EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107762/2020 (V)

Held in Aberdeen by CVP on 16 February 2021

Employment Judge Murphy (sitting alone)

Mr J O'Hara	**Claimant** **Represented by** **Ms D Flanigan -** **Solicitor**
XPO Supply Chain UK Ltd	**Respondent** **Represented by** **Mr T Doyle -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Respondent made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £336.72 (gross) in respect of a series of deductions in the period from February 2019 to August 2020.

2. The sum awarded in item 1 above is expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable. The sum awarded in item 3 should be paid to the Claimant net of any deductions.

REASONS

Introduction

1. The Claimant brings a claim in relation to unpaid shift allowances throughout the period of his employment for shifts he worked which straddled the hour between 6 and 7 am, or part thereof, but which commenced before 6 am.

2. The parties agree that, for the most part, no shift allowance was paid for time worked between 6 and 7 am in circumstances where the Claimant's shift commenced prior to 6 am.

3. The parties agree that, if the Claimant were entitled to receive shift allowance payments in such circumstances, the sum unlawfully deducted from his wages would be £336.72 (gross) across the period of his employment.

4. The Claimant claims a contractual entitlement to be paid the shift allowance on occasions when he worked between the hours of 6 and 7 am, having started earlier. The Respondent denies such an entitlement is conferred by the Claimant's contract of employment.

Issue to be determined

5. The issue for determination by the tribunal is:

    a. Was the Claimant contractually entitled to be paid a shift allowance pertaining to time worked between 6 and 7 am in circumstances where the Claimant's shift began prior to 6 am but ended after that time?

Findings in Fact

6. The tribunal made the following findings in fact.

7. The Claimant was employed by the Respondent from 11 February 2019 to 11 August 2020. At all material times, he was employed as a Class 2 Driver. He worked for the Respondent on their Iceland contract at the Livingston site and transported ambient frozen and chilled goods on Iceland routes.

8. He was contracted to work 50 hours per week on any five days from seven. When his employment began, he tended to work Monday to Friday or Monday to Saturday though latterly his shift pattern was Tuesday to Saturday. Throughout his employment his shifts routinely began between 2.30 am and 5.15 am, and tended to last twelve hours.

9. Before his employment began, the Claimant signed a contract of employment on 10th February 2019 ("the Contract"). He also signed an addendum to his employment contract on that date ("the Addendum"). The Addendum was headed 'Iceland Booker' and was issued to employees of the Respondent (including the Claimant) who commenced their employment after 2016 and who worked for the Respondent on its Iceland Foods Contract at Livingston. Both the Contract and the Addendum were signed on behalf of the Respondent by a manager called George Nicol on 5 February 2019.

10. Employees who commenced employment with the Respondent prior to 2016 and who worked on the Iceland Food contract had different contractual arrangements. There was a transfer of undertakings from DHL to the Respondent in 2016. Following that transfer, the Respondent had overhauled its employment contract template in 2016. Those whose employment predated the transfer were on different 'legacy' contracts inherited from DHL.

11. A section of clause numbering in the Contract is repeated. In the 'second' clause 12, which appears on the sixth and penultimate page of the contract, it states:

> "*the collective agreement between DHL and Iceland – Livingston – Warehouse, Drivers & Operational Support – USDAW dated 12th February 2007, a copy of which will be made available to you by your line manager, directly affects your employment.*
>
> *Where there is a conflict between your Collective Agreement and the terms and conditions of your employment as set out in your Contract of Employment, the Collective Agreement will prevail*."

12. A list of enclosures was included on the last page of the Contract (the signing page). It did not include a copy of the Collective Agreement.

13. On the commencement of his employment, the Claimant was not provided with a copy of the Collective Agreement by his line manager.

14. The Collective Agreement was not published or displayed anywhere employees could freely access it. It was not pinned to a notice board, provided in a handbook, or published on a staff intranet. The Respondent's policy was only to provide it in response to a request. Even then, there was no consistent practice in relation to its provision. Depending on the reason for the employee's query, the Respondent sometimes provided only such excerpt(s) as it considered relevant. Likewise there was no consistent practice by the Respondent regarding the provision of updates or amendments to the Collective Agreement.

15. The Addendum which the Claimant signed on 10 February 2019 included a clause numbered 6 in the following terms:

16. "*6.* ***Additional Payments***

Overtime is payable for this position at the following rates:

Driver	*£15.66*

Shift Allowances – Drivers

06.00hrs – 07.00hrs	*£1.29*
18.00hrs – 22.00hrs	*£1.92*
22.00hrs – 06.00hrs	*£2.38*
Night out	*£25.71*"

17. The Claimant discussed the Addendum with the Respondent's George Nicol before his employment began. Mr Nicol told the Claimant he would be eligible for the 'AM payment' between 6 and 7 am.

18. The Claimant was pleased with the pay and benefits described in the Contract and the Addendum. In taking up the employment, he considered the significant commute from Glasgow to Livingston of approximately 70 miles per day. The Claimant weighed up

the remuneration package on offer and considered, in particular, that the shift allowances payable would assist in meeting his monthly fuel costs associated with this commute.

19. In the early days of the Claimant's employment, he received the £1.29 allowance, including for shifts beginning before 6 am but continuing after that time. He noticed within a couple of months, however, that the payment was not always made. He waited until after his probationary period expired to raise it with the Respondent.

20. He did so around November 2019. He raised the matter with the Respondent's Stephanie Kellock, a frontline manager in the transport department. Ms Kellock did not dispute the Claimant's entitlement to the allowance, nor did she provide the Claimant with a copy of the Collective Agreement. Instead, she encouraged the Claimant to claim the missing allowance as an overtime payment by applying for overtime which he had not worked in the amount of the missing shift allowance payments. The Claimant did so, and the matter was initially resolved in this manner.

