EMPLOYMENT TRIBUNALS

Claimant: Mr P Cusick

Respondent: T J Morris Ltd t/a Home Bargains

Heard at: Manchester (remote public hearing via CVP)

On: 1 June 2021

Before: Judge BJ Doyle

Representation
Claimant: Ms L Gould, counsel
Respondent: Mr D Northall, counsel

RESERVED JUDGMENT

The claimant's complaint of unauthorised deductions from (or non-payment of) wages contrary to Part 2 of the Employment Rights Act 1996 is well-founded. The claim is upheld.

REASONS

Introduction

1. This is the reserved judgment of the Tribunal with written reasons.

2. The claim is about whether the respondent was entitled to withhold wages from the claimant LGV driver during a period when he had been disqualified from driving, but in circumstances in which a court had suspended the disqualification pending an appeal, which was ultimately successful.

3. The claim contains a single complaint of non-payment of wages during a period from March to August 2020. It has been treated throughout as being a complaint under Part 2 of the Employment Rights Act 1996.

4. Early conciliation commenced on 10 July 2020 and ended on 10 August 2020. The ET1 and particulars of claim were presented to the Tribunal on 9

September 2020. The ET3 and grounds of resistance were presented on 16 October 2020.

5. The claim had been automatically listed with standard case management orders at service of the claim upon the respondent on 19 September 2020 for a final hearing of 1 hour commencing at 2.15 pm on 1 June 2020.

6. In reading the papers on the day, it was immediately apparent to this Tribunal that this was no ordinary "Wages Act" claim for which a 1 hour time allocation would have been appropriate. Fortunately, the parties were professionally represented; there were only two witnesses (whose evidence had been committed to written witness statements); the facts were in large part uncontested; and both counsel (to whom the Tribunal is grateful) had prepared helpful written submissions. In the event, we were able to conclude the giving and testing of evidence and the presentation of submissions in just over 2.5 hours.

7. The Tribunal then reserved its judgment as to liability and it deferred further consideration of remedy until liability had been determined.

The evidence

8. The Tribunal had before it an agreed bundle of documents comprising a total of 323 pages, inclusive of a 7 page index. There were 97 separate documents before the Tribunal. Reserving judgment has furnished the Tribunal with a better opportunity to read the documents. References to the bundle are in square brackets [ ] below.

9. Within the documents bundle were also the witness statements of the claimant, Mr Cusick [287-305], and, for the respondent, Mr McLoughlin (the respondent's Chief Financial Officer and Company Secretary since 1997) [306-310].

10. Both counsel were agreed that the factual matrix is in very large part uncontested. Little if anything depends upon an assessment of the witnesses and their evidence.

11. Nevertheless, the claimant presented as an open, honest and credible witness.

12. The respondent's witness, Mr McLoughlin, had not been directly involved in the decisions on the ground that were being taken in relation to the claimant and his wages. As a result, he was not always able to answer questions that were being asked of him about the immediate facts of the matter as opposed to issues of policy and practice. The Tribunal makes and intends no criticism of this witness at all, who endeavoured to assist the Tribunal where he was able to do so.

13. In places the evidence on both sides ranged more widely than was strictly necessary to resolve the immediate dispute of which the Tribunal was seized. The Tribunal has taken care to make only such findings of fact as are necessary for its purpose. It also took pains to ensure that the parties had a full opportunity to put its evidence (and the testing of it) to the Tribunal.

Mr McLoughlin's evidence in particular

14. It may assist an understanding of the issues between the parties if the Tribunal were to take the unusual step of setting out Mr McLoughlin's evidence, which is offered less as a contribution to the findings of fact as to what happened, but more as an explanation of the company's position as to why it happened.

15. The respondent has a fleet of around 170 heavy goods vehicles (HGV). It employs in excess of 310 Class 1 drivers. The contract of employment issued to the claimant in this matter is typical of the terms the company offers to its drivers. The company stipulates as an express term of any driver's contractual terms that "it is a condition of your employment that you hold, and maintain, a current full driving licence". This contractual term is understood to be commonplace in companies who operate a fleet of vehicles, as their drivers holding a valid licence is an essential aspect of complying with their legal obligations.

16. In addition to the above express clause, the requirement that those drivers must also be insured to drive is implied into the contract, in Mr McLoughlin's view. No driver is permitted to drive the respondent's vehicles without being insured. The potential ramifications for the company if it were to allow a driver to drive uninsured are catastrophic. Not only would this be unlawful, but the traffic commissioner who controls the respondent's vehicle operating licence could revoke or curtail its licence thus impacting its entire operation and ability to service its customers. In the event of a crash, that could give rise to substantial financial liability, not to mention significant reputational damage. It is therefore imperative, in Mr McLoughlin's view, to imply this term into the contract. There is no room for error or leniency in this regard. This is said to be also applicable to all companies operating a fleet of vehicles, not just the respondent. It is common knowledge that it is illegal under UK law for persons to drive uninsured.

17. The respondent's driving fleet is insured by a major insurer. An insurance broker acts as an intermediary for the respondent.

18. In addition to the requirement to be insured, when operating commercial vehicles the respondent must also hold an operating licence which stipulates certain obligations. One of those obligations is that the company has to make sure its drivers are eligible to drive and have a valid licence.

19. In order to ensure that it complies with this requirement, the respondent relies on an online checker (the Licence Bureau) that is linked to and updated by the DVLA's central database and reports on drivers' licence status. (References to the DVLA's record of the claimant's driving licence status in the findings of fact below include access to that record via the Licence Bureau). The recommendation from the DVLA is that these checks are done, as a minimum, every 6 months, but any potential high risk persons should be checked more frequently. It is also possible for the company to run an *ad hoc* check as and when required.

20. All drivers within the business, including the claimant, confirmed their consent for the company to share their details through the Licence Bureau's website for the purposes of carrying out these online checks. When carrying out the checks the Licence Bureau requests relevant information from the DVLA and they use that information to update their systems. Where the DVLA finds that an individual is disqualified from driving, that will be reflected in the Licence Bureau's checks and reported back to the company. These would be carried out by management dealing with the operational side: for example, by Alan Beech (Transport Manager) and Jason Dibble (National Transport Manager).

21. The respondent uses the Licence Bureau as its “one version of the truth” to ensure a prudent, consistent and reliable approach to checking its drivers’ licence status. This method is used by 2,700 companies in the UK, as confirmed on the Licence Bureau's website.

22. So far as the claimant was concerned, Mr McLoughlin’s view of the matter – which could be said to be the corporate view taken on behalf of the company – was that the claimant had been disqualified from driving and had then presented various *ad hoc* documents to Jason Dibble and Alan Beech that confirmed that his ban was suspended “pending appeal”: including: a D20 notice from the Court; a letter from the Court dated 17 April 2020; and DVLA certificates dated 20 April 2020 and 4 May 2020. The claimant had not presented these documents directly to Mr McLoughlin, but he had been liaising with Alan Beech and Jason Dibble, who had consulted with Mr McLoughlin about their contents at various points from March 2020 to August 2020.

23. Despite the respondent being provided with these documents, when running repeated checks through the Licence Bureau during this period, it consistently showed the claimant's licence as being invalid. The respondent disclosed any documents provided by the claimant to the broker (who in turn liaised with the insurer on the company’s behalf). After reviewing the documents provided by the claimant, the broker confirmed that the insurer would not insure the claimant whilst the online status of his licence via the Licence Bureau still stated “invalid”. The company therefore could not proceed to let him drive again until the insurer was willing to insure him.

24. Mr McLoughlin’s position was that the claimant would have been best served focusing his efforts on communicating with the DVLA to update the official online record of the status of his licence on the Licence Bureau, rather than coming directly to the company. Whilst the Licence Bureau's report of the claimant's licence still showed that he did not have a valid licence, the respondent’s insurer would not insure him and therefore the matter was determined and out of the company’s hands. The claimant was also well aware that this was the method the respondent consistently adopted when assessing the validity of driving licences. For Mr McLoughlin, the situation is black and white. So long as the claimant's status on the Licence Bureau showed that his licence was not valid, the insurer would not insure him and the company in turn could not allow him to drive its fleet vehicles. It is quite clear from the documentation that as soon as the Licence Bureau reflected his licence was valid after his successful appeal, the insurer agreed to insure him. The company then acted swiftly to facilitate his return to work as a driver. The

company's searches of the Licence Bureau checks did not clear until 14 August 2020.

