EMPLOYMENT TRIBUNALS

Claimant: **Mr L Tooze** **Case Number: 2304747/19**

Respondent: **DHL Global Forwarding Limited**

Heard at: **Birmingham via CVP** **On:27th and 28th April 2021**

Before: **Employment Judge Beck**

Representation:

Claimant: Mr Tooze Litigant in person
Respondent: Represented by Miss Ferber (Counsel)

RESERVED JUDGMENT

1. The complaint under section 23(1) Employment Rights Act (1996) that the respondent has made unlawful deductions from the complainant's wages is not well founded. Therefore, the complaint is dismissed.

REASONS

Introduction

1.By a claim form received on the 29/9/19, the claimant brought a claim for £10,000 per year payments, which the claimant stated were unpaid wages, dating back to 2009. It was not clear from the ET1 whether the claimant was claiming breach of contract and / or non-payment of other sums at this stage. The unpaid wages act claim is brought under **section 23 (1) (a) Employment Rights Act (1996).**

2. The respondent returned the ET3 form indicating that the ET1 claim form was insufficiently pleaded, and could not be brought as a breach of contract claim, as the claimant was still employed by the company. The respondent indicated all claims would be opposed.

3.The claimant undertook early conciliation with ACAS under certificate number R574251/95. ACAS received notification of the claim on the 20/9/19, and issued a certificate on the 11/10/19.

4.The claimant's employment with the respondent was terminated on the 15/7/20, subsequent to the issue of this claim on the 20/9/19.

5. This claim is the first (in time) of 6 claims the claimant has made against the respondent. Initially this application was issued in the Employment Tribunal in London, and transferred to Birmingham on the 17/6/20 at the claimant's request.

6. The other 5 claims arising from the termination of the claimant's employment, and are due to be heard together at a later date. The claims relate to holiday pay, victimisation, disability discrimination, unfair dismissal and protected interest disclosure complaint under case numbers: 1304291/20, 1304855/20, 1304905/20, 1309421/20 and 1310711/20.

7. A preliminary hearing took place before Employment Judge Connolly on the 26/6/20 in relation to all claims.

8. Further preliminary hearings took place on the 16/10/20 and 5/1/2021 before Employment Judge Kelly. On the 5/1/21 it was determined that this claim, claim 1 would be heard separately to the other matters, and it was listed for a 2-day final hearing on the 27th and 28th April 2021. Claim 2 in relation to holiday pay was withdrawn, and the remaining claims were listed for a 2-day preliminary hearing on the 24/8/21 and 25/8/21, with a further 1-day preliminary hearing on the 19/11/21, with a 15-day final hearing due to commence on the 7/3/22.

9. A bundle has been provided by the respondent for this hearing, pages 1 – 363. This was not agreed, see paragraph 15 in 'preliminary issues' below. I have also received a witness statement from the claimant, undated but in numbered paragraphs 1 –67, and his witness Robert Aldridge dated 6/3/21. For the respondent, witness statements from Nicholas Sandison dated 26/3/21 and Julia Marsh dated 26/3/21. Also provided is a final agreed cast list, and a chronology for claim 1.

10. The claimant gave evidence and was cross examined by Miss Ferber, Nicholas Sandison and Julia Marsh gave evidence for the respondent and were cross examined by the claimant.

11. In relation to the claimants statement it did not contain a declaration of truth, and was not signed or dated. The claimant confirmed under oath that the statement was true to the best of his knowledge and belief, and the statement would be treated as signed electronically on the 27/4/21, and dated the 27/4/21.

Preliminary issues

12.The claimant had submitted a screen shot of cases involving DHL, from a search of Employment Tribunal cases on Gov.UK, regarding unpaid wages claims. The document did not contain a link to the cases, or any reference as to why the facts of those cases were relevant to this case. The claimant clarified that all the cases appeared to have been settled, and there were no particular facts of any one case he was asking me to consider.

I explained to the claimant that decisions made by one Employment Tribunal were not binding on another. The claimant accepted the general screenshot of cases involving DHL in the Employments Tribunals regarding unpaid wages claims were not to be relied upon.

13.The claimant confirmed Mr A Rickards had not provided a statement of evidence in this case. EJ Dimblelow had issued a witness summons for Alex Rickards on the 19/4/21. Mr Rickards had advised the tribunal by e mail that he was away on holiday, and unable to attend this hearing.