21. The discrepancy continued, however, and the Claimant raised the matter with the Respondent again in or around January 2020. On this occasion, the Claimant spoke to the Respondent's Grant Macintosh. Mr MacIntosh had been employed since July 2018 as the Respondent's HR Manager, based at the Iceland and Booker site in Livingston. Mr MacIntosh told the Claimant he would "take it upstairs" which the Claimant understood to mean he would discuss the matter with his finance and payroll colleagues.

22. In January 2020, the rates set out in Clause 6 of the Addendum were refreshed. The rate applicable for 06.00hrs to 07.00hrs increased to £1.32.

23. Mr MacIntosh told the Claimant he would get back to him. Mr MacIntosh did not, however, return to the Claimant.

24. In or about March 2020, as the Covid crisis developed in the UK, a female finance manager employed by the Respondent spoke to the Claimant about the matter. She indicated that the department was 'down on manpower' at that time, and that it would take two or three weeks to get the payments sorted. She did not dispute the Claimant

had any entitlement to the payment. She did not provide the Claimant a copy with the Collective Agreement or suggest it had any relevance to the issue.

25. The Claimant discussed the matter with four of his Driver colleagues who worked shifts, starting before 6 am but continuing thereafter. They, similarly, were not receiving shift allowance payments in respect of this period.

26. Employees starting at 6 am, or indeed after 6 am but before 7 am, were, conversely, paid the shift allowance for the hour or part of the hour worked before 7 am.

27. At some stage between March and June 2020, a manager of the Respondent provided the Claimant and /or his colleague, Steven Stoddart, with a copy of the Collective Agreement between DHL and the Union of Shop, Distributive and Allied Workers (USDAW) dated 12 February 2007 ("the Collective Agreement").

28. The Respondent did not provide the Claimant or Mr Stoddart with the unsigned document dated 1 April 2009, headed 'DRIVERS PAY RATES – LIVINGSTON FROM 01.04.09' ("the 2009 Schedule").

29. The Claimant / Mr Stoddart was provided with the body of the Collective Agreement which runs to some 46 pages. The Agreement purports to cover the terms and conditions of employment for specified categories of employees, including driver graded employees at the Livingston site. The following wording appears in the Introduction section:

> "*This Agreement will continue indefinitely until such time as amended by negotiation or the termination of the Agreement by either party giving six months' notice in writing.*
>
> *The Company and the Union undertake to discuss the Agreement on a regular basis and to amend the provision as may become appropriate for the continued efficient operation of the RDC.*
>
> *All employees covered by the Agreement will be given full access to a copy of the Agreement and will be informed that the Agreement is incorporated into their contract of employment. Any amendments, as may be made from time to time,*

will be fully communicated to each individual before any amendment to their contract of employment is effective."

[Introduction, page 10]

30. Section Two of the Collective Agreement is headed "General Terms and Conditions", and includes the following section at page 13:

"*Shift Allowances*

The Shift Allowance is standard between all jobs covered by the Agreement and is paid at the appropriate hourly shift rate. It is not related to basic pay.

Payment will be made pro rata for the rostered basic shift hours worked. Overtime hours are not included in any shift allowance payment.

….

Details of the shift allowances paid are shown in Section Three"

31. Section 3b was attached to the original Collective Agreement in 2007 when the Collective Agreement was entered. That section set out Drivers' pay rates including shift allowances. It did not refer to any shift allowance between the hours of 06.00 and 07.00 as, at that time, this allowance had not been introduced. Allowances were payable, however, for hours worked between 18.00 and 06.00. The allowance rate was higher between the hours of 22.00 and 06.00 than in the earlier evening.

32. A driver who started before 6 pm but whose shift continued beyond that hour would receive the shift allowance at the relevant rate for that part of their shift which was worked after 6 pm. Similarly, a driver who worked a shift from 8pm until 4 am would be paid at the relevant allowance rate for the hours from 8pm to 10 pm and at the higher rate applicable for the hours worked between 10 pm and 4 am. It was not necessary to start at 6 pm or 10pm on the nose to be eligible for the applicable allowance rate, if the shift straddled a period to which the rate applied.

33. The content of Section 3b was updated in the years that followed and the pay rates, including shift allowances, were refreshed annually so that the figures listed in the 2007

version were significantly out of date when the Claimant's employment began. In 2009, a shift allowance was introduced for the additional period of 06.00 to 07.00.

34. The correct shift allowance rates, as at February 2019, were listed in Clause 6 in the Addendum to the Claimant's Contract, and these rates increased further in January 2020. To communicate these annual pay increases, the Respondent relied upon the recognized trade union, USDAW, to send the new rates to their members. This they did by sending letters listing the new rates which the Trade Union representatives would then pin on notice boards at the Livingston site.

35. The Claimant and his colleagues raised the lack of payment of the shift allowance with a transport manager of the Respondent called Neil. Neil has subsequently left the Respondent's employment. Neil told the Claimant that "they know about it upstairs" but told him that whenever he asked a question about it, it got put to the side. Neil informed the Claimant that he would need to raise a formal grievance about it if he wished to pursue the matter. He did not inform the Claimant that he was not contractually entitled to the shift allowance. He did not draw the Claimant's attention to the 2009 Schedule.

36. The Claimant's colleague, Steven Stoddart. Prepared a joint formal grievance on behalf of the Claimant, himself, and three other colleagues. Mr Stoddart retained the copy of the Collective Agreement with which he had been provided. He reviewed it before drafting the grievance. The grievance was intimated to the manager named Neil on 25 June 2020. It was in the following terms:

37. *"Dear Neil,*

We are writing to raise a formal grievance.