25. In Mr McLoughlin's view, the company has a large fleet of in excess of 170 HGVs and over 310 drivers so that it is essential it has a consistent and reliable approach to such serious matters. It does not and cannot adopt a piecemeal or *ad hoc* approach to these matters. To be absolutely clear, in Mr McLoughlin's evidence, the respondent does not compromise when it comes to these issues. It is an organisation that relies on a unified and consistent approach, which is supported by the online tool of the Licence Bureau and also guided by the insurer. It must apply this approach consistently and diligently to ensure the safety of its fleet, the general public and also to protect the respondent company.

Findings of fact

26. The respondent company, T J Morris Ltd, trades as the well-known retail store chain, Home Bargains. The respondent is a national retailer of discounted household goods, with over 500 Home Bargains stores across the UK. It employs approximately 28,000 staff.

27. The claimant is (and remains) employed by the respondent as a Class 1 LGV Driver (Night Shift) at its Head Office Distribution Centre at Gillmoss in Liverpool. His employment commenced on 8 June 2009. The claimant's latest statutory written statement of employment particulars appears at [48-55].

28. For present purposes, the relevant clauses of that statutory statement are clause 3 (job title), clause 5 (remuneration), clause 6 (hours of work), clause 15 (deductions from salary) and clause 22 (driving licence).

29. Only clause 22 has been put directly in issue in these proceedings. It provides, so far as is relevant to this hearing:

> "If you are employed as an LGV Driver or a LGV Shunt Driver it is therefore a condition of your employment that you hold, and maintain, a current full driving licence. During your employment you shall: (a) take good care of the LGV and ensure that the provisions of the Company's LGV procedures as amended from time to time and any policy of insurance relating to the LGV are observed; … (d) consent to the Company conducting regular online licence checks for reasons of compliance; … (f) immediately inform the Company if you are convicted of a driving offence, receive any points on your licence or are disqualified from driving or become subject to any inquiry, investigation or proceeding that may lead to the loss of your driving licence … A failure to adhere to the above requirements will be handled in line with the Company's disciplinary procedure and depending upon the seriousness of the failure may amount to gross misconduct".

30. On 21 July 2019, during the claimant's non-working time, he was stopped by a police officer while he was riding his motorcycle. The claimant was cautioned by the police officer on suspicion of speeding and careless or dangerous driving. The later disclosure of police video evidence revealed that for a short period the claimant was reaching an average speed of 93 mph on a section of road (the A49 in Cheshire) for which the speed limit was 60 mph.

31. On 8 November 2019 the claimant received a summons. A decision had been taken to charge the claimant with the offence of dangerous driving. He was required to enter a plea on 22 November 2019. He appointed a criminal law solicitor to act for him. She attempted without success to have the charge reduced to careless driving. She advised him to plead not guilty to the charge of dangerous driving, but to accept a plea of guilty to a charge of speeding or careless driving. He acted on that advice.

32. The claimant immediately informed his line manager, Steve McKeown (Night Transport Manager). At Mr McKeown's request, the claimant provided him with a copy of the summons. Mr McKeown asked the claimant to keep him informed about the matter. The claimant understood that Mr McKeown would inform Alan Beech (Fleet and Compliance Manager). At this stage there was no question about the claimant's continued ability to perform his duties as a LGV Driver. His impression was that, if the result of the summons was a conviction that attracted penalty points only, there would be no problem.

33. The claimant attended Chester Magistrates Court on 22 November 2019. He pleaded not guilty to the charge of dangerous driving, but guilty to speeding or careless driving.

34. The respondent provided the claimant with a character reference dated 19 December 2019 in relation to the motor proceedings [57].

35. At trial at Chester Magistrates Court on 21 January 2020 the charge of dangerous driving was dropped. The claimant was found guilty of careless driving. He was due to be sentenced on 18 February 2020. On advice, he expected that he would receive penalty points.

36. At the sentencing hearing on 18 February 2020 at Chester Magistrates Court the claimant was disqualified from driving for 12 months. He received a Notice of Disqualification from Driving [58-59]. On advice [60-62], he appealed that decision.

37. The claimant informed Jason Dibble (National Transport Manager). As a result, he was invited to a meeting on 25 February 2020 [63-70]. The claimant set out his position [71-73]. At that meeting the claimant's ability to discharge his duties as a LGV driver was not determined, although Mr Dibble drew the claimant's attention to two vacancies (warehouse shift team leader and transport coordinator) [44-47], the implication being that these were alternative roles the claimant might fill while disqualified from driving. Mr Dibble suggested that the claimant might apply for these roles online. The claimant was asked to take annual leave from 18 February 2020.

38. The claimant applied for the two alternative roles. He was interviewed on 4 and 17 March 2020 respectively. He was unsuccessful. The claimant had to chase a decision in relation to this. His entitlement to paid leave ran out. It was suggested to him by Liam Wilson (Assistant Transport Manager) that he would have to take unpaid leave, which he did from 7 March 2020.

39. Meanwhile, the claimant's appeal against his disqualification was delayed by the events that arose as a result of the Covid-19 pandemic. His solicitor contacted the Court. It is understood that a judge (presumably a Circuit Judge or a judge of the Crown Court) reviewed the matter and issued an Order suspending the disqualification, pending appeal.

40. The Court also issued a D20 form on 26 March 2020 [76-78] confirming that the disqualification had been suspended, pending appeal. The claimant received that document on 3 April 2020 and immediately forwarded it to Jason Dibble. The claimant's solicitor also forwarded a copy of the order to the respondent's HR and to Jason Dibble on 24 April 2020 [88-89].

41. Mr Dibble told the claimant that the DVLA website would need to show that the claimant could return to driving duties (that is, that he had a valid licence). The matter would also have to be discussed with the respondent's insurers.

42. It was not until 16 April 2020 that the DVLA website was updated to show that the claimant had a valid licence (despite, or maybe because of, the claimant or his wife contacting the DVLA several times [74-75]). The claimant informed Jason Dibble [79-80]. The DVLA confirmation is dated 17 April 2020 [81]. This confirms that, following the information from the Court, the record shows that the claimant now had a valid full licence, at least until the matter was reviewed by the Court.

43. The claimant informed Liam Wilson. His view was that the DVLA website was not showing a change in status [82]. The claimant authorised Mr Wilson to contact DVLA. It is understood that he did so and that the DVLA confirmed the claimant's understanding of the position. Mr Wilson indicated that he would have to revert to the respondent's insurer. The DVLA offered to participate in a conference call about the matter. That offer was not taken up by the insurer or the respondent.

44. A formal document dated 17 April 2020 was issued confirming the claimant's licence position (a Certificate of Entitlement) [83]. It records under "Additional Information", somewhat confusingly, "D/Q PENDING APPEAL 15/07/2020". The Tribunal will not attempt to interpret that annotation, given the separate communication from the DVLA at this time referred to immediately above. The Tribunal also notes that the document is endorsed with particulars of the conviction and disqualification [83A].

45. That document was referred to the insurer by the respondent. The insurer regarded it as insufficient, no doubt because of the annotation referred to immediately above.

46. As a result the claimant approached the DVLA for a second Certificate of Entitlement, which was issued on 20 April 2020 [84-85]. That was also annotated, this time as "DISQUALIFICATION PENDING APPEAL on 15/07/2020" and again referred to the particulars of the conviction and disqualification. The claimant had asked for suitable wording that would satisfy the respondent's insurer that he could resume his duties as a LGV driver. He

understood that what the DVLA could produce was limited by the computerised drop down boxes available on its system.

47. The claimant advised Liam Wilson of this. He also advised that his solicitor would forward the Court's D20 document. This was done on 24 April 2020 [93-95]. The DVLA remained willing to participate in a conference call, but it appears that again this was rejected by the insurer.

48. Then on 28 April 2020 the respondent (via Jo Jarvis, HR Employee Relations Manager) invited the claimant to an investigation meeting on 4 May 2020. The purpose of the meeting was said to be to discuss: (1) the recent information provided to the respondent by the claimant from the Court and DVLA; (2) the insurer's view on this; and (3) the potential impact on his role as a transport driver. This appears to the Tribunal to be the first occasion on which the claimant's uncertain position was being treated with any degree of procedural formality, which is not how the previous meeting on 25 February 2020 can be regarded. It is also apparent that for the first time the respondent's HR was taking some ownership of the problem.

