



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hassan

Respondent: Metroline Travel Limited

Heard at: Watford by CVP **On:** 27 May & 2 July 2021

Before: Employment Judge Tegerdine

Representation

Claimant: Mr F Magennis (counsel)

Respondent: Ms C Nicolau (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to hear the claimant's breach of contract claim. The claimant's breach of contract complaint is therefore dismissed.
2. The claimant's claim for unauthorised deduction from wages is not well founded. Accordingly, the complaint of unauthorised deduction from wages fails.

WRITTEN REASONS

1. After hearing evidence, and receiving submissions from the claimant's representative and the respondent's representative, the Tribunal delivered its oral judgment. At the conclusion of the hearing on 2 July 2021 the respondent's representative requested written reasons. The Tribunal now gives its reasons for the judgment that was reached.

Introduction

2. In a claim form presented to the Tribunal on 3 November 2020, the claimant brought complaints of breach of contract and unauthorised deduction from wages.
3. Both complaints related to a claim for the sum of £2,786.48, which the claimant said were wages owed to him for the period between 26 June and

26 July 2021, a period during which the claimant was not working and was not paid.

4. The Tribunal heard evidence from the claimant, the claimant's son, Mr Mohammed Hassan, and the claimant's trade union representative, Ms Theresa Emerson. The respondent called evidence from Ms Tkaczyk, who is employed by the respondent as an Operations Manager at its West Perivale Garage.
5. The issue for the Tribunal to determine was whether the claimant had a right to be paid wages between 26 June and 26 July 2021. Most of the salient facts were not in dispute.
6. The Tribunal shall firstly set out its findings of fact. A summary of the relevant law will be then set out. The factual findings will then be applied to the relevant law, and the Tribunal's conclusions set out.

Findings of fact

Background

7. The claimant is a bus driver based at the respondent's West Perivale garage. The claimant's employment with the respondent began on 8 February 2010 and transferred to the respondent on 28 April 2018 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant's employment with the respondent is continuing.
8. It was common ground that the claimant's category D PCV driving licence (the "Licence") expired on 26 May 2020 and was not reissued by the DVLA until 24 July 2020. It was also common ground that the respondent did not permit the claimant to drive once the Licence had expired until it was reissued, and did not pay wages to the claimant during the period between the Licence expiring on 26 May 2020, and the claimant returning to work on 27 July 2020 after the Licence was reissued. The claimant did not work on 25 or 26 July 2020 as this was a weekend.
9. Although the claimant was not permitted to drive between 26 May and 26 July 2020, and was not paid throughout this period, his claim for unpaid wages related to the respondent's failure to pay him in respect of the period between 26 June 2020 and 26 July 2020 only. The claimant did not claim any wages for the period between 26 May and 25 June 2020, however the claimant did not explain to the Tribunal why he had decided not to pursue a claim any wages in respect of this earlier period.
10. The claimant's case was that although the Licence expired on 26 May 2020, he was legally entitled to drive pursuant to section 88 of the Road Traffic Act between 26 June 2020 and 24 July 2020, and was therefore entitled to be paid wages from 26 June 2020 onwards.
11. The respondent's case was that it didn't permit the claimant to drive between 26 May and 26 July 2020 because the Licence had expired, and the claimant did not prove to the respondent that he was legally entitled to drive until the Licence was renewed on 24 July 2020. The respondent argued that the

claimant was not entitled to any wages during the period when he was not driving because he was not able to drive unless the respondent was satisfied that he was legally entitled to drive, and the claimant did not satisfy the respondent that he was legally permitted to drive until the Licence was renewed on 24 July 2020.

The claimant's applications for renewal

12. It was not disputed that the claimant sent off his first application for the Licence to be renewed (the "Incomplete Application") on 25 May 2021. Unfortunately, it later transpired that this application had not been correctly completed, as it was rejected by the DVLA.
13. It was also not disputed that the claimant sent off a second application for the Licence to be renewed (the "Complete Application") on 25 June 2020. This application was eventually successful and led to the Licence being renewed on 24 July 2021.

