a C & D driver. Approximately 90% of the respondent's drivers are employed as C & D drivers to drive vans. An 18 tonne vehicle is an HGV and the driver of an 18 tonne vehicle requires to have and maintain an HGV driving licence. It is more efficient for the respondent to carry out collections and deliveries using smaller vans, which have less operational costs. Larger vans are used for bulk deliveries e.g. to retail shopping centres. The majority of the respondent's work outside of the London area is individual deliveries. In Scotland the respondent now operates only one route where an 18 tonne vehicle is used.

(c) The respondent was previously known as Parceline. From 10 January 2007 until 22 May 2014 the claimant was employed by Parceline in the position of Collection and Delivery Driver HGV 3, based at the Glasgow depot. The letter to the claimant from Andrew Ridgway (then Depot Manager) of 10 January 2007 is the formal offer to the claimant of this position (R32 – 35). The claimant became unfit for that role following a back injury which occurred outwith his work for the respondent. In May 2014, after a period of sickness absence, the claimant resigned due to his incapacity for the role. The claimant's condition improved and in December 2014 he was employed by the respondent, initially on a temporary basis. From the time of his employment with the respondent in December 2014, the claimant was no longer contracted to drive an HGV.

(d) The claimant was employed by the respondent as a Temporary C & D Driver from 9 December 2014 until 6 March 2015 (offer letter and contract at R37 – R46), and again as a Temporary C & D Driver from 8 March 2015 until 4 June 2015 (offer letter and contract at R47 – R55). The claimant was then offered a full time permanent role with the respondent. This offer is set out in letter to the claimant from Allan Henderson (General Manager) of 7 June 2015 (R56). The Contract of Employment enclosed with that letter is at R57 – R61. This states the claimant's job title as 'Full Time Permanent Collection and Delivery Driver'. Under the heading 'Drivers Allowance' in this contract (at R58), there is reference to two categories of drivers, 'C&D and LGVC'. Each of the temporary contract offer letters and the permanent contact offer letter contains the paragraph:-

> 'Attached are 2 copies of your Contract of Employment. In addition you will be provided with a copy of the Memorandum of Agreement which details the terms and conditions associated with this position.'

The claimant did not receive a copy of the Memorandum of Agreement. The claimant was aware from these offer letters of the

existence of the Memorandum of Agreement and that it was of relevance to the terms and conditions of his employment with the respondent.

(e) The claimant is paid a guaranteed weekly wage for a 40 hour week of £342.43. This is set out in his permanent contract at R58. That is the rate of pay for the respondent's C & D (Collection and Delivery) Driver, normally carrying out collections and deliveries driving a 3½ tonne 'sprinter' type van. The claimant has and maintains his licence to drive an 18 tone vehicle. This is known to the respondent. While the claimant was employed with Parceline, the claimant was employed as an HGV driver to drive an 18 tonne vehicle. In the period when he was employed by Parceline, the claimant carried out collections and deliveries using a 3½ tonne van on occasions, particularly during the busy Christmas period. During that period with Parceline, in July 2009, the claimant was moved to normally drive a 7½ tonne vehicle. The claimant is known to the respondent to be a flexible and helpful employee.

(f) During the course of his current employment with the respondent, the respondent utilises the claimant's ability and licence to drive an 18 tonne vehicle. The claimant is a flexible and obliging employee. When the claimant commenced employment with the respondent in December 2014 he carried out collections and deliveries using a 3½ tonne van. The claimant refers to the respondent's Hillington G5 /G51 18 tonne delivery run as 'my run'. The claimant covered this run for a period of 19 weeks from January 2015. The claimant changed from a Sunday – Thursday working week to a Monday – Friday working week to enable him to provide cover for driving the 18 tonne vehicle when required, as that vehicle was not utilised at weekends. At that time the respondent operated two 18 tonne vehicles from their Tannochside depot. The other 18 tonne vehicle was driven by Alex Callaghan and was used at that time for the 'Amazon run'; taking pallets to Greenock then delivering to the Amazon depot in Gourock. Alex Callaghan is employed by the

respondent as a class 1 HGV C & E driver. The respondent's rate of pay for this class of driver is significantly different from the claimant's rate of pay as a C & D driver. Alex Callaghan's basic rate of pay with the respondent is £476.76 per week. The respondent's identity badge for both the claimant (at C4(a)) and for Alex Callaghan (at C4(b)) states 'C & D Driver'. Those identity badges do not accurate reflect their contractual role within the respondent's business.