49. In the interim, on 29 April 2020, Mr McLoughlin became involved [97]. He expressed the view that the respondent should "keep it simple and objective". He stressed that the company should act on the DVLA status alone as this was the definitive position. He did not appear impressed with the material being provided by the Court. His view was the claimant's efforts were best directed towards getting DVLA to clarify the position. He sought "unequivocal comfort" that the claimant's licence was valid and when. Jason Dibble confirmed that position with HR.

50. The meeting took place on 4 May 2020. Notes of the meeting are at [100-110]. It appears that the insurers were still not satisfied with the information it had regarding the claimant's position. Jo Jarvis informed the claimant that he needed to provide clearer documentation that would satisfy the insurer.

51. The documentary evidence shows that following the meeting on 4 May 2020, and by 7 May 2020, ownership of the investigation of the matter rested with Liam Wilson. See the Investigation Plan and Report at [111-113]. He was tasked with examining the respondent's stance on the claimant's licence; how the claimant would demonstrate that he would not repeat a speeding offence in a company vehicle; and a contingency plan if his return to driving could not be supported or the disqualification were upheld. There appeared to be two issues for the respondent: (1) the claimant's licence status and (2) its trust and confidence in the claimant. It appeared that the respondent needed the DVLA's position to be clear and that the other documents provided by the claimant were not regarded as sufficient. Doubt was expressed as to whether the disqualification from driving had been suspended.

52. Liam Wilson recommended that this case be forwarded to a formal meeting with senior management for consideration of whether the claimant had lost the trust and confidence of his senior managers and the business. Even if his licence is reinstated, it was asked, what message does this send out to his colleagues and the wider public if he is permitted to drive for the company

again? If such an incident were to be repeated, did the company have justification if asked why it allowed him to carry on driving? Did this one conviction define the claimant's driving behaviour? His position was that until DVLA could show clearly that his licence is without disqualification then he should not drive.

53. It does not appear from the evidence that the claimant was aware that this was the respondent's position as at 7 May 2020. Nevertheless, he contacted the DVLA again. A third Certificate of Entitlement was produced. That Certificate is dated 20 April 2020 and is at [129-129A]. This time it read: "DISQUALIFICATION SUSPENDED L/H HAS VALID LICENCE PENDING APPEAL". On 12 May 2020 he sent this to Jason Dibble, Liam Wilson and HR [127-128].

54. On 13 May 2020 Liam Wilson emailed and telephoned the claimant. He asked for a hard copy of the certificate. He also queried why it was dated with the same date as the earlier certificates. The claimant could not explain that. He attended the office and provided a hard copy. It appears that the insurer was still not content. He asked for the position to be explained in writing [144-145]. It is not clear whether that request was acted upon or with what effect or outcome.

55. At about this time the claimant needed to renew his personal car insurance. He did so without difficulty, having explained his licence position to his insurer.

56. On 15 May 2020 the claimant was invited by HR to attend a further meeting on 20 May 2020 [146-147]. This time the agenda included a potential loss of trust and confidence in him as a result of the road traffic incident on 21 July 2019. The outcome of the meeting was said to include the possibilities of a planned return to work or dismissal for some other substantial reason. He was afforded a right to be accompanied.

57. In the event, the meeting was delayed due to the unavailability of Jason Dibble. This was undoubtedly a stressful time for the claimant, who sought medical advice and treatment. This is also a period during which there is copious correspondence between the claimant and HR.

58. As a result, the claimant submitted a formal grievance on 1 June 2020 [151-152]. The respondent indicated that the grievance would be dealt with as part of the same meeting as had been arranged for 20 May 2020, but which awaited rearrangement.

59. The meeting took place on 12 June 2020 [167, 171-172]. It was conducted by Alan Beech (Fleet and Compliance Manager). The notes of the meeting are at [175-194]. During the course of the meeting the claimant's licence status with DVLA was again checked [173-174]. This continued to show that the claimant's licence had "expired" (that is, that he had been disqualified).

60. Following that meeting, at Mr Beech's request, the claimant took part in a Zoom call with the respondent's insurance broker on 16 June 2020. The broker was

not aware that a conference call with the insurer and DVLA had been proposed (and apparently rejected).

61. On 19 June 2020 there was a further meeting of the claimant and Mr Beech. Again, it appeared that the insurer (and/or the broker) was still not satisfied as to the claimant's licence status. Mr Beech offered the claimant a job as a night loader, which the claimant accepted. It was not clear from this meeting whether the claimant would be paid at the rate of pay for his substantive post or at the rate of pay for this alternative post.

62. After some "toing and froing" the claimant commenced a week's training for the new role from 29 June 2020. He then did a further week's training on days rather than nights, although nights had always been his preferred shift working. He was paid at a lower rate of pay for this post rather than for his substantive post. Moreover, he could not be accommodated on the night shift and so he was offered work on the day shift.

63. The claimant was then signed off work as sick from 10 July 2020 to 10 August 2020. During this period he had some inconclusive communications with HR about his position. He also made contact with Acas for advice.

64. The outcome to the claimant's grievance was dealt with in a letter date 10 July 2020 [242-245]. The claimant did not receive that letter. Had he done so, he would have appealed the outcome. In short, the respondent maintained the position that its insurers had been taking and, while making some concessions about the process followed, did not uphold the grievance.

65. The claimant has given evidence as to employees of which he is aware who have not been treated in the way that he was treated. The Tribunal accepts this evidence. That evidence is relevant to the question of whether (and, if so, what) implication of terms might be made to cover the claimant's invidious position.

66. His comparators for this purpose are other HGV drivers who are all employed under the same or very similar contracts of employment with T J Morris, who have lost their licences fully in the past, either by virtue of medical reasons, or as a result of road traffic offences. In relation to road traffic offences, these drivers did not have their driving bans overturned by the Court. The driving ban remained in place for the full period. Yet over the years these drivers have been deployed by T J Morris into alternative roles as a matter of course.

67. For example, Employee A, who was unable to drive due to medical reasons after losing his thumb relating to an injury outside of work, was placed in the office issuing driver paperwork. Employee B, who had an accident at work and who was deemed unfit to drive by the DVLA, was placed in the planning office undertaking the administration of truck loads. Employee C, who was subject to a driving ban for speeding, was placed in the warehouse for 12 months. Employee D received 9 driving penalty points in succession for speeding on the same stretch of road. He was placed into a shunter role. In the claimant's view, even if their circumstances as to how they lost their licences were different from his, they lost their licences and were banned or prevented from driving by

the DVLA, and none of them suffered the financial detriment that he did by having their wages stopped.

68. In relation to medical reasons, Employee E injured his wrist whilst at work, and he was provided with alternative employment in the office for 12 months. Employee F hurt his head outside of work and he suffered fits as a result, and he was redeployed to the warehouse. Employee G broke his Achilles heel while walking his dog and he received full pay while on sick leave. The claimant does not believe that any of these employees were presented with a suggestion that the trust and confidence in the employment relationship had been lost as stated in the grievance outcome letter the claimant received. Neither does he believe any of them have been interviewed for other roles determined in skill set. They were just given other roles.

69. On 20 July 2020 the Court informed the claimant that his appeal against disqualification would be heard on 29 July 2020. He informed HR immediately [258]. On appeal, the driving disqualification was revoked and replaced with 6 penalty points [266]. The claimant informed HR on 31 July 2020 [265-266]. On 5 August 2020 he provided HR with a copy of the court order [265-266], without reply. On 11 August 2020 he sent to the respondent screenshots of the updated DVLA entry showing that his licence to drive had been restored [273-277]. This was acknowledged on 12 August 2020 [271]. Mr Beech was provided with this material also [272].

70. The claimant's fit note expired on 10 August 2020. He returned to work as a driver on 21 August 2020 [279].

Submissions

71. In order to do full justice to the parties' written submissions, which were also amplified by oral submissions, the Tribunal proposes to set them out as fully as appropriate, with some editing (but not as to substance).

Claimant's submissions

72. For the claimant, Ms Gould reminded the Tribunal that Mr Cusick presented a claim for unlawful deduction from wages on 9 September 2020 [2] following a period of Early Conciliation from 10 July 2020 until 10 August 2020 [1]. The claimant's claim relates to a failure to pay him wages properly payable related to a period from 12 March 2020 until 21 August 2020 [14-20]. The respondent contends that the wages were not properly payable to the claimant by virtue of either an express or implied term of his contract of employment [37-40].