The grievance is in regards to non-payment of a daily shift allowance, (AM payment 06.00-07.00 @ £1.32), which forms part of our employee T & C's.

We have been told various reasons as to why this payment is not being met, from "it's unfair on the drivers who start after 07.00 am" to "it's in the company handbook/ agreement that you have to physically start at 06.00 am to receive this payment."

After going through the latest site agreement (signed off in 2007) there is no mention as to why the payment would not be made.

We would be grateful if you could let us know when we can meet you to talk about our grievance."

38. The Claimant never obtained a response to his grievance. Two of the signatories to the grievance, named Derek Johnstone and Billy Johnstone, were called to a meeting about the grievance and informed that the grievance was rejected in their cases because their contractual terms made it clear they had no entitlement. These two employees had different terms and conditions of employment to the Claimant and Mr Stoddart, having begun employment before the 2016 transfer from DHL. Neither the Claimant nor Mr Stoddart were invited to a meeting to discuss the grievance. Neither were provided with a written response to the grievance at the material time.

39. The Claimant left the Respondent's employment on 11 August 2020.

40. During the preparation for these proceedings, the Respondent's solicitor provided the Claimant's solicitor with a document for inclusion in the parties' joint bundle. That document was headed 'DRIVERS PAY RATES – LIVINGSTON FROM 01.04.09.' This document was prepared in 2009 by DHL with the agreement of the recognised union, USDAW. It was stored on CD provided by DHL to the Respondent at the time of the transfer, along with other records of DHL relating to employment at the site. For convenience, in this judgment, this document is referred to as the '2009 Schedule'.

41. The Claimant had not seen the 2009 Schedule until his solicitor shared it with him, after his employment ended. The document produced by the Respondent to the Claimant's solicitor was not in the original format Mr MacIntosh retrieved from the CD. It contained words in parenthesis. Mr MacIntosh had altered the font colour of these words from black to red for emphasis. The document included the following material terms:

42. *" **3. SHIFT ALLOWANCES***

06.00hrs – 07.00hrs *£1.03 per hour*

(new shift allowance for drivers starting at 06.00am) [changed to red font]

18.00hrs – 22.00hrs	*£1.54 per hour*
22.00hrs – 06.00hrs	*£1.90 per hour"*

43. This was not the most recent iteration of such a document. In a subsequent version, the part of the document which dealt with the Overtime Allowance had been updated to stipulate it would be paid weekly after 50 hours, as opposed to 52 as the 2009. This iteration was not produced to the tribunal.

44. As mentioned, the rates payable in the 2009 Schedule had also been superseded because of annual reviews. No documentation documenting these changes was produced to the tribunal other than the Addendum to the Claimant's Contract.

Observations on the Evidence

Whether and when the Claimant received the 2009 Schedule

45. There was a factual dispute between the parties on the question of whether the Claimant had been provided with a copy of the 2009 Schedule before his employment ended and, if so, when he was provided with a copy.

46. It was difficult to weigh the evidence on this issue, which was unsatisfactory in various respects. However, on balance, the tribunal prefers the Claimant's account that he did not receive a copy of the 2009 Schedule in June or July 2020, or at all before his employment ended on 11 August 2020.

47. The Claimant initially gave evidence in cross-examination that he had not seen or read the Collective Agreement (excluding any schedules) at pages 26 to 71 in the bundle. Mr Doyle then put it to him that the collective grievance dated 25 June 2020 to which the Claimant was a signatory stated: "*After going through the latest site agreement (signed off 2007) there is no mention as to why the payment would not be made*." In response to Mr Doyle's questioning the Claimant conceded that he had indeed seen a copy of the Collective Agreement, but maintained that it did not say anything about having to start at 6 am to receive the shift allowance. This, of course, was correct. The

2007 Collective Agreement to which he had been taken by Mr Doyle at pages 26 to 71 of the joint bundle did not include either the Section 3b schedule which had been prepared in 2007 or the 2009 Schedule.

48. Mr Doyle then took the Claimant to those schedules. When taken to the 2009 Schedule, the Claimant asked where it came from. Mr Doyle took him to the text in red font. The Claimant's evidence was that he was confused by that text and disputed it. He gave evidence that he had never seen the text in red font on that page. He confirmed that a copy of the Collective Agreement had been obtained from management shortly before the grievance was submitted. He was unsure which manager had provided it. He explained he did not have the copy he saw at the time because this had been retained by his colleague Steven Stoddart, who drafted the collective grievance. He explained that this was why that version was not produced to the tribunal. He insisted that the first occasion on which he saw the version with the text in red font was when his solicitor provided him with a copy, obtained from the Respondent's representative, after his employment terminated.

49. Mr MacIntosh initially gave evidence that an updated version of the 2009 Schedule existed, amended to say the threshold for overtime allowance had changed from 52 hours (as stated in the 2009 Schedule) to 50 hours. He subsequently said that he and the Respondent's Jenna Smith had given the Claimant a copy of the Collective Agreement together "with updates". Contrary to his earlier evidence, he stated that the 2009 Schedule was the latest version, and that he hadn't found any updated schedule.

50. The evidence on the collective grievance also bears on the matter. It was undisputed between the parties that the Claimant was not invited to a meeting to discuss his grievance and nor did he receive a written response to his grievance. Both the Claimant and Mr MacIntosh gave evidence that Derek and Billy Johnstone (only) had been invited to a meeting at which they were told that based on their DHL legacy terms, they had no entitlement to the disputed allowance.

51. Mr MacIntosh gave evidence-in-chief that this was because, at the material time, one of the five signatories was sick and another was on holiday when they heard the grievance. It was hard, he said, to get five drivers in a room who worked different shifts

with differing finishing times. He said that because two of the drivers were on legacy contracts inherited from DHL which had different terms, the Respondent had met with these two individuals to advise the position based on their contracts.