Section 88 of the Road Traffic Act 1988

14. Mr Magennis argued on behalf of the claimant that the claimant was willing and legally entitled to drive buses between 26 June and 24 July 2020 even though his Licence had expired, because the claimant satisfied the criteria which are set out section 88 of the Road Traffic Act 1988 ("section 88"). Mr Magennis contended that as the claimant was legally allowed to drive during this period as a result of section 88, he should have been paid.
15. The claimant said at paragraph 28 of his witness statement that as he sent off the Complete Application on 25 June 2020 by special delivery, the DVLA would have received it on 26 June 2020. The claimant said that on that basis he was legally entitled to drive from 26 June, so was entitled to be paid wages from 26 June 2020 onwards.
16. Ms Emerson said at paragraph 14 of her witness statement that once the DVLA had received the Complete Application, the Licence didn't need to be updated in order for the claimant to be legally allowed to drive. Ms Emerson also suggested at paragraph 14 of her witness statement that section 88 letters "did not exist" and suggested that the respondent was insistent that the claimant provide a section 88 letter, which "isn't something that can be received".
17. A copy of some DVLA guidance for drivers about section 88 is at page 35 of the bundle. The guidance states that section 88 may allow a person to continue driving even though they do not hold a current driving licence "when you have applied to the DVLA to renew your licence, but your licence expires while we are processing your application". The guidance states that the DVLA must have received the individual's "correct and complete" renewal application, and that various other conditions must be satisfied in order for the section 88 criteria to be satisfied.
18. The Tribunal found that although Ms Emerson's evidence was that once the DVLA had received the claimant's renewal application the Licence didn't need to be updated in order for the claimant to legally drive, it is clear from

the DVLA guidance that a person is not permitted to drive simply because their renewal application has been received by the DVLA, as a number of other conditions must also be satisfied. For this reason the Tribunal found that Ms Emerson's evidence about section 88 was unreliable, as it was inconsistent with the DVLA guidance.

19. At paragraph 8 of Ms Tkaczyk's witness statement Ms Tkaczyk said that she received notifications from the DVLA in relation to 4 other drivers which confirmed that those drivers were legally entitled to drive while they waited for their driving licence renewal applications to be processed at around the time that the Licence expired. Ms Tkaczyk gave 2 specific examples in her witness statement. Ms Tkaczyk said that Mr Ademola's licence expired on 30 May 2020, and the respondent received a section 88 notice in relation to him on 28 May 2020. Ms Tkaczyk also said that the respondent received a section 88 notice from the DVLA on 6 June 2020 in relation to Mr Hussein, whose licence was also due to expire. Ms Tkaczyk's evidence in relation to Mr Ademola and Mr Hussein was not challenged.
20. The Tribunal found Ms Tkaczyk to be a credible witness. Ms Tkaczyk gave direct answers to the questions she was asked in cross-examination, and the answers she gave were consistent with the contemporaneous documentation, and the contents of her own witness statement. On the basis of Ms Tkaczyk's evidence the Tribunal found that Ms Tkaczyk received a number of section 88 notices from the DVLA in respect of other drivers around the time that the Licence expired.
21. It was not disputed that the DVLA never confirmed to the claimant or the respondent whether in writing or otherwise that a correctly completed renewal application had been received in respect of the claimant, that section 88 applied to the claimant, or that the claimant was otherwise lawfully entitled to drive at any point between 26 May and 24 July 2020.
22. Mr Magennis did not refer to the wording of section 88 of the Road Traffic Act 1988 itself during the hearing, and the claimant did not produce any evidence either to the respondent or the Tribunal which showed that the DVLA considered that the section 88 criteria were satisfied in respect of the claimant during the period between 26 June and 24 July 2020.
23. The Tribunal found that as the claimant's Complete Application was successful, it must have been correctly completed when it was submitted on 25 June 2021. The Tribunal also found that the Complete Application was delivered to the DVLA on 26 June 2020, as the Complete Application was sent by Special Delivery, and the respondent did not dispute the claimant's contention that it was received by the DVLA on 26 June 2020.
24. The Tribunal found that as the Complete Application was correctly completed and was received by the DVLA on 26 June 2020, the claimant may have been lawfully entitled to drive between 26 June and the date on which his Licence was renewed on 24 July 2020, on the basis that the section 88 criteria were satisfied.
25. However, although Mr Magennis referred the Tribunal to the DVLA guidance, the Tribunal found that this guidance was written for members of the public,

was rather vague, and there was no evidence that the DVLA intended it to be legally binding.