(g) In March 2016, the respondent made the operational decision to de-fleet one of the 18 tonne vehicles. From that time the 'Amazon run' was covered by an agency. Since that time, Alex Callaghan normally drives the only 18 tonne vehicle, doing the Hillington run. The claimant provides cover for the Hillington run, driving the 18 tonne vehicle at time when Alex Callaghan is on holiday or otherwise absent. The claimant organises his holiday dates to ensure the respondent has cover for the Hillington 18 tonne run. The respondent's requirements do not allow the claimant and Alex Callaghan to be on holiday at the same time. That has caused difficulties for the claimant and has caused him to miss an important family event involving his daughter.

(h) It is of benefit to the respondent that the claimant maintains his licence to drive 18 tonne vehicles and provides cover for the 18 tonne vehicle run. There are certain legal requirements which are necessary for the claimant to undertake in order to maintain his licence to drive an 18 tonne vehicle. The claimant would not be able to provide cover to drive the 18 tonne vehicle if he did not comply with these requirements. The claimant requires to undergo 35 hours of the CPC training on an annual basis. The claimant does this, with the training provided by and paid by the respondent. The claimant undergoes n annual medical, which is paid by the respondent. There are certain legal limitations on working time and rest breaks which require to be maintained and recorded by the claimant to ensure that he can be called on to drive an 18 tonne vehicle, including those known to the claimant as the 'the Tacograph Regulations'. These

limitations require the claimant to have an additional 15 minute rest break per working day. That rest break is unpaid and has an impact on the claimant's delivery times on days when he is not driving an 18 tonne vehicle. As a result of his compliance, the claimant requires to take unpaid rest break totalling 1½ hours per working week. The claimant spends some time each day carrying out the administration of recording his working time, which requires to be recorded manually because he is not normally driving an 18 tonne vehicle and so cannot rely on such a vehicle's 'digicard' recording system.. In order to comply with legal requirements with regard to working time, the respondent does not allow employees who drive an 18 tonne vehicle to work overtime every weekend. By maintaining his licence to drive an 18 tonne vehicle the claimant is therefore limited in his earnings from the respondent in respect of overtime

(i) The respondent has some difficulty recruiting and retaining 7½ tonne and 18 tonne drivers, particularly in the South West of England. As a means of addressing that problem, the respondent introduced additional payments to these drivers. The letter at R62 from David Poole (Director of HR & Training), dated 21 April 2016 and addressed 'Dear Colleague' is headed '18 Tonne Driver Pay Increase' and states:-

> 'We have recently conducted a review of the challenges of the role of an 18 tonne driver and of the pay rates in the marketplace, and in order to ensure that we remain competitive and can continue to attract and retain this group of drivers, the company has decided to increase the current rate of pay for 18 tonne drivers.
>
> I am therefore pleased to advise you that with effect from 2 May 2016 the basic pay for an 18 tonne driver will be increased by £100 per week. This results in a basic weekly pay of £476.76 which equates to an hourly rate of £11.91. I am sure you will

agree that this continues to support our people strategy to retain and develop the most customer centric people in the industry.

Can I finally thank you again for your hard work in helping to meet our many business challenges.'

This letter was not sent or given to the claimant. A similar increase was made around the same time to 7½ tonne C & D drivers.