52. This accorded with the Claimant's evidence. Mr McIntosh initially gave no evidence that he had met with the Claimant after the grievance was lodged to discuss the grievance with him or to advise of the Respondent's position in relation to it.

53. During cross-examination, however, Mr MacIntosh said he gave the Claimant the 2009 Schedule in July 2020 with the font colour of the text in parenthesis changed to red "to allow [the Claimant] to see it properly". He also suggested during cross-examination that one of the Trade Union representatives had shown the Claimant an older version of the 2009 Schedule, but that he, together with Ms Smith subsequently showed the Claimant a copy in July 2020 with the parenthesis coloured red.

54. When asked about the grievance thereafter, however, he continued to accept that the Claimant had never been called to speak formally or informally to himself or any member of management about the matter. At this stage in his evidence, he indicated that "we believed that having two drivers on site who would report back to the group was the only way we could do this". It had not previously been suggested that there was an expectation that these two drivers would report back to the group. Indeed, it had been explained that these two were syphoned off from the group because of their differing legacy contractual terms.

55. The tribunal had concerns about the reliability of Mr MacIntosh's evidence on the question of the provision of the 2009 Schedule to the Claimant. There was confusion about versions and inconsistency within his own account concerning whether a more up to date schedule existed.

56. Likewise, there was inconsistency regarding when and in what context the 2009 Schedule was provided to the Claimant. Mr MacIntosh did not dispute the failure of any manager to meet the Claimant after his grievance submission to discuss his grievance formally or otherwise. On the other hand, he maintained that he and Jenna Smith had indeed met with him following the grievance submission to provide him with the 2009

Schedule. This he claimed to have done with the font colour changed to red, for the purpose of demonstrating the Claimant's grievance was flawed. Likewise, the position taken regarding the reasoning behind the decision to meet with just two signatories to the grievance lacked cogency. On the one had it was suggested they were in a different category owing to their particular terms; on the other it was suggested they were expected to cascade what was said in relation to their positions as equally applicable to the others.

57. The tribunal had reservations too about the reliability of the Claimant's evidence in certain respects. The Claimant initially claimed not to have seen the Collective Agreement at all but then conceded he had, in fact, done so, albeit he did not accept he had ever seen the 2009 Schedule with the red text. The Claimant was unable to recall with any clarity who had provided a copy of the document to him and whether it was indeed a member of management or whether it came to him via his colleague, Mr Stoddart. He was, however, categoric that he had never before seen the text which appeared in red font in the version before the tribunal.

58. On balance, the tribunal preferred the Claimant's account that he had never, during his employment, seen the 2009 Schedule, either with the wording in parenthesis in black font or changed to red. In reaching this finding, the tribunal had regard to the wording of the grievance letter dated 25 June 2020 and, in particular, the sentence:

> '*After going through the latest site agreement (signed off 2007) there is no mention as to why the payment would not be made'*

59. Given the clear and specific wording regarding the date of the Collective Agreement they had reviewed, the tribunal finds on balance that the Collective Agreement dated 2007 had been viewed by the signatories including the Claimant. Further, at that time, they believed this to be the most recent version. In the period between 25 June and 11 August 2020, the tribunal accepted that the Claimant had received no contact from management including Mr MacIntosh or Ms Smith to discuss his grievance. The account of Mr MacIntosh that he and Ms Smith supplied a copy of the 2009 Schedule in July to the Claimant with red font was not accepted. No documentation was produced to indicate this was sent to the Claimant by post or email, and the evidence that there

had been a meeting for this purpose was very unclear. It appeared to contradict other evidence about the approach taken to the grievance. If Mr MacIntosh had indeed located the 2009 Schedule in this period, and if he believed it clearly excluded an entitlement to the allowance for shifts starting before 6 am (as he asserted during his evidence), the omission to provide or refer to the text in an outcome letter was curious. Taking these matters into account, it was found, on balance, that the 2009 Schedule was not provided to the Claimant while he remained employed.

Provenance of the 2009 Schedule

60. The evidence concerning the document referred to as the 2009 Schedule was rather thin. It was not expressly styled as an amendment to Section 3b of the site agreement, nor did it bare signatures on behalf of DHL, which was party to the collective bargaining arrangement at the material time, and the Trade Union.

61. The only evidence concerning its provenance came from the Respondent's Mr MacIntosh. He believed the document had been prepared by DHL's Network HR Manager in or around 2009 following negotiation with USDAW, although he himself was not involved, nor indeed employed either by DHL or by the Respondent, at the relevant time. Mr MacIntosh surmised his understanding based on the location of the document, found among archived records on the compact disc, believed to have been provided by DHL to the Respondent when the TUPE transfer took place in 2016.

62. There was no challenge to this evidence by the Claimant's solicitor and no evidence was led on the Claimant's behalf that might cast doubt on Mr MacIntosh's explanation. The tribunal accepted, on the balance of probabilities, having regard in particular to Mr MacIntosh's evidenced of the document's storage on the DHL 'TUPE CD' that it had indeed been prepared by DHL in 2009 and, given its nature, had been approved at that time by USDAW.

Relevant Law

Incorporation of terms included in a Collective Agreement

63. Where there is an issue as to the contractual effect of the terms of a collective agreement as between employer and employee, the overall question which the tribunal must determine is whether, assessing the matter objectively, it was intended that the relevant term or terms would give rise to contractual rights enforceable by the employer and individual employees.

63. Even where it is clear that a collective agreement is expressly incorporated, this forms only part of the evidence as to the intention of the parties. A key remains: is the term apt for incorporation?

64. Even where a collective agreement is expressly incorporated in a contract of employment, there is still to be considered the critical question of interpretation in determining whether the particular term is in fact incorporated.