73. The factual matrix in the pleadings is said to be largely uncontested, albeit there is likely to be some dispute based upon the witness evidence presented for the respondent by Mr Graeme McLoughlin, Chief Financial Officer and Company Secretary. The claimant presents evidence on his own behalf.

74. In summary, it is submitted, Mr Cusick received a harsh sanction of a 12 month driving ban due to a speeding offence [63-73]. His criminal lawyers were shocked by this sentence and he appealed this ban [60-62]. While the appeal

was pending (the hearing of which was delayed due to the first Covid lockdown), his disqualification was set aside pending the appeal, with Crown Court and DVLA documentation confirming this [83-85] being provided to the respondent. This decision was taken by the Crown Court on 26 March 2020 [74-78] and at the latest was conveyed clearly to his employers on 24 April 2020 [79], and frequently evidenced to them thereafter (see below).

75. Counsel submits that it is clear without doubt from the 20 April 2020 DVLA report [129-130] that the claimant's disqualification was suspended and he had a valid licence pending his appeal. It is also clear from the respondent's documentation that it intended to rely upon the DVLA status [135-136]. Despite this, following initially being told to take paid annual leave (paid at a rate referable to his driving duties), Mr Cusick was interviewed for other positions [87], in which he was unsuccessful, and he was placed on unpaid leave. Mr Cusick confirms in his witness statement details of colleagues who in the past have been unable to drive or who were banned from driving, but who have been placed into alternative roles without interview.

76. Mr Cusick's case is that he was very proactive in chasing relevant matters with the Court, DVLA [81, 88-89, 99, 116 and 122-123] and his employers [82, 86, 93-95], which resulted in a lack of response at [92, 114-115, 124, 128-125, 144, 145, 151-155, 259, 261], but his employers said that he was unable to drive, but not unable to work, due to the relevant insurer refusing to reinstate his insurance [90-91, 96, 97, 100-110, 130]. There appears to have been delays communicating with the insurer and/or the broker) [199, 201] and/or a lack of accurate or detailed information conveyed to the insurer.

77. Mr Cusick did perform 1 week and 3 days of training for a night loader role [221-222, 225-229]. He reasonably expected to be paid as a driver. Having stated this expectation, he did not agree to accept a lower wage and this lower payment was not known to him until he was paid his wages [256-257]. He agreed to undertake night duties, as he had worked for many years. Following training, he was told that only day work was available [233-234, 238-239, 242-245]. He was paid for these hours at the night loader role rate of pay, rather than his driving rate of pay.

78. Due to the financial impact on Mr Cusick, he and his wife had to re-mortgage their house to avoid missing any mortgage payments. Mr Cusick had to chase his employer for responses or action, including by raising a grievance, and the stress upon him eventually led to him taking 1 month of sick leave [241]. He was not paid SSP during this period as he did not qualify as he had not been paid enough wages prior to taking sick leave. During his sick leave, his appeal was successful in that the driving disqualification was removed and replaced with penalty points [266-267]. He informed his employer immediately [261], but was not allowed to return to work and begin receiving pay until 11 days after his sick note expired. No explanation was given for this delay [272-274, 279].

79. Ms Gould summarized the relevant law as follows.

80. Under section 13 of the Employment Rights Act 1996 (ERA 1996), the Tribunal will need to determine what were the wages properly payable to Mr Cusick;

then whether there has been any deduction from those wages; and whether that deduction was lawful or not. Authority to deduct from wages is only valid if required by law, authorised by the contract of employment or agreed/consented to “in writing”.

81. Counsel submitted that in this unusual case the Tribunal will need to consider the wage/work bargain in this particular situation. To determine whether wages are due, the first question is whether the respondent has any express or implied contractual right to lay workers off without pay. There is no express contractual provision relied on by the respondent to explicitly state that Mr Cusick could be laid off work with no pay in these circumstances.

82. In Ms Gould’s submission, the respondent contends that there is an implied term requiring Mr Cusick to be insured to drive. Mr Cusick has however referred to a number of comparators who it appears did not have the same process applied to them, indicating that this is not a term that was reasonable, notorious and certain. It also does not appear to accord with business efficacy that a driver will not be paid if they suddenly could not be insured to drive, as this would allow the respondent to immediately cease paying a driver whose insurance was revoked due to a disability. It is also relevant that an implied term cannot usurp an express term.

83. It is submitted that if no contractual right to lay off or suspension without pay can be found, then there is authority that the employee is entitled to full pay during the relevant period: *Hanley v Pease & Partners Ltd* [1915] 1 KB 698; *Marshall v English Electric Co Ltd* [1945] 1 All ER 653 CA; *Miller v Hanworthy Engineering Ltd* [1986] IRLR 461 CA.

84. Lord Templeman's judgment in *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193 HL is said to be a key case in this area. Lord Templeman stated: “In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work.”

85. In the recent case of *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570 CA, it was pointed out that the co-dependency principle of the wage/work bargain is a blunt tool for modern employment cases, where Coulson LJ stated: "In my view developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution … [T]he contractual analysis is fundamental: if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay [in circumstances where the employee has not been at work] then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not." Coulson LJ makes it clear that: “[T]he starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself. Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then the

related question is whether the decision to deduct pay for the period was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the 'ready, willing and able' analysis … – falls to be considered."

86. Ms Gould submits that there are a handful of cases in this area involving employees who are suspended or unable to work either because they have been arrested or remanded in custody or because they have lost a licence or registration necessary for the performance of their duties. *Burns v Santander UK plc* [2011] IRLR 639 EAT concerned a claimant who had been remanded in custody and charged with a number of criminal offences which were unconnected with his employment. This is a far more serious and clearly defined situation of being unable to attend work than that faced by Mr Cusick. *Burns* seems to suggest that the question is to what extent the employee's actions contributed to getting himself into a position where he was unable to work. Irrespective of blame, Mr Cusick was legally allowed to drive from 26 March 2020.

87. Counsel suggests that *Gregg* is perhaps more closely aligned to Mr Cusick's case. There a doctor was subject to a precautionary suspension of his registration by his regulator, suspending him as a medical practitioner, which prevented him from performing any medical work. The question arose whether the Trust was entitled to stop paying him during that suspension as he could not perform his contractual duties. In the Court of Appeal, Coulson LJ found that the first task for the court was to examine the contract. There was no express or implied term allowing the Trust to deduct pay in these circumstances. Nor was there any evidence of any custom and practice permitting the deduction. That being the case, it was necessary to consider whether Dr Gregg could be said to have been "ready, willing and able" to work during the suspension. Coulson LJ considered that this concept did not "fit easily into complex modern-day employment contracts" such as Dr Gregg's and in addition could be very difficult to apply. Moreover, he considered that it was not easy to discern a clear set of principles from the authorities. However, in his view, the following propositions were uncontroversial: (a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction of their pay; (b) If he or she was ready and willing to work, and the inability to work was the result of a third party decision or external constraint, any deduction of pay may be unlawful. It all depends on the circumstances.

88. In *Gregg* it was found that the term "unavoidable" should not be construed too narrowly: for example, by confining it to an act of God or some other form of accidental occurrence preventing the employee from attending work. Where the employee's actions may have had some causal connection to the suspension, the failure to attend work should not necessarily be regarded as either avoidable or voluntary, as Coulson LJ held: "What we are concerned with here is the happening of an event (the temporary suspension of Dr Gregg) which meant that he could not perform the services envisaged by his contract. This was not because he was not ready to work or not willing to work (thereby distinguishing him from the claimant in *Miles v Wakefield* [1987] IRLR 193 HL); it was because the decision of a third-party tribunal had against his will removed

his registration/licence to do so. In most cases, as here, the circumstances giving rise to the allegations will be challenged by the doctor concerned. Dr Gregg has had to accept that he will be the subject of an interim suspension. But it is involuntary … I consider that, in a situation where the contract does not address the issue of pay deduction during suspension, the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay. There may be exceptional circumstances (such as a complete or part admission of guilt) which might justify such a deduction, but they would not ordinarily arise."

89. In counsel's submission, where partial performance of a contract has been accepted, the worker is entitled to a proportion of his wages for the work he has carried out: *Royle v Trafford Borough Council* [1984] IRLR 184. It is a matter for the employer whether they accept partial performance; or make it clear that they decline partial performance and will not pay for the same; or treat it as a sufficiently serious breach of contract so as to be repudiatory. The respondent did not make this clear, but did pay the claimant for his alternative night loader duties.