(j) The claimant was unaware of the pay increase to certain categories of drivers employed by the respondent until a chance conversation with Steve Kington in April 2016. Steve Kington is Head of Network North, and has responsibility for 3 regions, including Region 6. Steve Kington had been introduced to the claimant when the claimant was employed by Parceline in his previous role as an HGV1 / 18 tonne driver. Steve Kington remembered the claimant as he had been introduced to him as 'one of the most well spoken drivers in the company'. The claimant had been allocated to drive the 18 tonne vehicle on the day when Steve Kington was visiting the Glasgow depot. Steve Kington saw the claimant loading the 18 tonne vehicle and presumed that the claimant was employed by the respondent as an 18 tonne driver. Steve Kington said to the claimant words to the effect of 'you'll be enjoying the pay increase?' Steve Kington did not tell or promise the claimant that he was entitled to a pay increase.

(k) The claimant raised a grievance through the respondent's formal grievance procedure. The claimant's grievance is set out in papers at R64 – R65. The minutes of the initial grievance hearing, which took place on 9 June 2016, are at R66 – R69 and are an accurate reflection of the main discussions. That Grievance was heard by Scott Maxwell (General Manager. The claimant was represented at that grievance meeting by Paul Carty (Regional Shop Steward for Unite Union). Scott Maxwell informed the claimant of the outcome of his grievance by letter to the claimant dated 9th June 2016 (R70).

Scott Maxwell's decision was not to uphold the claimant's grievance. His outcome letter states:-

> 'At the grievance hearing we discussed the following issues:
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> Not being paid £100 for being available to drive the 18t vehicle whilst continuing to operate under Tachograph regulations.
>
> I considered carefully all of your concerns and concluded that you are only entitled to the £100 payment when you are actually out on an 18t route. As you normally drive a 3.5t vehicle daily and only cover either holidays or sickness for the 18t route, I decided that you are not entitled to payment even though you raised a number of points in relation to your digicard and the recording of driving hours and breaks.'

(l) The claimant appealed that outcome to a Stage 2 Grievance. The claimant's Stage 2 grievance appeal is set out in papers at R71 – R72. The minutes of the grievance appeal hearing, which took place on 27th June 2016, are at R74 – R82 and are an accurate reflection of the main discussions. That Grievance was heard by Steve Kington. The claimant was again represented at that grievance meeting by Paul Carty (Regional Shop Steward for Unite Union). At no point in that meeting did the claimant claim or infer that Steve Kington had told him that he would be entitled to the £100 additional payment. At that meeting, Steve Kington sought to ascertain the extent to which the claimant had been driving the 18 tonne vehicle. During an adjournment, Steve Kington spoke to the manager of the Tannochside depot to obtain information on the allocation of routes. Steve Kington informed the claimant of the outcome of his grievance by letter to the claimant dated 28 June 2016 (R83 – R84). Steve Kington's decision was not to uphold the claimant's grievance. His outcome letter states:-

'At the grievance hearing we discussed your request to be paid the 7.5t driver rate. After carefully considering all of the evidence put in front of me, I believe based on what you have told me I am unable to resolve your grievance.

You have requested that you are allowed to drive the 18 tonne on a regular basis and believe you should be able to drive the 18t vehicle ahead of Alex Callaghan. Your logic behind this request is that the class 1 driver that is currently driving the 18 tonne should be doing class 1 duties namely the daily Amazon route that is being driven by an agency. As you are aware I discussed with the management team at the depot why it was the class 1 driver that was covering the 18t route and not yourself. They advised me that the class 1 driver was as keen as you to do the 18t route as they were receiving an additional payment. I was advised that it is easy to cover the Amazon route with agency as it only requires two collections a day and also for the depot to use yourself to cover the 18t route. You presented no valid argument to me why you should get priority over the class 1 driver. Unfortunately therefore I was unable to resolve your grievance.