26. The Tribunal found Mr Magennis's submissions in relation to section 88 to be unconvincing, as he did not refer to the detail of section 88 itself during the course of his submissions, or explain in any detail how each of the relevant subsections were satisfied. Furthermore, the claimant did not produce any evidence which showed that the DVLA considered that the section 88 criteria were satisfied in relation to him at any time. For these reasons, the Tribunal was not able to establish whether the section 88 criteria were satisfied in relation to the claimant between 26 June and 24 July 2020.
27. On the basis of the findings of fact set out at paragraphs 19-21, the Tribunal found that even if the section 88 criteria were satisfied in respect of the claimant between 26 June and 24 July 2020, the respondent was not provided with any satisfactory evidence of this.
28. As the Tribunal found that the DVLA had provided section 88 notices in relation to other drivers at around the time the Licence expired, the Tribunal found that it was possible for the claimant to request and obtain a section 88 notice from the DVLA for at least some of the time during which he was waiting for his Licence to be renewed. However, there was no evidence that such a notification was ever requested by the claimant, and in any event a section 88 notice was certainly never obtained.

Events leading up to the expiry of the Licence on 26 May 2020

29. It was not disputed that on 3 March 2020 the respondent sent a letter to the claimant informing him that the Licence was due to expire on 26 May 2020. A copy of this letter is in the bundle at page 72. The letter said: "***you will not be able to work if your licence expires or if you are unable to prove that your licence is valid (suspension without pay)***".
30. The findings set out at paragraphs 31-35 are based on paragraphs 6-9 of Ms Tkaczyk's witness statement, which were not disputed by the claimant in relation to these findings.
31. Bus drivers are usually required to have a medical assessment before they can apply for their category D PCV driving licences to be renewed. The respondent arranged for the claimant to have a medical assessment with an occupational health professional on 31 March 2020, however the assessment was cancelled by the occupational health provider because of Covid-19 related issues.
32. A further occupational health appointment was arranged for 1 April 2020, however as this appointment clashed with a training session, the respondent rearranged it for 6 April 2020.
33. Unfortunately the claimant fell ill with coronavirus on 5 April 2020, so was unable to attend his medical assessment on 6 April 2020. The claimant was off sick until 4 May 2020.
34. At some point between the claimant going off sick on 5 April 2020 and returning to work on 4 May 2020, the DVLA temporarily changed its

requirements in relation to driving licence renewals for bus drivers because of the difficulties which had been caused by the Covid-19 pandemic. As a result of these temporary changes, a medical assessment was not required in order for a bus driver to apply for their licence to be renewed.

35. The claimant took a period of annual leave between 16 May and 8 June 2020.
36. The claimant sent off the Incomplete Application to the DVLA on 25 May 2020.
37. The Licence expired on 26 May 2020, while the claimant was on annual leave.

Events between the expiry of the Licence on 26 May 2020 and its renewal on 24 July 2020

38. The matters set out at paragraphs 39-42 were referred to at paragraphs 9 and 10 of Ms Tkaczyk's witness statement. As these matters were not contested, the Tribunal made these findings on the basis of Ms Tkaczyk's witness statement.
39. On 5 June 2020 the claimant forwarded an email to the respondent. The email is in the bundle at page 80. The email was a generic email from the DVLA which stated that: "section 88 of the Road Traffic Act could allow you to drive while your application is with the DVLA. More information here..."
40. Ms Tkaczyk spoke to the claimant on the telephone on 5 June 2020, and explained that the email the claimant had forwarded to her did not prove that the Incomplete Application was being processed. Ms Tkaczyk asked the claimant to either produce a section 88 notice, or his renewed driving licence.
41. When the claimant returned to work on 8 June 2020 he was asked to produce either his renewed driving licence or a section 88 notice. As the claimant was unable to produce either of these documents, he was sent home from work, and told that he would not be paid or allowed to drive until he was able to produce one of them. The claimant was asked to make urgent contact with Ms Tkaczyk in order to resolve the issue with his Licence.
42. The claimant did not contact Ms Tkaczyk. However, the contact did authorise his trade union representative, Ms Emerson, to contact the respondent on his behalf.
43. There was an exchange of emails between Ms Emerson and Ms Tkaczyk about the renewal of the Licence and the impact of section 88. A copy of these emails is in the bundle at pages 83-91. In these emails Ms Emerson argued that the claimant should be allowed to drive because the section 88 requirements were satisfied, however Ms Tkaczyk replied that she needed confirmation from the DVLA that section 88 was satisfied.
44. At paragraph 14 of Ms Tkaczyk's witness statement she explained that the DVLA was being slower than usual at issuing renewals owing to the effects of the Covid-19 pandemic. Ms Tkaczyk said that because of these delays, the respondent decided that as a temporary measure, if a driver came into the garage and called the DVLA in the presence of a manager, and the