90. Counsel then addressed remedy, which submissions the Tribunal has not reproduced for now.

91. Counsel summarised her submissions on liability as follows.

92. Taking matters in the order set out in *Miles*, there is no express contractual provision which assists the respondent here. Mr Cusick has given evidence regarding comparators who were allowed to continue working when unable to drive, whether due to being banned or for ill health reasons. As such, it is submitted that the implied terms advanced by the respondent in their ET3 ought not to be found to exist. It is relevant that: (1) Mr Cusick's understanding of how colleagues have been treated entirely undermines the respondent's case on implied terms. They have not given any examples of others being treated in the same way as Mr Cusick in the past which, given the size and age of the respondent company, it seems unlikely that the issue of a driver being disqualified has not arisen before. (2) On the respondent's case, their express terms would allow them to stop paying staff who could not work due to ill-health reasons, which would not be reasonable nor required for business efficacy as between the employees and employer. Therefore, as in *Miles*, it appears that there is no evidence of custom and practice of treating those in Mr Cusick's situation in the way that he was so treated.

93. Lord Templeman in *Miles* confirmed that so long as the employee is ready and willing to work, then he is generally entitled to payment of the remuneration due under the contract unless there is a specific term (express or implied) to the contrary. Mr Cusick was ready and willing to work and objectively viewed, from 26 March 2020 when the Court suspended his disqualification, he was able to work in his contractual role. The respondent was fully aware of and had seen the relevant documentation from the Court and DVLA by 20 April 2020 at the latest that confirmed this position.

94. In counsel's submission, it is abundantly clear from the documentary evidence

that the claimant was (emphasis added) "ready, willing and able" to work at least from 26 March 2020 and this was unequivocally known by his employer by 24 April 2020. Whether the insurer chose to take a different view is a matter as between the insurer and the respondent, but ought not to impact upon the wages properly payable by the respondent to the claimant. It was open to the respondent to suspend Mr Cusick on pay or to put him on other duties while the insurer remained unsatisfied of the position.

95. Applying *Gregg*, it is submitted, the Tribunal will have to look at whether the insurer's refusal to insure Mr Cusick meant that in all the circumstances the decision not to pay the claimant was lawful. It is submitted that it was not for the following reasons. (1) Objectively viewed, Mr Cusick had a licence which entitled him to drive. (2) The respondent acted slowly with its insurer. There is not a clear trail of documentary evidence of what took place. The respondent has not called the managers who the claimant dealt with as witnesses. From the claimant's involvement with the broker, it appeared that they were unaware of the situation. (3) Comparators have been put into alternative roles in the past with no evidence of them having been interviewed for such roles. (4) The insurer does not have as high a degree of authority as a regulator. Furthermore, alternative insurance could have been sought. (5) Mr Cusick did all he could to update his employer and the insurer. (6) The claimant was required to take holiday pay, paid at his driver's rate, indicating an intention to keep the contract alive. (7) The claimant was eventually provided with separate duties and provided some payment for the same.

96. Ms Gould contended that, while it is arguable that the respondent has accepted part performance for the 1 week 3 days where the claimant trained on night loader duties, it is submitted that this is putting the cart before the horse. It is submitted that the claimant was entitled to be paid his contractual pay throughout this period, or at the very latest from 26 March 2020 when his licence allowed him to drive. He did not agree to any change in this rate of pay and therefore, whether the respondent directed him to perform night loader duties, driving duties or no duties, he ought still be entitled to his driver rate of pay.

97. Counsel then addressed the question of sick pay and of remedy generally. The Tribunal does not set out those submissions at present. The Tribunal is invited to find that the claimant's wages were properly payable during the relevant periods and to award damages accordingly to reflect the unpaid wages and consequential losses.

Respondent's submissions

98. For the respondent, Mr Northall put before the Tribunal a number of authorities upon which he relied: *Agarwal v Cardiff University* [2019] IRLR 657 CA; *New Century Cleaning v Church* [2000] IRLR 27 CA; *Wincanton Group plc v Stone* [2013] IRLR 178 EAT; *Coors Brewers v Adcock* [2007] IRLR 440 CA; and *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570 CA.

99. Counsel also reminded the Tribunal that the claim is for unauthorised deductions from wages (see the description of the claim at paragraph 27 of the Grounds of Complaint).

100. Counsel suggested that very few of the facts are in dispute. In summary, Mr Northall recounted that the claimant is employed by the respondent as a Class 1 LGV Driver on the Night Shift. He received a 12 month driving disqualification on 18 February 2020 as part of a sentence following a conviction for driving without due care and attention. The disqualification was suspended on 26 March 2020 pending appeal against sentence. The respondent's insurer, acting through its broker, refused to indemnify the respondent in respect of claimant. Mr Cusick was not insured to resume his role as a LGV driver. Following an initial period of annual leave, the claimant was placed on unpaid leave pending: (a) the availability of suitable alternative employment; (b) further enquiry with the respondent's insurer; and (c) the appeal against sentence. Following a successful appeal against sentence on 29 July 2020, the claimant returned to his role of LGV driver on 21 August 2020.

101. Counsel submits that the claimant claims that he was "willing and able" to resume his role. He claims unpaid wages for the period 12 March 2020 to 21 August 2020. The respondent contends that, the insurer having declined indemnity, he could not lawfully discharge his role. It was an express or implied term of the contract of employment that he be insured to drive in the course of his employment.

102. In Mr Northall's analysis, the claim is likely to turn upon whether the wages claimed by Mr Cusick were "properly payable" within the meaning of section 13(3) ERA 1996, which in turn involves an examination of the express and implied terms of the contract: see *Agarwal v Cardiff University* [2019] IRLR 657 CA. To be "properly payable" the sum to be paid must arise from a legal obligation, usually the contract of employment: see *New Century Cleaning v Church* [2000] IRLR 27. The claimant relies upon express terms of the contract relating to pay. See paragraphs 2 and 3 of the Grounds of Complaint. Consequently, questions of "fairness" do not arise. The essential question is simply: what did the contract require on the present facts?

103. Counsel then turned to the facts.

104. In his submission, the facts relevant to the claim are relatively few. Large parts of Mr Cusick's witness statement are concerned with the respondent's search for alternative employment and its alleged failure to redeploy him. These facts are not relevant to the claim for deductions from wages because: (1) the claimant did not have a contractual right to be redeployed in these circumstances and he does not rely upon the same. (2) He does not claim the wages payable in an alternative role (and would have no right to claim such sums). (3) It is questionable whether the respondent was subject to any legal duty to find alternative employment: see the comments of Langstaff J to this effect in *Wincanton v Stone* [2013] IRLR 178 at paragraph 40 in the context of a claim for unfair dismissal. (4) Such a claim would be for an unquantified sum and could not be pursued as a claim for unauthorised deductions from wages: *Coors Brewers v Adcock* [2007] IRLR 440 CA.

105. In counsel's analysis of the evidence, the claimant admits that on 21 July 2019 he committed a speeding offence while riding a motorcycle. The most objective description of the offence within the documents before the Tribunal appears in an email from the claimant's solicitor dated 25 February 2020 [60]. It stated that: "Our expert…calculated your average speed over the distance of…1.6 miles in the time of 62 seconds as being in the region of 93mph in an area where the speed limit fluctuated between 50 and 60 mph" [62]. Mr Cusick was convicted of driving without due care and attention at a trial on 21 January 2020. The court sentenced him to a 12 month driving disqualification on 18 February 2020.

106. Mr Cusick attended a meeting with Jason Dibble (the respondent's National Transport Manager) on 25 February 2020 to discuss the disqualification. Mr Dibble explained the importance of the insurer's assessment [68]. He also invited the claimant to apply for other positions.

107. The claimant informed Jason Dibble on 3 April 2020 that his sentence of disqualification had been suspended pending an appeal against sentence. The order suspending the disqualification was made by the court on 26 March 2020. On 3 April 2020, the respondent's insurer emailed the respondent's broker in the following terms: "As discussed, if this driver has been disqualified, he must not drive until DVLA confirm they have lifted the ban whilst it is under appeal. This can be checked via the DVLA driver check system, but it might take a little time under the current circumstances we find ourselves under" [162].