(m) The claimant appealed that decision to a Stage 3 Grievance. The claimant's Stage 3 Grievance is set out in papers at R85 - R91. The Stage 3 Grievance took place on 18 August 2016. That Grievance did not take the form of a meeting, rather the claimant and his representative, Unite the Union National Shop Steward, Frank Holtz, were in one room at the respondent's premises while the respondent's Director of HR and Training, David Poole, was present in another room at the respondent's premises and did not meet the claimant to discuss his grievance. David Poole took the decision at that Stage 3 hearing. Communications took place via messages being passed between the two rooms. The claimant was surprised by this format but neither he nor his Trade Union representative objected to the format at the time. The respondent believed that a

solution to the claimant's grievance had been agreed upon on 18th August.

(n) The Memorandum of Agreement referred to in the offer letters sent by the respondent to the claimant is a Memorandum of Agreement between the Respondent and Unite the Union (the recognised trade union) for depot based collection and delivery drivers, 7.5T drivers and warehouse operatives who joined the business after 9 May 2014. The version of that Memorandum of Agreement dated 12 May 2014 is at R157 – R199. That Memorandum of Agreement anticipates and provides for employees carrying out duties additional to their job title. It contains a provision headed 'Multi-Functional duties', which states at 4 (B) (at R161):-

> 'In addition to paragraphs 4 (A) above, the employee will be required to perform alternative work that falls outside of their job title or key duties that is within the employee's capabilities or training if his / her work is not available and / or as the Company reasonably directs.'.

The Memorandum of Agreement also contains a provision at clause 8, headed 'Duties', which states at (C) (at R163):-

> 'If a Driver is undertaking LGV work on a temporary basis and has been in receipt of an LGV payment continuously for 12 months, and at the company's request is no longer required for full time LGV duties, he/she will retain the rate of an LGV driver for a maximum period of 26 weeks. After 26 weeks the terms and conditions of the position shall apply.'

Since his re-employment by the respondent in December 2014, the claimant has not carried out duties driving the 18 tonne vehicle for a continuous period of 12 months.

(o) The Memorandum of Agreement contains a provision headed 'Allowances', which states at (D) (at R166):-

'When a Driver or Operative is involved in higher grade driving, he/she shall be in receipt of the appropriate allowance shown below:-

(i) All Grades of Collection and Delivery Driver and Operatives driving a 5.5 to 7.5 vehicle - £1.85 per day (£9.27 per week)

driving an LGV C vehicle - £1.53 per day (£7.67 per week)

driving an LGV C + E vehicle- £4.70 per day (£23.51 per week).

On days when the claimant drives an 18 tonne vehicle, the claimant is paid by the respondent sums in addition to his normal rate of pay, being the additional rate of £1.63 per day, in accordance with clause 8 (C) of the Memorandum of Agreement (at R163), plus a pro rata daily rate of £20, calculated from the pay increase of £100 a day given to 18 tonne drivers. Since the outcome of his stage 3 Grievance Hearing, the claimant has been paid £20 per week in recognition of the time spent by him carrying out the administration of recording his compliance with the Tachograph regulations. The respondent understood that additional £20 per week payment to have resolved the claimant's grievance. On 23 August 2017, the claimant wrote to David Poole (letter at R118) stating that he was prepared to accept the additional payment of £20 per week 'as an interim measure only'.

Relevant Law

6. The Employment Rights Act 1996 ('the ERA') at section 13 provides for the right of an employee not to suffer unauthorised deductions from wages, unless in certain circumstances as set out at section 13(1) (a) and (b). it states:-

> 'An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.'

7. Section 13(3) states:-

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

8. Section 27 sets out the meaning of 'wages' etc. 'Wages' includes, at section 27(1)(a) -

> 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.'

9. The position on costs in the Employment Tribunal is now governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, in particular Rules 76, 78 and 84.