respondent was informed by the DVLA that the individual's licence renewal had been received, was correct and complete, and was being processed, the respondent would allow the driver to continue driving while they waited for the DVLA to process their renewal application. As the claimant did not dispute Ms Tkaczyk's evidence in relation to these matters, the Tribunal found that the DVLA was slower than usual in processing licence renewal applications during the relevant period, and that the respondent did change its policy to allow drivers to call the DVLA to request oral confirmation that their correctly completed renewal application had been received.

45. Ms Tkaczyk said at paragraph 14 of her witness statement that the claimant was told about respondent's new policy, and that one of the clerks of the garage, Mr Farrukh, spoke to the claimant a number of times about this. Ms Tkaczyk's said in her witness statement that on 29 June 2020 Mr Farrukh told her that he had explained to the claimant and the claimant's son what the claimant needed to say to DVLA, and had asked the claimant to come into the garage so the claimant could call the DVLA from there.
46. On the basis that the Tribunal found Ms Tkaczyk to be a reliable witness, the Tribunal found that the claimant was informed that the respondent would allow drivers whose licences had expired to drive if they called the DVLA in the presence of a manager, and obtained confirmation that their correctly completed renewal application had been received. For the same reasons the Tribunal found that Mr Farrukh did explained to the claimant and his son what the claimant needed to do in order to be allowed to drive, and that he asked the claimant to go into the garage to phone the DVLA.
47. It was common ground that on 27 June 2020 the claimant submitted a grievance about the fact that he had been suspended without pay. A copy of the claimant's grievance is at page 92 of the bundle. The grievance was heard by Mr Webley, who was another of the respondent's managers.
48. It was not disputed that a meeting to discuss the claimant's grievance took place on 2 July and 3 July 2020. The minutes of the grievance meeting are at page 100 of the bundle. A letter confirming the outcome of the grievance is at page 107 of the bundle.
49. The claimant did not dispute the accuracy of the grievance meeting minutes, and the findings set out at paragraphs 50-53 were made on that basis.
50. During the grievance meeting Mr Webley asked the claimant a number of questions about the Incomplete Application. Mr Webley asked the claimant when and how the claimant had sent off the Incomplete Application, and asked the claimant whether he had proof that the Incomplete Application had been received by the DVLA.
51. The claimant told Mr Webley that he had sent off the Incomplete Application prior to his suspension by special delivery, and that he had received confirmation from the DVLA that they had received his renewal form.
52. Mr Webley explained to the claimant that the respondent needed something concrete which confirmed that the claimant was eligible to drive, so he could be put back to work.