65. In **Cadoux v Central Regional Council** [1986] IRLR 131, 1986 SLT 117, Ct of Sess, the employee's letter of appointment expressly incorporated the Conditions of Service laid down by the National Joint Council for Local Authorities Administrative, Professional, Technical and Clerical Services (Scottish Council) 'as supplemented by the Authorities' Rules and as amended from time to time'. These Rules extended to provide the employee with a non-contributory life assurance scheme. This was unilaterally withdrawn by the Council, but the Court of Session held that, although the Local Authorities' Rules were incorporated, so too was the employer's entitlement to unilaterally withdraw (by amendment) the provision.

Apt for Incorporation?

66. In **Alexander v Standard Telephones and Cables Ltd (No2)** [1991] IRLR 286 HC Hobhouse J summarized the principles to be applied at para 31 of his judgment as follows.

    a. *The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained.*

b. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements.

c. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee.

d. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract.

e. *Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."*

67. The need to look at the other provisions of the collective agreement with a view to deciding whether, considering the agreement as a whole, a term was intended to have contractual force has been emphasized. For example, in **Alexander**, Hobhouse J considered that a term concerned with a redundancy selection procedure was capable of giving rise to individual rights, but found that the term was nevertheless unenforceable. Where none of the other clauses of the collective agreement were apt to be incorporated, it would require cogent evidence that a particular clause was to have a different character.

Communication of the Collective Agreement?

68. A question which may arise on the facts of the present case is whether evidence that the contents of a Collective Agreement have not been communicated to an employee is relevant to the question of whether it is incorporated into the individual employment contract.

69. In **Gray Dunn & Co Ltd v Edwards** 1980 IRLR 23, the EAT considered this question. The case concerned an employee who was summarily dismissed for being under the influence of alcohol at work. He admitted that before coming on shift, he had had two pints of beer. He was dismissed in accordance with the terms of a disciplinary code which provided that being at work under the influence of alcohol was a serious misdemeanour which would incur summary dismissal. In that case, Lord McDonald gave the following *obiter dicta:*

> *Where employers negotiate a detailed agreement with a recognised union, they are entitled to assume that all employees who are members of the union know of and are bound by its provisions. There could be no stability in industrial relations if this were not so.*

70. The appeal did not turn on this issue, but was concerned with issues regarding the employer's investigation and the employee's absence during part of his disciplinary hearing.

71. Another division of the EAT distinguished **Gray Dunn**. In **W Brooks and Son v Skinner** 1984 IRLR 379, EAT, an employment tribunal found a dismissal to be unfair. The employee was dismissed with regard to a management-union agreement that employees too inebriated to report for work after a staff Christmas party would be dismissed. The tribunal based its finding on the grounds that the agreement had not been communicated in writing to employees and that the employee concerned had not known he would be dismissed if he did not return to work after the party. The EAT upheld the tribunal's decision and distinguished the case from **Gray Dunn** on two grounds: (i) the agreement only covered the single occasion of the Christmas party; and (ii) the agreement in **Skinner**, unlike in **Gray Dunn**, did not relate to conduct which any reasonable employee would realise would have the consequence of summary dismissal.

72. Referring to Ld McDonald's dicta in **Gray Dunn** (set out above at paragraph 69), Mr Justice Bedlam said:

> *'Of course, there are many cases in which that is a perfectly proper and reasonable approach but it does not follow from that that in every case an employer who reaches agreement with the trade union side is justified in taking the view that all*

employees will be fixed with knowledge of what has been agreed. In this particular case, the finding of the Industrial Tribunal that the applicant did not know that he would be dismissed and that the company had not communicated this agreement in writing to its employees or given warning clearly to the applicant was supported by the evidence.' [para 18]

73. Both these EAT cases related to unfair dismissal claims where matters of disciplinary policy agreed with the trade union were relied upon by the employer. Neither concerned contractual entitlement to pay or benefits.

74. In the case of **Briscoe v Lubrizol Ltd** [2002] IRLR 607, the Court of Appeal gave some consideration to the question, not in the context of incorporating a collective agreement, but terms from a handbook which dealt with entitlement to a sickness benefit.

"It is also true that the court does not look favourably upon an employer who seeks to restrict his contractual obligations in reliance upon a document (whether by reference to a 'works notice' or an insurance policy) to which the employee is not party and to which his attention has not been specifically drawn, so as to limit a right or benefit which information given in the handbook has led the employee to expect: see the approach in the not dissimilar case of Villella v MFI Furniture Centres Ltd [1999] IRLR 468, in which Judge Green QC, sitting as a judge of Queen's Bench Division, held that a restriction in an insurance policy underwriting a contractual permanent health insurance scheme which stipulated that entitlement to benefit would cease on an employee leaving service did not form part of the claimant's contract, with the result that he was entitled to continue to receive benefits notwithstanding the employer's contention that his employment had terminated" [para 14]

In Villella*, the judge upheld the primary case advanced for the claimant, that the stipulation that entitlement to benefit ceased on an employee leaving service could not be regarded as having been incorporated by reference in the claimant's contract because there was no evidence that he was shown or saw the policy, or had it drawn to his attention that he could or should read it. The judge applied by analogy the*

remarks of Lord Denning in Falton v Shoe Lane Parking [1971] 2 QB 163 when refusing to give contractual effect to an exemption clause which was:

'... so wide and so destructive of rights [that] the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way ... In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it or something equally startling.' [para 15]

…..