Claimant's Submissions

10. The claimant's representative's position was that the respondent relies heavily on the Memorandum of Agreement and that was never received by the claimant, rather all three contracts sent to the claimant after December

2014 were sent to the claimant without a document which 'details the terms and conditions associated with this position'. It was submitted that as far as the claimant was concerned, he was starting back on the same terms and conditions as his previous period of employment with the company. Everyone was classed as a collection and delivery driver. The claimant was not paid the class 2 rate additional payment of £100 per week despite driving the 18 tonne lorry for more than 26 consecutive weeks. It was only at the stage 3 Grievance hearing that the claimant learned that the 'occasional payments' stated on his payslips was in respect of the 'derisory' £1.53 per day for the responsibilities of an HGV driver.

11. The claimant's representative relied on the facts that a van driver does not have to take a 45 minute unpaid break, does not have to complete manual Tachograph records, does not have a digicard and cannot receive infringements which could jeopardise his continuing employment and livelihood. A van driver can drive 7 days a week without any restriction on hours. The claimant is restricted to one day's overtime every second week. The claimant's holidays, days off and overtime, it was submitted, are 'dictated' by the fact that he is an HGV driver who the company 'chooses to exploit at their beck and call which expecting him to adhere to all relevant regulations 7 days a week'. It was submitted that the claimant did not ask to be treated as an HGV driver for training and licensing purposes, rather that he is an HGV driver, who does what hi is told by his employer, be it driving an 18 tonne lorry, a 7.5 tonne lorry or a van and he was treated as such by the respondent's Transport Department from the outset. He was not given a choice in the matter, nor did he expect one, because he is an HGV driver. He simply expects to be paid as one or compensated for his losses.

12. It was submitted that it was believed that the claimant has a valid claim. It had never been put to the claimant that he had a choice whether to drive the 18 tonne vehicle or not.

Respondent's Submissions

13. The respondent's position was that the claimant's employment as an HGV driver ended in May 2014. The respondent relied on the contracts issued in terms of the claimant's current period of employment with the respondent, and the terms of the Memorandum of Association. It was submitted that the claimant was obliged to carry out duties which were within his capability at the request of the respondent but that additional duties can be performed on an ad hoc basis. The claimant was a helpful employee and 'acted up' to provide cover for the 18 tonne route when asked to do so. That was the claimant's choice and there was no obligation on him to do so. There was benefit to the claimant and the respondent. The respondent paid for and provided the claimant's annual training. It was submitted that the contracts were clear. The claimant was not required to do the training or provide cover for the 18 tonne vehicle. The respondent is happy to fund the claimant's training but cannot insist on the claimant doing duties which are outwith his contractual duties. If the claimant chooses not to maintain his training then he could not be obliged to do so by the respondent. The claimant's flexibility is appreciated by the respondent but he gets benefits in the additional sums paid when he is driving the 18 tonne vehicle, training paid for, payment re admin time and he is more employable.

14. It was submitted that there has been no unlawful deduction from wages in terms of sections 13 and 23 of the ERA. It was submitted that the claimant is contractually entitled to a daily allowance of £1.53 for particular ad hoc days when he acts up to drive an 18 tonne vehicle. The respondent relied on there being significant differences in the daily rate between a C & D driver and a driver employed to drive an 18 tonne vehicle and that at no stage prior to the £100 weekly increase had the claimant complained that he was not being paid the correct rate for his job. On days when the claimant 'acts up', the claimant receives a pro-rate payment of £20 per day, reflective of the £100 weekly increase received by 18 tonne drivers. Since his 3rd stage grievance he has received an additional £20 per week to reflect time spent in administration. The claimant was represented by experienced

Trade Union representatives throughout the internal grievance in respect of this matter. It was believed at the conclusion of the grievance that matter had been resolved. The respondent's representative submitted that the claimant had received the Memorandum of Association and that this set out the contractual position. The claimant's Trade Union representatives would be aware of the terms of the Memorandum of Association.