14.Robert Aldridge has provided a statement in these proceedings dated 6/3/21, for the claimant. He attended the hearing on the 27/4/21. Miss Ferber for the respondent indicated she accepted his statement, and did not have any cross examination for the witness. Both parties agreed that Mr Aldridge could be released from the requirement to give oral evidence, and his written statement would stand in evidence.

15. The claimant had made an application to have excluded from the bundle pages 99a,107a, 109a, 110a, 115a, 146a, 105a, 106a on the basis the respondents had not properly complied with the case management order dated 5/1/21 to provide an agreed bundle by the 9/2/21. The claimant renewed his application before the Tribunal. These documents were said by Miss Ferber to be late additions submitted on the 11/2/21 and 11/3/21 and 12/3/21 by the respondent. The claimant argued the items should be struck out from the bundle as they had not been submitted in a timely manner.

16. Miss Ferber highlighted the difficulty in the company obtaining documentation from 12 years ago, and argued that the claimant was not prejudiced because copies of all the documents were provided to the claimant as soon as they became available. This allowed the claimant time to consider them and amend his witness statement if required before the deadline for it to be submitted. Miss Ferber also submitted that the additional documents were highly relevant to the facts in issue, for example contract of employment dated 1/6/09 at page 107a, and copies of letter regarding bonus payments at 109a, 110a and 115a.

17. I determined that the additional documents including e mails concerning the claimants pay, contract of employment and letter regarding bonus payments were all relevant to the issues before the tribunal. The claimant had been provided with the additional documents as soon as possible, and had not suffered any prejudice as a consequence. The claimant had at least a further 2 weeks in which to submit his written statements by the 26/3/21, and could include his evidence in relation to the additional items.

18. The claimant took issue with paragraph 12 of Nicholas Sandison's statement, which referred to ‘backhand’ payments to Mr Aldridge, which the claimant said were ‘without prejudice’ statements. Miss Ferber questioned how these statements could be said to be ‘without prejudice’, which the claimant was unable to answer.

However, the parties agreed that paragraph 12 of Nicholas Sandison's statement would be amended, and would consist of the first line of the statement only 'I asked Mr Tooze to provided evidence for DHL to investigate his allegation that the business was hiding his salary but no evidence was forthcoming and therefore we could not investigate this matter further'.

19. The claimant submitted case law by e mail in advance of the hearing, seeking to rely on **Agarwal and University of Cardiff 2018 EWCA Civ 2084.** The claimant provided copies of the case law to the respondent's solicitors.

20. Counsel for the respondent relied upon **Prometric Limited and Cunliffe (2016) EWCA Civ 191, Judge and Crown Leisure (2005) EWCA Civ 571, and Whitney and Monster Worldwide Limited (2010) EWCA Civ 1312.** The respondent submitted the caselaw in advance of the hearing, and provided copies of the caselaw to the claimant.

21. The parties both agreed that the issues in the case were those set out by EJ Connolly in her order dated 26/6/20, and by EJ Kelly in her order dated 5/1/21, replicated below.

Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by:

a. Failing to adhere to an agreement in June 2009 that it would pay the claimant a sum of £10,000 in addition to salary and instead only paying £5,000?
b. Ceasing all additional payments in June 2019 when the claimant was absent by reason of illness?
c. If so, how much was deducted and to what compensation is the claimant entitled?

22. The claimant has provided a schedule of loss attached to his statement in these proceedings. The claim relates to three areas (1) loss of salary reflecting the £10,000 per year the claimant alleges was verbally agreed to be paid from 2009 onwards (2) loss of pension payments on the additional salary of £10,000 per year from 2009 and (3) loss of medical insurance and company car for the period of 2006-2012.

23. I clarified with the claimant that if his claim was successful, he would only be able to pursue item (1), the loss of salary, this coming within the definition of wages in **section 27 (1) Employment Rights Act (1996)** 'wages in relation to a worker means any sum payable to the worker in connection with his employment, including any fee, bonus, commission, holiday pay..... but excluding any payments within subsection (2)'.

24. Items (2) and (3) being excluded by the terms of section 27 (2), 'these payments are (b) any payment in respect of expenses incurred by the worker in carrying out his employment, and (c) any payment by way of a pension, allowance, or gratuity in connection with the workers retirement or as compensation for loss of office'.