108. On 17 April 2020, the DVLA issued to the claimant a document entitled Confirmation of GB driving licence details. Within the "additional information" section it stated "D/Q PENDING APPEAL 15/07/2020". On 22 April 2020, Jason Dibble provided the respondent's insurance broker with copies of documents provided by the claimant [120]. The broker responded the same day [119] and stated as follows: "…I have now had chance to talk it through with my risk management colleague (who is an ex lawyer) … I understand that when you do an online DVLA check, the ban is still showing as valid, we think that puts both T J Morris and the driver in a situation that does not allow him to drive. We think as it stands you should not allow him to drive until the appeal has been heard…"

109. An investigation meeting took place between the claimant and Liam Wilson (Transport Assistant Manager) on 4 May 2020 [100]. Within the meeting, Mr Wilson commented that the suspension of disqualification was "not replicated in DVLA [website]". Mr Cusick admitted that "DVLA can't update website" [101]. Mr Wilson later remarked that: "when insurers need to review licence will go to DVLA" [102]. He also confirmed that: "insurers have final say" [105].

110. On 12 May 2020, the claimant sent the respondent a further "certificate of entitlement" [143]. The following day, Jason Dibble confirmed that he had sent a copy of the document to the insurance company [134].

111. The respondent engages a third party organisation, the Licence Bureau, to undertake checks on driving licences. In counsel's submission, it is important

to emphasise that the Licence Bureau does not maintain its own database, but rather uses information provided by DVLA, for which it pays a subscription fee. On 14 May 2020, a check undertaken through the Licence Bureau confirmed that records held by DVLA indicated that the claimant was disqualified from driving [140]. The same day, the respondent's insurance broker stated that any confirmation of the claimant's ability to drive "needs to come through on the bureau checks so that there is no question over the business or the drive[r]" [133]. A second check through the Licence Bureau on 10 June 2020 continued to confirm that records held by DVLA indicated that the claimant was still disqualified from driving [165].

112. At a meeting of 12 June 2020 attended by Mr Cusick and Alan Beech (Transport Manager), they both logged into the DVLA website [177]. The information obtained is at [173]. Under the heading "Driving Status", the summary stated: "Expired full licence" and included details of the disqualification following the offence. Throughout the meeting, Mr Beech confirmed that the position was "dependent on insurers": see, for example, [181]. The 12 June 2020 meeting concluded with the claimant confirming that he felt he had now received sufficient information [188].

113. The claimant attended a meeting with Alan Beech and Janet Phair of the broker on 16 June 2020. Ms Phair undertook to revert to the insurer with the most recent information and obtain its up-to-date view. On 18 June 2020, Janet Phair confirmed by email that "the stance has not changed" due to the fact that the DVLA systems continued to report that the claimant was disqualified [202]. At a meeting of 19 June 2020, Alan Beech informed Mr Cusick that Janet Phair had reverted to the insurer and "the stance from [it] has not changed" [205]. The claimant responded that "you have moved it on, I do appreciate that".

114. On 29 July 2020, the claimant was successful in appealing the sentence relating to disqualification. The disqualification was substituted for a six point endorsement. He emailed the respondent to confirm the appeal outcome on 31 July 2020 [261]. The DVLA website was updated to confirm the reinstatement of his licence on 11 August 2020 [273]. The respondent's insurer confirmed it would now indemnify the claimant on 14 August 2020 [270]. He returned to his contractual driving duties on 21 August 2020.

115. Mr Northall then turned to the relevant law.

116. Counsel emphasised the importance of the contract. He submitted that the right to be paid is not engaged simply where the employee is "ready, willing and able" to work. Whether the employee's readiness etc to work entitles him to be paid is secondary to the express and implied terms of the contract. "The starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself… Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then… the related question is whether the decision to deduct pay for the period… was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the "ready, willing and able" analysis… falls to be considered": *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570 CA, *per* Coulson

LJ at paragraph 54. If the express or implied terms of the contract entitled the employer to withhold pay, it does not matter whether the employee was ready, willing and able to work.

117. Turning next to the implication of terms, Mr Northall's submissions (deliberately) do not set out an extended discussion of the law on the implication of contractual terms, although counsel went further in oral submissions.

118. Counsel submitted that there are various bases for implying terms on which the respondent relies as part of this case. (1) The term should be implied in fact, through (a) the officious bystander test; and (b) business efficacy. (2) The term should be implied by law on the ground that it is necessary to give effect to the general law on the need to carry insurance when driving on a public road. (3) The term should be implied through custom and practice on the ground that it is reasonable, notorious and certain and because there is a sense of legal obligation to do so. Counsel stated that it may be unnecessary for the Tribunal to grapple with each of these tests in the present case. The need for an employed driver to be insured to do so is so obvious that the officious bystander test is likely to be sufficient.

119. Turning next to the "ready, willing and able" principle, counsel explained that his submissions do not analyse the authorities which consider the employee's right to pay on the basis they were "ready, willing and able" to work. The authorities are analysed and an attempt at summarising them is made at paragraphs 47-53 of the judgment of Coulson LJ in *Gregg*. As commented upon in *Gregg*, on the "ability" of an employee to work, the authorities draw a distinction between an "involuntary impediment" and a situation in which the employee has a responsibility for the inability. An example of the latter would be the employee's imprisonment due to their conviction for a criminal offence, a situation which occurred in *Burns v Santander UK plc* [2011] IRLR 639 EAT.

120. Counsel then addressed himself to his consequent submissions.

121. Commencing with express terms, it is submitted that it was an express term of the contract of employment that the claimant be insured as a condition of performing his role. Clause 22 of the contract of employment [51] provided as follows: "If you are employed as an LGV driver or a LGV Shunter Driver it is therefore a condition of your employment that you hold, and maintain, a current full driving licence. During your employment you shall: (a) Take good care of the LGV and ensure that the provisions of the Company's LGV procedures as amended from time to time and <u>any policy of insurance relating to the LGV are observed</u>" (emphasis added).

122. It is contended that clause 22 requires the claimant to observe the terms of any policy of insurance in place from time to time relating to his duties as a driver. It presupposes that a valid policy of insurance is in place and that the claimant is indemnified under it. Properly construed, it is submitted, each of the requirements of clause 22 constitute conditions of employment. Their significance to the contract, and the employment relationship, is demonstrated

by the final sentence, which warns the employee that a failure to adhere to any of the requirements of clause 22 may constitute gross misconduct.

123. Turning then to implied terms, Mr Northall first addressed the “officious bystander” test. The respondent relies upon the (said to be) self-evident proposition that an employed driver cannot discharge his or her contractual duties unless they are insured by their employer to drive. Allowing the employee to drive on a public highway would result in a criminal offence. The proposed term will be implied in accordance with the officious bystander test if it is so obvious that if an officious bystander suggested to the parties that they include it in the contract they would respond “of course”. A requirement to be insured plainly satisfies the test. Such a requirement is obvious to anyone.

124. As to business efficacy, if an employed driver were entitled to be paid regardless of whether they were insured to drive, it would serve to frustrate the purpose of the contract. The driver is employed to discharge their duties in accordance with the law. They cannot expect to be paid where performance of the contract would be unlawful. As explained in Mr McLoughlin’s evidence, it could result in the loss of the respondent's operating licence.

125. Regarding terms implied in law, section 143(1)(a) of the Road Traffic Act 1988 provides that a person must not use a motor vehicle on a road unless there is in force a policy of insurance held by such person. Furthermore, section 143(1)(b) provides that a person must not cause or permit any other person to use a motor vehicle on a road unless there is in force a valid and applicable policy of insurance in respect of that person's use of the vehicle. The parties to a contract of employment must be taken to have agreed performance of the obligations in accordance with the law. Consequently, it is necessary to imply into the contract employment a requirement that the claimant be insured as a condition of his undertaking the role.

126. Finally, regarding any term implied through custom and practice, Mr McLoughlin has given evidence concerning the custom and usage within the logistics industry. No haulier or logistics company would even contemplate permitting an employed driver to drive while uninsured.

127. Nevertheless, in counsel’s submission, there are limits to the implied term. The respondent recognises that the implied term on which it relies is limited by further implied terms relating to trust and confidence and the duty of cooperation. The respondent could not, for example, employ the claimant as a driver but then refuse to pay for insurance. However, the decision of the insurer in the present case did not result from the respondent's breach of a further implied term. Rather, it resulted from the independent exercise of the insurer's judgement and its assessment of risk. The respondent had no control over the insurer's decision-making, nor should it. An insurer must be able to make an arm's-length decision, uninfluenced by the employer or the employee.