15. It was submitted that the claimant has no legal basis for his position that he should be paid the additional £100 per week whether he is driving the 18 tonne vehicle or not. He has no right to drive the 18 tonne vehicle and no obligation to be a class 2 driver. It was submitted that the claimant relies on receiving 'some payment' as a matter of 'farness' and that his claim is misconceived as a legal claim. It was agreed that if the claimant succeeded, the sum of £6,699.80 would be due to the claimant but that the claimant knew that he was not legally due that money, and his claim was based on 'fairness'. It was submitted that the claimant is entitled to raise matters of fairness within the internal grievance procedure, but not in the Tribunal process. It was submitted that there is no due payment withheld from the claimant. The contractual position is set out in the contract which was offered, accepted and crystallised. The Memorandum of Association was sent to the claimant or was sufficiently available to him to be incorporated into the contractual terms. It is abundantly clear on the face of the contract that there are conditions set out in the Memorandum of Association. The respondent's primary submission was that the Memorandum of Agreement had been received. If that was not accepted, then it was their submission that the Memorandum of Agreement was available and there is no dispute that it was referenced in the offer letters and contracts. It was submitted that the respondent's case is stronger if it is accepted that the Memorandum forms part of the contractual material, as the position is consistent with working ad hoc as referenced in the Memorandum, but that in any event the issued contracts state the pay for the claimant's post. The claimant was paid that rate of pay, which is significantly different to the rate of pay for an 18 tonne vehicle driver.

16. The respondent relied on the ERA sections 13 and 23, *Duran –v Duran* (1904) 7 F 87; *J Spurling Ltd –v- Bradshaw* [1956] 1 WLR 461 and Gloag and Henderson: The Law of Scotland; 13ed at para 5.05 and 7.23.

17. The costs warning letter of 27 January 2017 was relied upon. It was submitted that at the adjournment of this case in March 2017, an offer had been made that expenses would not be sought if the claim was withdrawn but the claimant chose to proceed. Costs totally £10,852.40 were sought in respect of agents' fees of £8,462.40, counsel's fees for representation of £2,000 and a 'hearing fee' of £390.

Comments on Evidence

18. Evidence was heard from the claimant. For the respondent, evidence was heard from Steve Kington, Lynsey Harkness (HR Business Partner Region 6) and Fiona Reid (Depot Administrator). All witnesses'' evidence was heard on oath or on affirmation. Other than regarding whether or not the Memorandum of Agreement between the respondent and the recognised Trade Union, Unite, had been issued to the claimant, there was no real dispute on the material facts and all witnesses were found by the Tribunal to be credible and reliable.

19. In relation to the question as to whether or not the Memorandum of Agreement was issued to the claimant, the Tribunal preferred the claimant's evidence. The claimant's position was that no Memorandum of Association had been enclosed with any of the offer letters. The offer letters each state that the Memorandum of Agreement 'will follow'. There is no reference in any of the letters to a copy being enclosed. The respondent's witnesses could only speak to the general practice of the Memo of Agreement being sent with the offer letters, and could not state specifically that the claimant had been sent a copy of the Memorandum of Agreement. The Tribunal accepted the claimant's evidence that he had not been issued with a copy of the Memorandum of Agreement and that if he had been issued this he would have kept it, as he is in the habit of keeping all such paperwork, as

evidenced by the papers before the Tribunal. The Tribunal concluded that the claimant had not been issued the Memorandum of Agreement by the respondent.