25. I also clarified with the claimant that if his claim was successful in relation to item (1), **Section 23 (4A) of the Employment Rights Act (1996)** would be applicable in relation to the extent to which loss of wages could be awarded, in that the tribunal would not be able to consider any period of time prior to a 2-year period which ended with the date of presentation of the complaint.

Law

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 the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to **Section 23 of the Employment Rights Act 1996.**

Section 23(4A) of the Employment Rights Act (1996) states an Employment Tribunal is not (despite subsection (3) and (4)) to consider so much of a complaint brought under this section, as relates to a deduction where the date of payment of the wages from which the deduction was made, was before the period of 2 years ending with the date of presentation of the complaint.

Section 27 (1) Employment Rights Act (1996) defines wages in relation to any worker means any sums payable to the worker in connection with his employment including (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. It includes other categories such as statutory sick pay, but excludes any payments within subsection (2). Subsection (2) defines the excluded categories as (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (b) any payment in respect of expenses incurred by the worker in carrying out his employment, (c) any payment by way of pension, allowance or gratuity in connection with the workers retirement or as compensation for loss of office, (d) any pay referable to the workers redundancy and (e) any payment to the worker otherwise than in his capacity as a worker.

Agarwal and Cardiff University and anor 2018 EWCA Civ 2084 CA The Court of Appeal overturned the Employment Appeal Tribunal's decision and confirmed Employment Tribunals had general jurisdiction to determine and construe contractual terms of employment, in claims brought under section 13 of the Employment Rights Act (1996).

Prometric Ltd and Cunliffe (2016) EWCA Civ 191 It was determined that Mr Cunliffe's claim that he was entitled, on the basis of an alleged oral promise, to a defined benefit pension scheme would be struck out. The Court would have expected an oral agreement to be reflected in contemporaneous documentation, if intended to have contractual effect. The alleged oral promise made was not referred to until some 10 years after it was said to have taken place, it was not alleged that documentary proof had been requested or provided.

Judge and Crown Leisure (2005) EWCA Civ 571

The Court of Appeal held, an Employment Tribunal had not erred in holding that statements made by the employers during a conversation with the claimant at the company's Christmas party, did not amount to a contractual promise to increase his salary to that of another employee in the same position within two years.

The tribunal correctly directed itself that in order for there to be a legally binding and enforceable contractual commitment, there must be certainty as to the contractual commitment entered into, or alternatively facts from which certainty can be established.

Whitney and Monster Worldwide Limited (2010) EWCA Civ 1312 The Court of Appeal found the employer was contractually obliged to honour a promise made to the employee and colleagues orally many years before, by producing near contemporaneous documentary evidence to that effect. The Court of Appeal accepted that documents, such as a memorandum dated 13 February 1991 and letters of 16 December 1991 and 13 October 1992, confirmed that the employer had given the employee a guarantee that, when he transferred from a final salary scheme into a money purchase scheme, he would be no worse off upon retirement.

Finding of fact

26.The parties agreed that the claimant worked for DHL from 19/4/99, that Robert Aldridge was his line manager from 1/12/04 until 20/2/18, and that on the 1/11/08 the claimant has a grade 'M' role with a salary of £32,814. (see chronology for claim 1)

27.The claimant in his statement and evidence stated he earned approximately £55,000 for the years 2006/2007/2008. Pay slips in the bundle at page 169, 170 and 182 confirm this. Miss Ferber in cross examination established with the claimant that for example in relation to his salary in 2007, at page 102 of the bundle, DHL's letter confirmed a salary of £28,556. Additional payments shown on the wage slip as call out / overtime accounted for the remainder of the approximately £26,000 pay, which gave the total of £55,000 income for that year. The claimant agreed with this.

28.In March 2008 the claimant received an increase of salary from £28,556 to £30,041, this is reflected in a letter sent to the claimant by DHL confirming these arrangements at page 104 of the bundle. The claimant agreed with the figures in cross examination.

29.The claimant and Nicholas Sandison agreed in their respective evidence, that the claimant had signed a new contract of employment on the 17/8/09, for the post of Operational Account Manager, reporting to Robert Aldridge, Regional Operations Director. The post was effective from the 1/6/09 on a salary of £45,000. (page 107). Both the claimant and Nicholas Sandison confirmed the new contractual terms did not include overtime or call out payments.