53. Mr Webley advised the claimant that he should either contact the DVLA to get a section 88 notice, or go to the garage and give management permission to speak to the DVLA. Mr Webley told the claimant to report to the office on 6 July 2021 and ask to see the Garage Manager or Operations Manager.
54. The claimant said at paragraph 17 of his witness statement that on 6 July 2020 he went to the respondent's Perivale garage and spoke to Mr Morrison, an Operations Manager. The claimant said that he informed Mr Morrison that the Incomplete Application had been returned as it was incomplete, so he had sent off the Complete Application on 25 June 2021.
55. A copy of Mr Morrison's handwritten note from that meeting is at page 109 of the bundle. The note states that Mr Morrison and the claimant were unable to get through to the DVLA on the telephone.
56. The claimant's account of what happened to the Incomplete Application and what happened on 6 July 2020 was not disputed by the respondent. On that basis the Tribunal found that the Incomplete Application was rejected on or before 25 June 2021, and that the Complete Application was sent off on 25 June 2021.
57. On the basis of the claimant's evidence the Tribunal also found that the claimant went to the Perivale garage on 6 July 2020, spoke to Mr Morrison, informed Mr Morrison that the Incomplete Application had been rejected, told Mr Morrison that the Complete Application has been sent off on 25 June 2021, and that together they unsuccessfully attempted to contact the DVLA by telephone about the Complete Application.
58. On the basis of the claimant's evidence and Ms Tkaczyk's evidence, the Tribunal found that although the claimant did go into the garage on 6 July 2020, he did not go into the garage to try to speak to the DVLA before 6 July 2020, despite being asked to do so by the respondent several times.
59. The Tribunal found that the claimant did not tell the respondent that the Incomplete Application had been rejected until 6 July 2020, even though the Incomplete Application was rejected before the grievance meeting on 2 July and 3 July 2020, during which the Incomplete Application was discussed in detail.
60. The claimant did not explain to the Tribunal why he didn't tell Mr Webley during the grievance meeting on 2 and 3 July 2020 that the Incomplete Application had been rejected. The Tribunal found as the whole purpose of the grievance meeting on 2 and 3 July 2020 was to discuss issues relating to the expiry of the Licence. As the claimant was asked numerous questions about the Incomplete Application, but did not tell Mr Webley that the application had been rejected, he misled the respondent about the status of the Incomplete Application during the grievance meeting.
61. The claimant misled Mr Webley because he told him what forms he had sent off, when he had sent them off, how he sent them off, and that he had proof that the Incomplete Application had been received by the DVLA, however he failed to inform Mr Webley that the Incomplete Application had been rejected,

and that as a result the claimant had had to submit another driving licence renewal application the previous week.

62. On the basis of the findings set out at paragraph 56-61 the Tribunal found that the claimant was not completely honest with the respondent at the grievance meeting, and did not fully cooperate with the respondent to resolve the issues which had been caused by the Licence expiring.
63. It was not disputed that the claimant appealed against the outcome of his grievance. The appeal was dealt with by Mr Faichney, the respondent's Area Operations Director, and the appeal hearing took place on 24 July 2020. Minutes of the hearing are at page 114 of the bundle, and a letter confirming the outcome of the claimant's appeal is at page 116 of the bundle. The claimant's appeal was unsuccessful.
64. The claimant's category D PCV driving licence was renewed on 24 July 2020, and he was allowed to return to work the following Monday, which was 27 July 2020.
65. Mr Magennis submitted on behalf of the claimant that it wasn't the claimant's fault that the Licence wasn't renewed on time, and that the late renewal of the Licence was caused by the respondent rearranging the claimant's occupational health assessment, as well as delays at the DVLA. The claimant said at paragraph 28 of his witness statement that there was not much more he could have done in the circumstances. In his oral evidence the claimant said that it was not his fault that the Licence was not renewed on time; it was the pandemic's fault.
66. On the basis of the evidence and submission referred at paragraph 65, the Tribunal found that the claimant laid all the blame for the delays in the Licence being renewed with the respondent, the DVLA and the pandemic. The Tribunal found that the claimant did not accept that he was in any way to blame for the fact that the Licence expired on 26 May 2020, was not renewed for two months, and that the respondent was not provided with any satisfactory evidence which showed that it was lawful for the claimant to drive buses in the meantime.
67. The Tribunal found that the claimant was asked several times to come into the office so the respondent could contact the DVLA to obtain confirmation that the section 88 criteria were satisfied, and that the claimant was legally entitled to drive. The Tribunal found that the claimant was also asked to contact the DVLA himself to get this confirmation.
68. Although the Tribunal found that the claimant did go to the garage on 6 July 2020 to try to phone the DVLA, this was only after he had been asked to do so at his grievance meeting. By this time the claimant had already been asked to go into the garage by the respondent several times, and had been without the Licence for a period of 6 weeks.
69. As the Incomplete Application was rejected by the DVLA, the Tribunal found that the claimant failed to ensure that the Incomplete Application was correctly completed, even though he only sent it off the day before the

Licence expired, and this led to further delays when the Incomplete Application was rejected by the DVLA several weeks later.