20. There was however no dispute that the claimant was put on notice of the content and effect of the Memorandum of Agreement. The offer letters in respect of the claimant's temporary contracts and permanent contract since December 2014 each specifically refer to the Memorandum of Agreement as detailing the terms and conditions of employment. On this basis, and in light of the Memorandum reflecting the agreement between the respondent and the recognised trade union, Unite the Union (representatives of which represented the claimant throughout the grievance process), the Tribunal concluded that the Memorandum of Agreement does form part of the terms and conditions of the claimant's contact of employment with the respondent. The Tribunal did not however find that this case turns on that point. This is not a claim for breach of contract, rather it is a claim for unpaid wages. The Tribunal required to determine whether the claimant has a legal entitlement to receive an additional payment of £100 per week, as given by the respondent to their 18 tonne drivers from 2 May 2016. The Tribunal finds that the claimant has no legal entitlement to such payment other than for the days in which the claimant has worked or works driving such an 18t vehicle, for which he has been paid. The additional £100 payment to 18 tonne drivers is not payable to the claimant in terms of wages other than on a pro-rata basis for days when the claimant is allocated to drive an 18 tonne vehicle.

21. The claimant did not draw a distinction between his previous employment with Parceline and his employment with the respondent. This is understandable to a certain extent: Steve Kington's evidence was that the respondent 'effectively rebranded from Parceline to DPD'. The claimant re-commenced working from the same depot and with similar duties. There was however an important contractual difference in the claimant's status in the two periods of employment. He was employed by Paceline as an HGV Driver and is employed by the respondent as a C & D Driver. The claimant

admitted in cross examination that the consecutive period when he drove the 18 tonne lorry was 19 weeks rather than 26 weeks. The respondent's distinction in classes of drivers is somewhat confusing – drivers are referred to having various titles. The claimant does however understand that he is not employed to drive an HGV. This was clear from his evidence as to why Alex Callaghan was moved to drive the Hillington route rather than the claimant at the time when the decision was made to de-fleet one 18 tonne vehicle. That decision had repercussions for the claimant and may not have arisen if he had been employed as an HGV driver. The claimant's position in his ET1 that he was employed in both periods of employment as a C & D driver is not factually correct. As set out in the findings in fact, during his employment with Parcel line the claimant was employed as an HGV driver.

22. The claimant appeared to be able to take a reasonable view of the respondent's operations. During his evidence in chief, the claimant offered that he 'could see why' ''his truck' was de-fleeted, on the basis that 'Alex is a class 1 driver'. The claimant did not however see any distinction between his contractual role for the respondent in the period from December 2014 in comparison with that in his period of employment at Parceline. When the contractual job tiles as set out in the contracts issued from December 2014 were pointed out to the claimant in cross examination, his position was 'I can see where you are coming from but I just saw what I was doing before' and that 'everyone was C & D as far as I was concerned'. That is not reflective of the contractual position. It was put to the claimant that he 'presented as willing' to drive the 18 tonne vehicle and therefore he had to comply with the restrictions with regard to working time, annual training, etc. It was clear that the claimant did not understand the position to be that he could refuse the respondent's instructions to provide cover for the 18 tonne vehicle when requested .and that therefore maintaining his 18 tonne licence and being subject to the working time limitations etc was a voluntary arrangement and the claimant could refuse to do this. That was however the respondent's clear argument before the Tribunal.

Decision

23. The claimant is not employed by the respondent as an 18 tonne / HGV driver and is not entitled to payment in respect of the additional £100 per week made to 18 tonne drivers, other than in respect of those days when the claimant drives an 18 tonne vehicle, for which he is paid a pro rate payment of £20 per day, in addition to the daily additional payment set out in the Memorandum of Association and the sum of £20 which the claimant now receives to reflect his time spent in administrative duties required to maintain his availability to drive an 18 tonne vehicle.

24. The respondent's unequivocal position before this Tribunal was that the claimant was free to choose whether he wished to offer his services to drive the 18 tonne vehicle or not. Their position was that although it was helpful to the respondent, and if the claimant decided not to continue they would try to persuade him otherwise, that the claimant's position with them as a C & D driver would not be affected by his decision to cease to maintain his 18 tonne licence. On the basis of that position, the claimant has a choice whether to maintain his licence to drive an 18 tonne vehicle and make himself available to the respondent to drive such a vehicle when required by the business or not. Should the claimant decide not to maintain his 18 tonne licence and should there be negative consequences flowing from that decision with regard to his employment with the respondent, the claimant would be entitled to rely on that position, as recorded in this decision.