30.The contract of employment contained at paragraph 7 the 'Bonus Arrangements'. The terms stated:

7.1 You are entitled to participate in the company bonus scheme which is non contractual and may alter from year to year. This bonus is subject to achievement against personal and business targets.

7.2 For performance year 1st July to 31st December 2009 your bonus split will be 90% fixed (reference salary) and 10% variable (bonus potential).

31. The contract of employment stated the hours of work at paragraph 7, and that overtime would not be paid. The terms stated:

8.1 Basic weekly hours of work are 37 ½ (excluding meal breaks which are unpaid) in accordance with the arrangements applying in your location.

8.2 In addition, you will be required to work such extra hours as are necessary to fulfil the requirements of the job and meet the needs of the business, for which overtime is not paid.

32. I find the following facts based upon the evidence summarised above at paragraphs 26 - 31, and the contents of the bundle, and the claimant's confirmation of the chronology of his employment.

- For the period 2006/2007/2008 the claimant earnt £55,000 which included approximately £26,000 call out / overtime pay.
- In March 2008, the claimants base salary was £30,041, in November 2008 it was £32,814.
- On the 17/8/09 the claimant signed a new contract of employment for the post of Operational Account Manager, with a salary of £45,000.
- The claimant's contract of employment entitled him to participate in the company bonus scheme.
- The was no term of the new contract which entitled the claimant to overtime or on call payments. (page 107c of the bundle, the contract specifically states overtime will not be paid, and on call payments are not mentioned in the contract)

Was there an agreement in 2009 for an additional £10,000 to be paid in addition to salary?

32. The parties disagree on whether there was an agreement in 2009 for the respondent to pay the claimant an additional £10,000 to top up his salary.

33. The claimant in his statement states he negotiated with Steve Barker, the Chief Executive Officer at the time, and Robert Aldridge his line manager in May / June 2009, with all parties agreeing the £45,000 salary, and a £10,000 per year additional payment. The claimant in addition to his evidence confirming these negotiations did take place, relies on an e mail sent on the 24/6/09 by Steve Barker to Rob Aldridge which reads:

'until we sort out his salary, place the equivalent of the 40 h/rs o/t as a cash value in call out or one off bonus' (page 106 of bundle)

When cross examined the claimant did not accept this e mail reflected a temporary / one off situation and payment. It was put to him that at p126 of the bundle, the 'staff update/ internal offer form' setting out his new role as the Operational Account Manager, dated the 1/6/09 reflected a grade 'K' role, at a salary of £45,000, was a 33% increase on his previous salary. This was reflected at page 105 in the bundle, a letter from DHL increasing his salary to £32,814 from the 1/11/08. The claimant accepted in evidence the documents and the increase in salary he had received, from £32,814 to £45,000.

Robert Aldridge's statement refers to his understanding of this instruction as to calculate 40 hours overtime based on Lee's salary at that time, and pay Lee that amount as call out, until an agreement on his salary was reached. The statement confirms his recollection that an agreement on the claimant salary had not been reached in 2008, payments for call out continuing until at least 2017 to his knowledge, when the claimant began to work for a different part of the business.

Miss Ferber put to the claimant an e mail exchange at page 106a of the bundle, between Steve Barker and Carolyn Woodhams, Vice President of Human Resources at that time.

From Steve Barker

'Carolyn, attached 11,200pa increase may seem outrageous, however we need to 'tidy this up' once and for all.

Additional info u need to be aware of.

Lee is presently paid 18,400 pa by way of overtime and call out. Attached increase will result in this no longer being paid to Lee, however he will continue to work the same hours, and will also still action call outs. Therefore, a saving of 7,200pa.

In addition, we have negotiated with Shell that they partially fund Lee to the value of 20,000pa which is billed to them monthly.

Therefore, overall a total benefit of 27,200pa.

Can you plse arrange for this salary increase to be cnfm in writing to Lee'

In response to this Carolyn Woodhams e mails:

'This change will move Lee into a graded role- can you ask Mel to advise on appropriate grade. Rob thought lowest at bonus (l) but I'm not sure may be higher.

Also we need to issue a new contract with bonus instead of overtime and new role title etc'

In cross examination the claimant accepted that the reference to part of his salary at that time being made up of £18,400 of call out fees and overtime was accurate.

Nicholas Sandison in evidence stated although he wasn't employed by DHL at that time, his understanding of the e mail from Steve Barker, was that it was a one of payment of £10,000 only, and not an ongoing yearly arrangement.