70. On the basis of Miss Tkaczyk's evidence, the Tribunal found if a driver's driving licence expired between 26 May 2020 and 24 July 2020, then provided that the respondent received confirmation from the DVLA that the DVLA has received a valid renewal application from the individual, the driver was allowed to drive.
71. In her oral evidence Ms Tkaczyk explained that the respondent had other drivers who had been in a similar position to the claimant. Ms Tkaczyk said that although one driver lost one day's pay because of an issue with their driving licence expiring, the respondent worked with the other drivers to resolve their issues, and contacted the DVLA to get confirmation that those drivers were legally entitled to drive, even though this sometimes involved the respondent having to spend several hours with the driver on the phone to the DVLA.
72. On the basis of Ms Tkaczyk's oral evidence, which was not disputed the claimant in this respect, the Tribunal found that the claimant was the only driver whose driving licence had expired who failed to produce or obtain evidence which showed that he was legally entitled to drive for any significant length of time.
73. On the basis of Ms Tkaczyk's evidence, the Tribunal found that the claimant would have been allowed to drive even though the Licence had expired, if the respondent had received confirmation from the DVLA that it has received a valid renewal application from the claimant. However, the respondent never received any such confirmation in the claimant's case. The Tribunal found that this was the reason why the claimant was not allowed to drive after the Licence expired until it was renewed on 24 July 2020.
74. On the basis of both Ms Tkaczyk's evidence and the claimant's evidence, the Tribunal found that although the claimant took steps to get the Licence renewed, and attempted to contact the DVLA, he did not do everything he could reasonably be expected to do to ensure that the Licence was renewed on time.
75. In addition, the Tribunal found that when the Licence expired, the claimant did not do everything he could reasonably be expected to do to prove to the respondent that he was legally entitled to drive whilst he was waiting for the Licence renewal to be processed.
76. For these reasons the Tribunal found that the claimant's suspension without pay was not caused solely by the impact of the Covid-19 pandemic, the actions or inactions of the DVLA, and by the actions or inactions of the respondent, but was to a significant extent caused by the claimant's own actions and inactions.
77. On the basis of the findings set out at paragraphs 69-73, the Tribunal found that if the claimant had submitted his Licence renewal application promptly and properly, and had otherwise done what the respondent asked of him without delay, the Licence might never have expired. Furthermore, even if

the Licence had expired, the respondent would have received confirmation from the DVLA that he was legally allowed to drive by 26 June 2020, and the respondent would then have allowed him to drive between 26 June 2020 and 26 July 2020.

The contract of employment

78. A copy of the claimant's employment contract is at page 46 of the bundle. The claimant did not dispute that this document was his employment contract, and on that basis the Tribunal found that this document was the claimant's contract. The title of the contract is "Main conditions of employment for operating (wages) staff - OPO driver" and it was common ground that the claimant was employed as a bus driver.
79. Clause 7 of the claimant's employment contract states:
"To be employed as a bus driver you must have obtained a passenger carrying vehicle licence. You must continue to hold a valid PCV licence from then on."
80. A copy of the respondent's Drivers Handbook is at page 139 of the bundle. As the claimant did not dispute that this was the Drivers Handbook, the Tribunal found that it was.
81. Section 5 of the Drivers Handbook, which is at page 146 of the bundle, states:
"Your entitlement to drive a passenger carrying vehicles must be renewed by the expiry date." "Having your licence withdrawn and/or a failure to renew your licence may be deemed a breach of contract."
82. The Tribunal found that the Drivers Handbook was a comprehensive document, and was good evidence of what the terms of the contract between the claimant and respondent were.
83. On the basis of clause 7 of the claimant's employment contract and section 5 of the Drivers Handbook, the Tribunal found that it was an express term of the claimant's contract that he must have a valid category D PCV licence at all times, and that the Licence must be renewed on or before the expiry date.
84. In her oral evidence, Ms Tkaczyk explained that the respondent requires all of its drivers to show that they all legally entitled to drive. Ms Tkaczyk explained that this is because if the respondent doesn't carry out the necessary checks, and inadvertently allows someone to drive when they are not legally allowed to drive, this could affect the respondent's operator licence. The Tribunal accepted Ms Tkaczyk's evidence about this issue which was not challenged by the claimant, and found that the respondent has a legal responsibility to ensure that all of its drivers either have valid driving licences, or are otherwise legally entitled to drive.
85. The Licence expired on 26 May 2020 and was not renewed until 24 July 2020. The Tribunal also found that the DVLA was slower than usual in processing driving licence renewal applications between 26 May and 24 July 2020 because of the Covid-19 pandemic. However, the Tribunal found that the claimant was nevertheless in breach of the express term of his contract which required him to have maintain a valid PCV licence throughout this period.