25. Both parties addressed the Tribunal on the question of expenses. The Respondent relied on their costs warning letter sent to the claimant's representative on 27 January 2017. Their position was that the claimant's claim was misconceived, being based on a question of fairness rather than legal entitlement. . No detailed breakdown of the costs incurred was provided and no information was given with regard to any applicable hourly rates. The claimant's representative's position was that she had carefully considered the respondent's position as set out in their letter of 27 January and believed that the claimant could demonstrate why he had a case to

answer in respect of each point. Her position was that it had never been put to the claimant by the respondent that he had a choice other than to be available to drive the 18 tonne vehicle; rather it was believed that if he chose not to keep his 18t licence then he wouldn't have a job with the respondent.

26. The Tribunal considered the terms of the letter from the respondent's representatives, Freeths LLP, to the claimant's representative, his wife Mrs Sandra Broadway 27 January 2017. This letter sets out the reasons for the respondent's representative's view that the claimant's claim no reasonable prospect of success. This is not a short form letter setting out a general paragraph which warns that expenses may be sought. There is a detailed analysis of the claim and the basis of the respondent's position that the claim for had little or no reasonable prospect of success. The Tribunal accepted the respondent's submission that the claim was misconceived. There is no legal basis for the claimant's claim that he should be paid an additional £100 per week because he is available to drive an 18t vehicle for the respondent. Since December 2014 the claimant has not been employed by the respondent to drive an 18 tonne vehicle and his rate of pay from the respondent has reflected that. The respondent has addressed the claimant's concerns through the grievance process by making pro rata payments to the claimant on the days when he does drive an 18 tonne truck and an additional £20 payment to reflect his time spent on administrative duties connected to his retention of the licence to drive the 18 tonne vehicle.

27. The Tribunal then considered whether it was appropriate in this case to exercise its discretion to award costs at all under Rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal required to be satisfied that it was appropriate to make such an order in the circumstances of this case. In its consideration of this, the Tribunal took into account that although a detailed letter was sent to the claimant's representative putting her on notice that a costs award would be sought unless the claim was withdrawn by 3 February 2017, no application for strike out of the claim was made. Although that is not determinative of whether or not a costs order would be made, the Tribunal does take that

factor into account. Although the respondent sought information from the claimant in their ET3 there was no application by the respondent for issue of an 'Unless Order' under Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The claimant believed that he had a claim. There was a continuing employment relationship between the parties. Although it was the respondent's clear position before the Tribunal that the arrangement for him to provide cover to drive the 18 tonne vehicle was an entirely voluntary arrangement. It was not put to the claimant in evidence that during the course of his employment that had been explained to him. The claimant clearly did not understand the arrangement to be voluntary. Attempts were made by both parties to resolve this matter through the internal grievance procedure. The claimant has incurred Tribunal fees and the respondent has incurred legal costs in the pursuit of this claim to the stage of a hearing.

28. Costs awards in the Employment Tribunal are still the exception rather than the rule. In all these circumstances, and where the claimant is not legally represented and where the basis of the claim requires an analysis of whether there is a legal entitlement to certain sums, the Tribunal does not consider it appropriate to exercise its discretion to award costs. The claimant could not be said in the circumstances of this case to have acted so unreasonably as to attract costs.

29. Had the Tribunal decided to exercise its discretion to award costs, it would have taken into account the claimant's ability to pay, with regard to the income which the claimant continues to receive from the respondent, and such Costs award would have been for the specified sum of £2,000, being the extent of counsel's fees for representation before the Tribunal, taking

into account that the costs awarded should not breach the indemnity principle and must compensate and not penalise and having regard to the extent of the evidence and complexity of the issues.

Employment Judge: Claire McManus
Date of Judgment: 09 May 2017
Entered in Register: 09 May 2017
and copied to parties