34. The claimant confirmed in evidence he had not received bonus payments prior to the issue of his new contract, and accepted in cross examination the bonus payments received as evidenced in the bundle at pages 109a in March 2012 - £2,000, page 110a in January 2014 - £1,500, page 115a in March 2016 £3,000, page 146 in April 2019 £4,665. The claimant accepted receiving bonus payments in line with the terms of his contract of employment.

35 At page 152 of the bundle a spreadsheet contains the total salary received by the claimant from January 2009 until November 2019. It is a spreadsheet generated by DHL, and splits pay into basic pay, bonus, call out payments, overtime. The claimant accepted when questioned by Miss Ferber, the spreadsheet showed he stopped receiving overtime payments in August 2009, which accords with the terms of his contract effective from the 1/6/09.

36. The claimant confirmed the spreadsheet at page 152 showed he continued to receive call out payments from the date of the spreadsheet January 2009, until July 2019.The only exception to this being September 2009 until March 2010. The claimant stated in evidence these were part of the agreed £10,000 per year additional payment that Steve Barker had previously agreed. His position was that his line manager Rob Aldridge asked him to e mail him every month so there was an audit trail in respect of the payments, which could be attributed as call out payments.

37. Nicholas Sandison gave evidence that a manager in Robert Aldridge's position would not have known his budget to the extent that he would have been able to state to the claimant put in a claim of £460.00 or £420.00 this month. He denied any arrangement existing in the business which would have enabled a manager to make payments to staff dependent on what was left at the end of a month. He accepted that although the on-call payments were not part of the claimants written contractual terms, it has become custom and practice in his case for call out fees to be paid.

38. In cross examination in respect of the call out payments, the claimant confirmed he did provide a 24/7 call out service to his customers. Miss Ferber put to the claimant that at page 115 of the bundle, on the 30/12/15 there was an e mail sent from the claimant to Robert Aldridge confirming 'on call pay December 2015 – figure is £450'. The claimant advised he had sent the e mail, and had to report it, he was told by Mr Aldridge what to write, he would tell him what he felt he could put through every month. The claimant went on to explain that the on-call payments were £10.00 during the week and £25.00 during the weekend. He accepted call out payments were not specified in his 2009 contract.

39. In respect of call out payments, it was put to the claimant that at page 119 of the bundle, Robert Aldridge had by e mail on the 6/3/17 requested details of the function that the claimant provided during the week and weekends. The claimant replied by e mail on the 7/3/17, 'that Stasco and NSML contracts required 24/7 cover due to the nature of the parts, each month they pay for myself and an operations person to be on call'. The claimant stated Robert Aldridge requested this e mail so he had evidence for senior managers.

40. The claimant confirmed he lodged a formal grievance with the company in 2018. An E Mail in the bundle at page 127 from the complainant confirms this was in relation to the percentage increase in his pay award that year. A letter from Andy Cooke, Vice President, at page 129 of the bundle upholds the grievance and awards the claimant at 2.5% pay increase. An appeal in relation to the aligning of the claimant's base line salary to another colleague then followed this grievance. The claimants e mail to Carolyn Woodhams dated 22/6/18 does reference 'my other long-standing benefits which were put in place by the previous CEO'. In cross examination the claimant confirmed this was a reference to his on-call payments.

41. The claimant stated in evidence he was always asked to do extra work, and he always did it. He was entitled to the on-call payments when he went off sick in 2019, because in his view they were contractual payments he was entitled to.

42. It was conceded in evidence by both Nicholas Sandison and Julia Marsh for the respondent that the records of the claimants pay as summarised in the bundle at page 152a, showed the claimant received on call payments for the period January 2009 until August 2009, and then from April 2010 until July 2019. In cross examination by the claimant, it was accepted the on-call payments made were not part of the claimant's contract of employment dated 2009.

43. Julia Marsh confirmed in evidence she met with the claimant on the 7/6/19, the claimant was off work sick at this time, and he was advised there was no requirement to carry out any additional work at this time 'on call', because he was signed off work sick. Therefore, no additional call out payments would be made to him.

Findings in relation to whether there was a 2009 agreement to pay an additional £10,000 to the claimant

44. I find as a fact that the claimant continued to receive on call payments from 2009 until July 2019. In particular the spreadsheet at page 152a of the bundle, which all parties accept, shows that call out payments were made until August 2009, and resumed in April 2010, continuing until July 2019.