86. In her oral evidence, Ms Tkaczyk stated that when she worked for another bus company, initially as a driver, she was aware that if a driver was not able to produce a valid driving licence they would be suspended without pay, and she had seen this happen on a number of occasions.
87. The claimant did not produce any evidence of other drivers being suspended with pay because their driving licence had expired.
88. The Tribunal found Ms Tkaczyk to be a reliable witness, and on the basis of her evidence the Tribunal found that it was common practice in the respondent's industry for drivers to be suspended without pay if they were unable to produce a valid driving licence.

Relevant law

Breach of contract

89. Regulation 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 states that in order to bring a breach of contract claim in the employment tribunal, the breach of contract claim must arise or be outstanding on termination of employment.

Unauthorised deductions from wages

90. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision, or a relevant provision of a worker's contract, or the worker has previously signified in writing their agreement to the making of the deduction.
91. An employee has the right to complain to an employment tribunal of an unauthorised deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.
92. There can be no unauthorised deduction from wages unless the employee can establish some legal right to the wages in question. The issue to be determined is whether the employee has a contractual right to be paid if they cannot work, and wages will not be due unless the employee has provided some consideration.
93. The consideration in the case of a worker with regular contracted hours will be their readiness, willingness and ability to work, and an employee's right to be paid is generally dependent on their being ready and willing and able to perform their contractual duties.
94. In circumstances where an employee is prevented from doing their work, the Tribunal must determine whether or not wages are nevertheless payable. There is no rule that in the absence of express terms that wages are always payable to employees who are involuntarily prevented from doing their work. In order to determine whether an employee has a contractual right to be paid when they are involuntarily prevented from doing their work where there are no express terms covering the point, the Tribunal must decide if there are facts from which a term can be implied one way or the other.

95. This question must be addressed with an open mind, and only if there are no factors pointing either way should there be any need to resort to the presumption in Morrison v Bell [1939] 2 KB 187(CA) that wages continue to be payable even though no work is being done (Mears v Safecar [1982] IRLR 183 (CA)).
96. The courts have drawn a distinction between voluntary and involuntary non-performance of work. In Cuckson v Stones (1858) 1 E&E 248 the court ruled that an employee was entitled to wages during 13 weeks' sickness absence because he "was ready and willing to serve had he been able to do so, and was only prevented from serving... by the visitation of God."
97. However, in Burns v Santander UK plc [2011] IRLR 639 the Employment Appeal Tribunal held that an employee remanded in custody pending a criminal trial was not entitled to wages. The EAT considered the proposition put forward by the claimant that he was still entitled to wages as he was prevented from working by an "unavoidable impediment", but upheld the Tribunal's decision that Mr Burns's detention was not "unavoidable" and gave rise to circumstances where it was to be implied that he was not entitled to any wages.
98. A contractual term can be implied on the basis of the conduct of the parties. The Tribunal must consider how the employer and the employee have operated the contract in practice, taking into account all the surrounding facts and circumstances.

Conclusions

99. The Tribunal reached the following conclusions based on the findings of fact set out above.
100. As the claimant remains employed by the respondent, the Tribunal did not have jurisdiction to hear a breach of contract claim. The claimant's breach of contract claim was therefore dismissed.
101. In respect of the claimant's complaint of unauthorised deduction from wages, the Tribunal found that the claimant was entitled to be paid for work done, and if he did not do any work, he was still entitled to be paid provided that he was ready, willing and able to perform work.
102. The Tribunal made the following findings of fact:
 - The claimant was employed as a driver;
 - The claimant's written employment contract contained an express term which stated that the claimant must have a valid category D PCV licence at all times, and that his licence must be renewed on or before the expiry date;
 - The Driver's Handbook stated that drivers' category D PCV licences must be renewed by the expiry date, and that a failure to renew a driving licence may be deemed a breach of contract.
103. The claimant's was employed solely as a bus driver. The respondent made it very clear to the claimant that he was required to have a valid driving licence at all times. It is common knowledge that it is a criminal offence to

drive a vehicle without a valid driving licence, and the consequences for the respondent if it permits an individual who isn't legally entitled to drive to drive buses which are used by members of the public are potentially extremely serious.