In the Villella *case, it was of course in the interests of the claimant to establish that the terms of his employment were comprehensively contained in his employers' handbook in order to avoid the term which purported to limit benefit to the period of the claimant's employment. Furthermore, he was assisted to that end by the terms of the employers' letter to him which stated that the 'full details' of his pension plan were set out in a separate memorandum forwarded to him, which memorandum in turn set out a definition of disability which faithfully reproduced the definition of incapacity contained in the policy. In my view that is an important factual distinction, as is the fact that, in this case, it is the employee who invokes the terms of the policy as incorporated by reference in so far as his entitlement to benefit is concerned. As already observed, the court looks unfavourably upon an employer who seeks to restrict his contractual obligations as described in a handbook in reliance upon a policy which he has not brought to the attention of his employee; but that does not mean, by way of corollary, that where the handbook expressly or by implication refers to such a policy and purports to summarise its effect upon the employee's rights in a manner which is disadvantageous to the employee, the court will similarly regard the handbook as definitive of those rights. In the former case, it will be just that the employer should be estopped from asserting a position less advantageous than that which he has represented. In the latter case, he seeks to rely on his own error to deprive the employee of a benefit which he has in fact intended to bestow.* [para 17]

Rules of contractual construction

75. The express terms of a contract are paramount (unless overridden by statute). They must be construed with regard to the general rules of construction.

76. In **Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd** [2013] CSOH 18 Lord Hodge considered that the approach to interpreting ambiguous contractual terms was so well established that it hardly required restating. He summarised it at follows:

> *The court, when construing a contract, considers the language that the parties have used. It uses the concept of a reasonable person, who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It ascertains what that reasonable person would have understood the parties to have meant by their use of that language. In doing so, the court has regard to the relevant surrounding circumstances, being the circumstances which were reasonably within the knowledge of both parties, or all of the parties in a multilateral contract.* [Paragraph 14]

Deductions of overpayments of wages

77. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of the Employment Rights Act 1996 ("ERA") is satisfied. Section 27 defines "wages" as sums "payable to the worker in connection with his employment", to include "any fee, bonus, commission, … or other emolument referable to his employment, whether payable under his contract or otherwise."

78. Under section 23 of ERA, a worker may complain to an employment tribunal that his employer has made a deduction or a series of deductions in contravention of section 13 and a tribunal may, pursuant to section 24 make a declaration to the effect that an unlawful deduction or deductions have been made and order the employer to pay the worker the amount of any deduction or deductions.

Submissions

Cases cited

79. Agents cited the following cases in submissions.

- **Cleeve Link Ltd v Bryla** [2014] IRLR 86
- **Investors Compensation Scheme Ltd v West Bomwich Building Society** [1998] 1 WLR 896
- **Arnold v Britton & Ors** [2015] UKSC 36
- **Campbell v British Airways** UKEATS/0015/17
- **Briscoe v Lubrizol Ltd** [2000] ICR 694
- **South Lanarkshire Council v Arriva** 2016 CSOH 83
- **Gray Dunn & Co Ltd v Edwards** 1980 IRLR 23, EAT

Submissions for the Claimant

80. Ms Flanigan, on behalf of the Claimant invited the tribunal to make a finding in fact that the wording in parenthesis altered to red by Mr MacIntosh in the 2009 Schedule was not in the version of the Collective Agreement he was given prior to raising his grievance on 25 June 2020. She submitted that an unauthorised deduction had been made from the Claimant's wages contrary to section 13 of ERA.

81. With regard to his entitlement to the allowance, Ms Flanigan submitted it was necessary to construe the Claimant's contract with regard to the general rules of contract law. She cited **Investors Compensation Scheme Ltd v West Bomwich Building Society** [1998] 1 WLR 896 as authority for her proposition that the aim was to find the meaning which the document would convey a reasonable person, having all the background knowledge reasonably available to the parties. The meaning, said Ms Flanigan, must be assessed in light of the natural and ordinary meanings of words, the overall purpose, and commercial common sense.

82. She referred to the EAT's decision in **Campbell v British Airways** UKEATS/0015/17 as authority that these rules of construction apply as much to contractual provisions concerned with pay as to commercial contracts. Ms Flanigan said even where terms are incorporated from a collective agreement, the question of interpretation still arises. The Claimant's representative did not deny the Collective Agreement's incorporation, but submitted that was not the end of the matter.

83. If, she said, the tribunal finds as a matter of fact that the Claimant had not seen the wording in parenthesis in the 2009 Schedule that Mr MacIntosh coloured red, then the natural meaning of the Claimant's contract (specifically the Addendum, Clause 6) was that the Claimant was due the shift allowance for any shift which included time between 6 am and 7 am. If, however, the tribunal declined to make that finding, she submitted that the Addendum terms governed the employment as opposed to the terms of the 2009 Schedule. This set out the shift allowance without qualification, said Ms Flanigan, and any ambiguity should be resolved against the Respondent under the rule of *contra proferentem*.

*Parties' submissions on **Briscoe v Lubrizol Ltd** (Court of Appeal)*

84. The tribunal in the course of the hearing, invited parties' representatives to address the tribunal in submissions on caselaw concerned with the relevance, if any, of whether the Collective Agreement terms relied upon were published or disclosed to employees. An opportunity to consider this was provided during a lunch time adjournment. When the hearing resumed, the tribunal heard submissions and referred agents to the case of **Briscoe v Lubrizol Ltd** [2000] ICR 694. Agents were invited to make further written submissions, if they wished, on that authority. Both kindly did so.

85. Those written submissions are not replicate in full, but summarised. Ms Flanigan explained **Briscoe,** a Court of Appeal decision, concerned, amongst other things, an employee handbook which contained a less advantageous benefit than that set out in another policy. The court determined that the handbook was incorporated into the contract of employment but ultimately found that another provision in the handbook was the preferred interpretation. She placed reliance on the passage by Lord Justice Potter reported at paragraph 14 which is reproduced at paragraph 74 above.