128. Mr Northall then address the issue of readiness, willingness and ability to work. In his submission, if the Tribunal accept the respondent's submissions on the existence of an express or implied term, it is unnecessary to go on to consider whether the claimant was “ready, willing and able” to work. Subject to

this, regardless of whether the claimant was ready or willing to undertake work, he was unable to do so and consequently lost the right to payment under the contract.

129. Counsel returned to *Gregg*. The Court of Appeal at paragraph 53 commented on the principle drawn from the authorities that, where an inability to work was "unavoidable", that unavoidability is to be construed narrowly and should be taken to mean an Act of God, or some other form of "accident". The Court of Appeal urged caution where this approach might lead to an assumption of guilt: for example, where an employee is placed on unpaid suspension as a result of a criminal charge, but prior to conviction. However, the Court did not disapprove of the principle other than in these limited circumstances.

130. In the present case, it is submitted, the insurer's decision not to insure the claimant does not fall within the description of "unavoidable". The origin of the decision lay in the claimant's own culpable conduct. As he stated himself [71]: "I accept my actions have led to this." The claimant admits that he committed a criminal offence and the circumstances of the offence are not in dispute. The distinction between the status of the claimant's licence, as reported by him, and its status as reported by the DVLA website and the Licence Bureau, resulted from the fact that his disqualification was suspended pending an appeal against sentence. The original sentence was made by a court of competent jurisdiction following conviction. The sentence may have been suspended, but it was not expunged until the successful appeal on 29 July 2020.

131. In conclusion, counsel submits, for the claim to succeed, the claimant must demonstrate that, on the occasion of each deduction claimed, the full amount of his salary as a Class 1 LGV driver was "properly payable" within the meaning of section 13(3) ERA 1996. He cannot do so. No such sum was properly payable because, due to the fact the insurer would not insure him, he could not discharge his contractual duties and he had no contractual right to payment. The claim should be dismissed.

132. Mr Northall appropriately reserved his position as to remedy should the claim succeed.

Relevant legal principles

133. The Tribunal draws upon the commentaries in *Harvey on Industrial Relations and Employment Law* and in the relevant *IDS Employment Law Handbooks* on contracts and wages for its general assistance.

134. Section 13 is concerned with the right not to suffer unauthorised deductions. So far as is relevant to the present case, the operative provisions are in section 13(1)-(3).

135. An employer shall not make a deduction from wages of a worker employed by it 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 or her agreement or consent to the making of the deduction (section 13(1)).

136. A “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion (section 13(2)).

137. 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 it to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion (section 13(3)).

138. For these purposes, a “deduction” includes a non-payment: *Delaney v Staples (t/a De Montfort Recruitment)* [1991] IRLR 112 CA; [1992] IRLR 191 HL. Any shortfall in a payment of an amount of wages is treated as a deduction from wages. A dispute as to what is properly payable does not have any contrary effect.

139. The question of what is the “the total amount of wages properly payable” is key. It is for the Tribunal to consider and resolve factual issues to determine whether an amount was properly payable to the employee under his or her contract: *Capek v Lincolnshire CC* [2000] IRLR 590 CA. However, section 13 is only appropriate for a claim for a specific amount of money or an amount that is quantifiable. Otherwise, section 13 is not appropriate. The claimant’s cause of action then is one of breach of contract in the Civil Court: *New Century Cleaning Co Ltd v Church* [2000] IRLR 27 CA; *Coors Brewers v Adcock* [2007] IRLR 440 CA.

140. In exercising its jurisdiction under section 13, it may be necessary for the Tribunal to resolve legal issues as well as factual issues. The question might include whether the amount being claimed by the claimant was lawfully due. If necessary the Tribunal might also have to construe and interpret the contract to determine what was properly payable. See: *Agarwal v Cardiff University; Tyne & Wear Passenger Transport Executive* [2019] IRLR 657 CA.

141. Exceptionally, where an employer withholds statutory sick pay because it believes it is not legally payable, the question whether it was “properly payable” does not fall for determination by an Employment Tribunal: *Sarti (Sauchiehall St) v Polito* [2008] ICR 1279 EAT.

142. Turning from the specific provisions of section 13 ERA 1996, an employee’s general right to be paid wages is addressed by the appropriate express and implied terms of his or her contract of employment.

143. As a general rule, there is no implied obligation upon the employer to provide the employee with work, unless exceptionally the employee’s pay would be adversely affected by a failure to provide work (as in piece work). The

general expectation is that the employer will pay the employee the wages agreed under the contract of employment. That is at the very least an implied obligation. It cannot be easily displaced, for example, by suspending the employee without pay, unless there is a clear term of the contract that permits suspension without pay. Even then an express right to suspend without pay might be qualified by an implied term, for example, as to a reasonable length of time.

144. On the other hand, an employee's entitlement to be paid wages is generally dependent upon the employee being ready and willing to work and to discharge his or her contractual obligations to the employer. That can be subject to exceptions, for example, in respect of sick pay and holiday pay, but as in the present case, can easily be the subject of dispute. There are clearly circumstances in which an employee cannot demonstrate readiness and willingness to work: as, for example, where the employee is in prison: *Burns v Santander UK plc* [2011] IRLR 639 EAT. Nor can an employee expect to be paid wages in return for offering only partial performance of his or her duties, unless the employer accepts such partial performance: *Miles v Wakefield MDC* [1987] ICR 368 HL. If partial performance has been accepted, the employee is entitled to a proportion of his or her wages for the work he or she has carried out: *Royle v Trafford Borough Council [1984] IRLR 184.*

145. Taking these two points together, therefore, in the absence of any contractual right to suspend without pay, an employee's wages are "properly payable" while he or she is suspended from work, so long as he or she is otherwise ready, willing and able to work as required. See: *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570 CA. If there is no contractual right of suspension without pay, then (as *Harvey* summarises) the employee is entitled to full pay during the relevant period: *Hanley v Pease & Partners Ltd* [1915] 1 KB 698; *Marshall v English Electric Co Ltd* [1945] 1 All ER 653 CA; *Miller v Hanworthy Engineering Ltd* [1986] IRLR 461 CA.

146. In *Gregg* the express terms of the employee's contract did not permit the deduction of pay during an interim suspension. There was no basis on which to imply a term into the contract to that effect. The position was therefore governed by common law principles. An employee who does not work must show that he or she is ready, willing and able to perform work to avoid a deduction from pay. If the employee is ready and willing, and the inability to work is the result of a third party decision or external constraint, any deduction may be unlawful depending on the circumstances. An "involuntary" inability to work, or one resulting from an "unavoidable impediment", may render the deduction of pay unlawful.

147. In *Gregg* the employee was ready, willing and able to work, but a decision of a third party had removed his registration to do so. Where the contract did not address the issue of pay deduction during suspension, the default position was that a suspension should not attract a deduction of pay. Exceptional circumstances did not arise in that case. Whether or not an employee is "ready and willing" to work during an effective suspension involves examining the employee's situation and intentions. It also involves deciphering exactly what his or her contractual duties are.

Discussion and conclusion

148. The Tribunal deals first with the respondent's submissions. The facts are largely not in dispute.

149. The Tribunal agrees that the contractual position is important. The right to be paid is not engaged simply where the employee is "ready, willing and able" to work. That is also subject to any express and implied terms of the contract: see *Gregg*. If the express or implied terms of the contract entitled the employer to withhold pay, it does not matter whether the employee was ready, willing and able to work.

150. The respondent's position relies upon the implication of terms, rather than upon an express term. The Tribunal acknowledges counsel's summary submissions as to the law on the implication of contractual terms and the various bases for implication of the term for which the respondent contends. The Tribunal readily accepts that the respondent could not permit the claimant to drive its vehicles without him being insured to do so, but that does not take us any further as to the scope of any resulting implied term, in the Tribunal's judgment.

151. In the Tribunal's judgment, it was not an express term of the contract of employment that the claimant be insured as a condition of performing his role. Clause 22 of the contract of employment provided: "If you are employed as an LGV driver or a LGV Shunter Driver it is therefore a condition of your employment that you hold, and maintain, a current full driving licence. During your employment you shall: (a) Take good care of the LGV and ensure that the provisions of the Company's LGV procedures as amended from time to time and any policy of insurance relating to the LGV are observed". In the Tribunal's analysis, the express term is that the claimant must have a current driving licence. Clause 22 requires him to abide by the provisions of the respondent's insurance policy for the vehicle in question. That falls short of placing an obligation upon the claimant in relation to being insured. Responsibility for ensuring that the claimant is insured to drive its vehicles is the respondent's rather than the claimant's.