104. For these reasons the Tribunal found that it was an implied term of the claimant's employment contract that he would not be allowed to drive if he did not have a valid category D PCV driving licence, unless he could prove to the respondent's reasonable satisfaction that he was legally entitled to drive a bus. In this case the claimant is not able to work if cannot demonstrate to the respondent that he is legally allowed to drive a bus.
105. The Tribunal had to determine whether the claimant had a contractual right to be paid wages during the period between 26 June and 26 July 2020, a period during which the respondent did not allow him to work because the Licence had expired. This required the Tribunal to decide on the facts:
 - Whether there was an express term in the claimant's contract of employment which gave the respondent the right not to pay wages to the claimant if he wasn't able to work because he didn't have a valid Licence, and if not;
 - Whether such a term could be implied into the claimant's contract.
106. The Tribunal made the following findings:
 - The claimant's written employment contract does not contain any express terms which cover this point;
 - It is common practice amongst some bus operators for drivers who are unable to produce a valid driving licence to be suspended without pay; and
 - The respondent sent a letter to the claimant two and a half months before the Licence was due to expire, reminding him that the Licence would expire on 26 May 2020. This letter clearly stated that the claimant would not be able to work if the Licence expired, and that if this happened the claimant would be suspended without pay.
107. There are some clear differences between the claimant's circumstances in Burns v Santander UK plc and the claimant's case, and there was certainly no suggestion that the claimant has ever been involved in any criminal activities. However, the Tribunal found that it is common practice amongst some bus operators to suspend drivers without pay if they cannot produce a valid driving licence. The Tribunal also found that the respondent had made it clear to the claimant what the consequences would be if his driving licence expired, and that the claimant's inability to work in this case was to a significant extent caused by his own actions and inactions, and was not "unavoidable".
108. On the basis of the Tribunal's findings at paragraphs 106-107, The Tribunal found that it was an implied term of the claimant's contract that he was not entitled to be paid wages:

- If he was unable to drive because the Licence had expired and he was unable to prove to the respondent's reasonable satisfaction that he was legally entitled to drive;
 - In circumstances where this could have been avoided by the Claimant.
109. The Tribunal found that there were significant delays at the DVLA in processing driving licence renewal applications during the relevant period which were caused by the COVID-19 pandemic, and that some of the claimant's colleagues also experienced delays in getting their driving licences renewed. However, none of the respondent's other employees found themselves in a position where there were prevented from driving for more than a day or two because their driving licence had expired.
110. The Tribunal found that the claimant did not take reasonable steps to ensure that the Licence was renewed before it expired, or as soon as possible thereafter. The claimant also failed to take reasonable steps to obtain confirmation from the DVLA that he was legally entitled to drive while he was waiting for the Licence to be renewed.
111. The Tribunal found that if the claimant had taken the steps referred to at paragraph 110, it would have been lawful for the claimant to drive buses by 26 June 2020, and the claimant would also have been able to prove to the respondent that he was legally entitled to drive by that date. As a result, the claimant would have been allowed to drive for the period between 26 June and 26 July 2020, and would have been paid his wages during this period.
112. On the basis of the findings set out at paragraphs 102-111, the Tribunal found that the following terms were implied into the employee's contract:
- The claimant was not entitled to do any driving for the respondent unless he could demonstrate to the respondent that he was legally able to work, either by producing a valid driving licence, or by producing evidence which demonstrated to the respondent's reasonable satisfaction that he was otherwise legally entitled to drive; and
 - The claimant was not entitled to any wages if the respondent did not allow him to drive because he has not produced a valid driving licence, or provided satisfactory evidence that he was legally entitled to drive.
113. The Tribunal found that as the claimant did not have a valid driving licence between 26 June and 24 July 2020, and was not able to demonstrate to the respondent's reasonable satisfaction that he was legally entitled to drive during this period, the respondent had the right to stop him from driving.
114. The Tribunal also found that the claimant had no right to be paid any wages during this period if he could have taken steps to avoid the situation occurring. In this case, as there are a number of steps the claimant could have taken to avoid being unable to work which he failed to take, he had no right to be paid any wages between 26 June and 26 July 2020.
115. The judgment of the Tribunal was that the claimant's claim for unauthorised deduction from wages was not well founded. Accordingly, the complaint of unauthorised deduction from wages failed.

Employment Judge Tegerdine

Date 3 September 2021

JUDGMENT SENT TO THE PARTIES ON

14 September 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.

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