86. Ms Flanigan asserted there were parallels with the present case. The claimant expected to be paid as per the terms set out in the Addendum and was instead subject to the rule apparently set out in the Collective Agreement. The claimant did not dispute that the Collective Agreement was incorporated into his contract of employment or that the pay rate as set out in the joint bundle was apt for incorporation.

87. She argued, however, that the differing manifestations of that contract created an ambiguity which, applying normal contractual principles of interpretation, should be resolved in the employee's [the claimant's] favour. As well as relying on the *contra proferentem* rule, she placed reliance on **Briscoe** as authority that because the claimant struggled to even get a copy of the collective agreement (and even then, she submitted, it is unclear which version he did see) and as it was not provided to him by his line manager as the clause stipulated, the tribunal should not look favourably on the Respondent seeking to rely upon its terms to deprive the Claimant of an allowance. She reiterated the Claimant's primary submission was that the version of the collective agreement eventually provided to him did not show the wording in parenthesis in the 2009 Schedule. But even if the tribunal found that it was so provided, she said that based on **Briscoe** and the general rules of interpretation, the shift allowance was properly payable.

88. Mr Doyle's submissions are **Briscoe** is summarised first so that the parties arguments concerned with this authority are juxtaposed. Mr Doyle said **Briscoe** fell to be distinguished from the present case. The Court of Appeal in **Briscoe** was considering the interpretation of an employer's handbook to determine an employee's entitlement to long term disability benefits. He referred to the same passage of Potter LJ at paragraph 14, reproduced above and emphasized the words :

"*and to which his attention has not been specifically drawn"*

89. A collective agreement, said Mr Doyle, is different to a handbook. Whilst a handbook will normally set out additional detail beyond that set out in a contract they are not normally agreed with an employee or union. In contrast, a collective agreement contained terms and conditions which had been the subject of negotiation and agreement with the union. These, he said, were binding on the employee. The union has authority, Mr Doyle

submitted, to bind the employee to the terms set out in the collective agreement, regardless of the employee's individual agreement.

90. In any event, Mr Doyle said, the Claimant's attention in the present case was specifically drawn to the Collective Agreement in Clause 12 of his Contract. He placed reliance on the fact that that clause "also sets out who [the Claimant] needs to talk to in order to obtain a copy of the collective agreement (namely his line manager)". It was also clear from the clause that the Collective Agreement directly affected the Claimant's employment. The Claimant accepted those contract terms by signing the Contract.

91. Mr Doyle then cited the further passage from the **Briscoe** judgment reported in IRLR at paragraph 15 (reproduced at paragraph 74 above).

> "*In Villella the judge upheld the primary case … that the stipulation that entitlement to benefit ceased … could not be regarded as having been incorporated by reference in the claimant's contract because there was no evidence that he was shown or saw the policy,* ***or had it drawn to his attention that he could or should read it***." (Mr Doyle's emphasis added).

92. Mr Doyle distinguished Potter LJ's comments on **Villella** on the basis that, in the present claim, the Addendum states at paragraph 7, that it is expected that employees will make themselves familiar with the site handbook. This, Mr Doyle said, included the Collective Agreement. There was no evidence led at all during the hearing that the Collective Agreement was contained in a Staff Handbook, and this assertion appears to run counter to the evidence of the Respondent's Mr MacIntosh who confirmed it was provided only in response to requests. There is no scope for the tribunal to make the finding in fact on which this particular submission of the Respondent's proceeds.

Submissions for the Respondent

93. Mr Doyle submitted that the Respondent relied on the terms of the Collective Agreement. He pointed out that these expressly prevailed over the terms of the Contract as provided by Clause 12 of the Contract.

94. He submitted that the trade union, USDAW was recognized by the Respondent. Collective bargaining rights had been agreed with USDAW in 2007, and it was the Respondent's belief that the 2007 Collective Agreement transferred under the TUPE Regulations 2006 in 2018, when the Iceland Booker contract transferred to the Respondent.

95. The Claimant had, in Mr Doyle's submission, had sight of the Collective Agreement dated 2007 at some point during his employment. He was aware of it by the time he raised the grievance in June 2020. The Claimant had, at the time of signing the Contract, read sufficient contents to know of the Collective Agreement, whether or not he paid particular attention to Clause 12. In any event, he had signed to accept the Contract Terms, including that clause.

96. Mr Doyle submitted that in 2009, the Collective Agreement was updated to include the document referred to in this judgment as the 2009 Schedule. Based on the wording of this document, he submitted that it was clear that the shift allowance was only payable to drivers who started at 6 am. He submitted it was never represented to the Claimant that the position might be otherwise.

97. He cited the case of **South Lanarkshire Council v Arriva** (which had also been mentioned briefly by the Claimant's representative). He said the case made it clear that the starting point is to look at the wording of the contractual clause. He invited the tribunal to consider the natural and ordinary meaning of the words set out in the 2009 Schedule which, he said, was that the allowance was only payable to those starting at 6 am. He reiterated the Respondent's reliance upon the express term that the Collective Agreement would prevail in the event of conflict.

98. Mr Doyle drew the tribunal's attention to the **Gray Dunn & Co** case. Mr Doyle relied on Lord McDonald's obiter dicta, quoted at paragraph 69 above. As the Collective Agreement was expressly referred to in the Contract, he said the Respondent was entitled to rely upon it, regardless of when he saw it.

Discussion and Decision

99. The starting point is to consider the terms of the Claimant's contract. Clause 6 of the Addendum includes a section headed 'Shift Allowances - Drivers' and includes the following wording.