152. In the absence of any particular express terms, what terms are capable of being implied that would support the respondent's position? The Tribunal agrees that it is self-evident that an employed driver cannot discharge his or her contractual duties unless they are insured by their employer to drive. A requirement to be insured plainly satisfies the officious bystander test. However, that takes us no further, the Tribunal suggests, than does clause 22, properly construed.

153. Again, the Tribunal agrees that if an employed driver were entitled to be paid regardless of whether they were insured to drive, it would serve to frustrate the purpose of the contract. The driver is employed to discharge their duties in accordance with the law. They cannot expect to be paid where performance of the contract would be unlawful. It could result in the loss of the respondent's operating licence. However, again that only takes us so far and is not a

complete answer to the claimant's position in this claim, in the Tribunal's judgment.

154. Similarly, the Tribunal accepts that the parties to a contract of employment must be taken to have agreed performance of the obligations in accordance with the law – here the Road Traffic Acts. It is thus necessary to imply into the contract of employment a requirement that the claimant be insured as a condition of his undertaking the role. Whether that is implied as a matter of business efficacy or custom and practice in the industry matters not. However, that does not dispose of the claimant's claim on these facts.

155. The Tribunal notes the respondent's position that it could not, for example, employ the claimant as a driver but then refuse to pay for insurance. It agrees that the decision of the insurer in the present case resulted from the third party's independent exercise of its judgement and its assessment of risk. The respondent had no control over the insurer's decision-making.

156. Turning next to the respondent's position on the claimant's asserted readiness, willingness and ability to work. The Tribunal has not accepted to their fullest extent the respondent's submissions on the existence of an express or implied term. Therefore, it is necessary to consider whether the claimant was "ready, willing and able" to work. In the Tribunal's judgment, the claimant was ready and willing to undertake work. The respondent's position is that he was unable to do so and thus lost the right to be paid under the contract.

157. Counsel relied here upon *Gregg* to the extent that it is authority for the principle that, where an inability to work was "unavoidable", that unavoidability is to be construed narrowly. The Tribunal agrees that the insurer's decision not to insure the claimant does not fall within the description of "unavoidable". However, equally, it does not accept that the origin of the decision lay in the claimant's own culpable conduct. At the relevant time (or, at least, for a relevant part of that time) the claimant was not disqualified from driving, but the DVLA record (and the Licence Bureau account of it) did not reflect that, although the DVLA itself accepted the claimant's position. The claimant took every reasonable step to establish his continuing or renewed qualification to drive, but neither the respondent nor its insurer would or could accept that. The Tribunal does not accept that this is as a result of the claimant's own culpable conduct.

158. Counsel is correct in submitting that for the claim to succeed the claimant must demonstrate that on the occasion of each deduction claimed the full amount of his salary was "properly payable" within the meaning of section 13(3) ERA 1996. Do the submissions on behalf of the claimant establish that, in the Tribunal's judgment?

159. Turning then to the submissions of the claimant's counsel.

160. The Tribunal accepts Ms Gould's summary of the essential facts of the matter. The claimant committed a speeding-related offence of driving without due care and attention. This was not an offence committed during working time or when using the respondent's vehicle. He pleaded guilty to the offence at the

earliest opportunity. He received a sanction of a 12 month driving disqualification, which those advising him regarded as surprising. He appealed the disqualification. While the appeal was pending, his disqualification was set aside pending the appeal. A Crown Court order and the DVLA documentation confirmed this. This was provided to the respondent at an early opportunity and frequently evidenced to them (and indirectly to its insurer and insurance broker). Subsequently, the disqualification was quashed.

161. The Tribunal agrees that from the date of the Crown Court order the claimant's disqualification was suspended. He had a valid licence pending his appeal. The respondent intended to rely upon the DVLA status. However, the claimant was not permitted to return to work. He was at first required to take paid annual leave. He was encouraged to apply for other positions within the company, in which he was unsuccessful. He was not transferred to alternative duties, despite there being comparative evidence of other colleagues in broadly similar situations who had been. He was then placed on unpaid leave.

162. The claimant was proactive in attempting to establish by various means for the satisfaction of the respondent, its broker and its insurer that he was enabled to drive and held a full driving licence in compliance with clause 22 of his employment contract. Eventually, he was provided with training and with work as a loader, but this turned out to be day work rather than his existing preference for night working, and at a reduced rate of pay compared with his substantive wage.

163. The Tribunal accepts the legal analysis of section 13 ERA 1996 advanced by counsel. The Tribunal begins by determining whether wages were properly payable to the claimant (and, if so, what wages). Then has there been any deduction from those wages? If so, was that deduction lawful or not? Authority to deduct from wages is only valid if required by law, authorised by the contract of employment or agreed to in writing.

164. In the Tribunal's judgment, to determine whether wages are due, the question is whether the respondent had any express or implied contractual right to suspend the claimant without pay. It does not matter how that right is labelled or described, whether as a suspension or as a lay off or as unpaid leave or otherwise. In this case, it is clear that there is no express contractual provision relied upon by the respondent to (in effect) suspend him from work without pay in the circumstances that arose.

165. As to the respondent's contention that there is an implied term requiring the claimant to be insured to drive, the Tribunal agrees that the comparator evidence undermines any suggestion that there was an implied term that was reasonable, notorious and certain. The Tribunal further agrees that business efficacy does not require that a driver be suspended without pay if there is an interruption in their insurability under the respondent's insurance policy or arrangements.

166. In the Tribunal's judgment, there was no contractual right to (in effect) suspend the claimant without pay (by whatever means that might have been achieved). The claimant was entitled to full pay during the relevant period. See:

Hanley v Pease & Partners Ltd [1915] 1 KB 698; *Marshall v English Electric Co Ltd* [1945] 1 All ER 653, CA; *Miller v Hanworthy Engineering Ltd* [1986] IRLR 461 CA; *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193 HL; and *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570 CA (and in particular the analysis of Coulson LJ cited above). This is not a case of the type that was being addressed in cases like *Burns v Santander UK plc* [2011] IRLR 639 EAT. The Tribunal agrees that the claimant's case is more closely aligned with a case such as *Gregg*.

167. In summary, the Tribunal accepts the claimant's submission that there is no express contractual provision that assists the respondent. The evidence of the treatment of comparators undermines the existence of a suitable implied term upon which the respondent might rely in the alternative. So long as the claimant was ready and willing to work, then he was generally entitled to payment of the remuneration due under the contract unless there is a specific term (express or implied) to the contrary.

168. The claimant was ready and willing to work. From 26 March 2020, when the Court suspended his disqualification, he was able to work in his contractual role. As counsel put it, whether the insurer chose to take a different view is a matter as between the insurer and the respondent. It does not impact upon the wages properly payable by the respondent to the claimant. It was open to the respondent to suspend the claimant on pay or to put him on other duties while the insurer remained unsatisfied of the position – or to take some other, perhaps more radical, view of the claimant's continued employability. It did not do so.

169. In conclusion, in the Tribunal's analysis, the respondent made a deduction from the wages of the claimant in circumstances where the deduction was not required or authorised to be made by virtue of a statutory provision or a relevant provision of his contract, nor where he had previously signified in writing his agreement or consent to the making of the deduction. There was no provision of the contract comprised in one or more written terms of the contract of which the respondent had given the claimant a copy on an occasion prior to the respondent making the deduction in question, nor in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the claimant the respondent had notified to him in writing on such an occasion

170. The total amount of wages paid on relevant occasions by the respondent to the claimant was less than the total amount of the wages properly payable by it to him on those occasions. The amount of that deficiency is a deduction made by the respondent from the claimant's wages on those occasions. Those deductions included non-payments of wages properly payable.

171. The claimant's complaint of unauthorised deductions from (or non-payment of) wages contrary to Part 2 of the Employment Rights Act 1996 is well-founded. The claim is upheld.

172. The question of remedy and quantum remains to be decided. The parties shall advise the Tribunal within 21 days of the date on which this judgment is

sent to the parties as to how they wish to proceed.

Judge Brian Doyle
Date: 10 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 June 2021

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.