    '06.00hrs – 07.00hrs £1.29'

    There is no further explanation of the entitlement in the Addendum. There is no qualification or condition. Giving the words in the Addendum their natural and ordinary meaning, Clause 6 is interpreted as conferring a contractual entitlement to the shift allowance at the hourly rate specified for the period of any shift worked that falls between 6 am and 7 am (regardless of when the shift begins or ends).

100. The question then arises whether any term or terms are incorporated into the Claimant's contract that may alter that interpretation. Clause 12 of the Contract states '*The collective agreement … a copy of which will be made available to you by your line manager, directly affects your employment*'.

101. The wording "directly affects your employment" is not unusual and is likely influenced by the requirements and phrasing of section 1 of ERA which requires employers to include particulars of 'any collective agreements which 'directly affect the terms and conditions of the employment' in a written statement (s.1(4)(j)). A contractual intention to incorporate terms from a collective agreement, could certainly be expressed more clearly and specifically, however.

102. The Collective Agreement itself is clearer on this issue. It states (page 10:

> *All employees covered by the Agreement will be given full access to a copy of the Agreement and will be informed that the Agreement is incorporated into their contract of employment.*

103. When this part of the Collective Agreement is read together with Clause 12 of the Contract, it is adequately clear that the intention is to incorporate the Collective Agreement (or more accurately those terms apt for incorporation within it) into the employment contracts of the affected categories of employees at the site.

104. The tribunal would have no hesitation in holding that it did so, were it not for the fact that the Collective Agreement was not made available to the Claimant by his line manager as envisaged by Clause 12 of the Contract for over a year after his employment began. Nevertheless, he was eventually provided with a copy of the 2007 Collective Agreement between March 2020 and June 2020, and he did not protest at its terms upon receipt. He continued in employment with the Respondent until August 2020. On that basis, the tribunal finds that such terms of the original 2007 Collective Agreement as were apt for incorporation in the Claimant's contract were so incorporated, at least at the stage when it they were disclosed to him, if not from the commencement of his employment.

105. However, that is not the end of the matter. The original Section 3b which formed part of the Collective Agreement dated 2007 was subject to amendment over the years. None of the rates set out in the original schedule were applicable any longer. Updated rates had been intimated to the Claimant in his Contract and the availability of a rate for the 06.00 -07.00 period (which rate did not exist in 2007) had likewise been set out. The threshold number of hours for an overtime allowance had been reduced.

106. The Collective Agreement itself includes the following text on the question of amendments (at page 10):

> *Any amendments, as may be made from time to time, will be fully communicated to each individual before any amendment to their contract of employment is effective.*

107. The Respondent maintains that the 2009 Schedule was an amendment to the Collective Agreement and included terms on which it was entitled to rely. The tribunal made a finding in fact that this document was never communicated to the Claimant during his employment. On that basis, applying the express terms of the Collective Agreement cited above, it is held that the purported amendment was not effective. With regard to shift allowances, the Claimant therefore remained entitled to rely on Clause 6 of the Addendum. Standing the express terms of the Collective Agreement set out in the preceding paragraph, it was not necessary to consider whether incorporation might

or might not have been excluded based on the principles discussed in **Briscoe**, **Gray Dunn** or **W Brooks and Son**.

108. Separately, and in any event, if the express terms of the Collective Agreement had not excluded the incorporation of the 2009 Schedule because of the failure of communication, the tribunal would not, in any event, have accepted the interpretation of that Schedule contended for by the Respondent.

109. It is not accepted that the wording, had it been properly communicated to employees, entitled the Respondent to withhold the shift allowance for shifts which began before 6 am but included all or part of the hour between 6 and 7 am. Assuming communication had taken place, it would remain to be determined what it meant, when read in conjunction with the other contractual terms and whether the term in question was apt for incorporation.

110. The Respondent relies on the bracketed words in the 2009 Schedule beneath the rate for the shift allowance applicable for 06.00 to 07.00:

(new shift allowance for drivers starting at 06.00 am).

111. The tribunal does not accept that this was a term which was apt for incorporation in the employment contracts of employees. Giving these words their natural and ordinary meaning, they are no more and no less than a correct statement of the position as it was in 2009. Before then, drivers starting at 6 am did not benefit from any shift allowance. It was new for those who started at 6 am.

112. The words don't evidence an intention to limit the availability of the allowance to drivers who started at 6 am on the nose. Even the Respondent did not interpret them in that manner, as it pays the allowance to those who started after 6 am but before 7 am. For none of the other allowances was it necessary, in 2009 or now, for the shift to coincide exactly with the beginning of the allowance period to establish eligibility. The Clause on shift allowances in the body of the Collective Agreement includes the following:

Payment will be made pro rata for the rostered basic shift hours worked.

113. The use of the words '*pro rata'* in the sentence envisages that shifts may not coincide exactly with the full period an allowance was payable. If the intention was to make eligibility for the 6 - 7am allowance conditional upon the shift beginning at 6 am, in contrast to the other shift allowance periods, clear and unequivocal wording would be expected. Taking the terms of the Collective Agreement as a whole, it is not accepted that a reasonable person, with all the background knowledge reasonably available to the parties at the time the 2009 Schedule was drafted, would interpret it as restricting eligibility as the Respondent asserts.

114. Therefore, even if incorporation were not expressly excluded by the communication failure under the express terms of the Collective Agreement, the tribunal would have found that the term in question was not apt for incorporation because it did not disclose a clear intention to create or to qualify an individual contractual right.

Conclusion

115. It is concluded that the Claimant was contractually entitled to be paid a shift allowance pertaining to time worked between the hours of 6 am and 7 am in circumstances where the Claimant's shift began prior to 6 am but ended after that time.

116. The Respondent's deduction of such payments from his wages was unlawful.

Employment Judge: Lesley Murphy
Date of Judgment: 24 February 2021
Entered in register: 26 February 2021
and copied to parties