45. The payments prior to August 2009 were made under previous contractual arrangements, which all parties accept included overtime and call out payments. I find that payments made subsequent to August 2009, after the signing of the new contract, were on call payments, although the claimant's contract no longer provided for those payments to be made. It is apparent from page 106 of the bundle, that Steve Barker in his e mail to Carolyn Woodhams, anticipated the claimant would 'still action call outs'. The claimant in his evidence confirmed he had 'always done the extras'. At page 116 of the bundle, there are e mails from the claimant confirming call out monthly amounts to his manager for example in March 2016. In answer to an email asking for confirmation of what function was provided to call out customers, the claimant confirmed in his e mail dated 7/3/17, page 119 of the bundle that 2 customers 'required 24/7 cover due to the nature of the parts'. His employee timesheet at page 150 shows for example in the month June 2019 he attributed a number of £25.00 and £10.00 call out charges to different named customer accounts.

When considering the spreadsheet at Page 152a, it is apparent that throughout the 10-year period of call out fees being paid the amounts paid monthly were variable between £100 and £825, which suggests amounts being charged in accordance with differing demands of customers on a monthly basis. In my view all this evidence confirms that the call out payments received by the claimant, were in relation to work actually done by him and claimed in respect of specific customers.

46. In relation to overtime payments all parties accepted the 2009 contract made no provision for this, and the spreadsheet at page 152a shows the claimant was not paid any overtime amount after August 2009, which accords with his contract. The evidence of bonus payments being made to the claimant at pages 109, 109a, 110a, 115a, and 146 of the bundle in 2011, 2012, 2014, 2016 and 2019 also supports the view that the claimant was paid a salary and bonus in accordance with the terms of his contract from 2009 onwards.

47. I find as a fact there was no agreement to pay the claimant an additional £10,000 in addition to salary from 2009. The claimant has given evidence confirming his statement, which is that he negotiated this as part of discussions with Steve Barker at the time. He points to the e mail sent by Steve Barker at page 106 on the 24/6/09, indicating a payment equivalent of 40 hours should be made. I do not find this e mail of itself adequate to establish an implied term of the claimant's contract for an additional £10,000 payment.

If an agreement of this nature had been reached, taking into account the significance of a £10,000 additional payment to a £45,000 per year salary, I would expect to have seen other contemporaneous documents, perhaps an agreement annexed to the contract of employment, signed and dated by the parties, reflecting the terms of the agreement between them. In this case there is no additional documentation confirming the position.

At page 106a of the bundle, it is apparent from the 7/8/09 e mail from Steve Barker that overtime and call outs would be no longer payable under the terms of the 2009 contract. I have considered **Prometric Ltd and Cunliffe (2016) EWCA Civ 191**, and the need for contemporaneous documentation generally to confirm an oral agreement. I have also considered **Judge and Crown Leisure (2005) EWCA Civ 571** and the need for certainty as to the contractual commitment entered into, or alternatively facts from which the certainty can be established.

48. Roberts Aldridge’s statement contains no reference to him being part of the negotiation discussions with the claimant in 2009, regarding salary, although he does confirm the e mail regarding paying the claimant the equivalent of 40 hours overtime. His statement confirms that no agreement was reached regarding the claimant's salary in 2008, but he makes no mention of any verbal agreement for a £10,000 additional payment in 2009 being reached.

49. There is no evidence in the bundle that the claimant raised with DHL the additional £10,000 payments, between 2009 and 2018. There is some reference in the bundle regarding the grievance claim in 2018, that the claimant referred to

'my other long-standing benefits'. The claimant confirmed in cross examination that this was a reference to on call payments, however a specific reference does not appear to be made to payments reflecting an additional £10,000 yearly payment. I find it significant that there is no evidence of the additional £10,000 payment being raised in a formal way with the respondent, between 2009 and 2018.

50. I find that the claimant was off work sick in July 2019. He did not return to work prior to the termination of his contract on the 15/7/20.This is not disputed by the parties. I have found that the on-call payments were made subsequent to his 2009 contract. Therefore, I find he was not entitled to on call payments for his period of absence from work in 2019 due to illness. The claimant in his evidence did not suggest he had undertaken any call out work whilst he was off sick. His contention was he was entitled to the payments contractually. I have found that the call out payments received were for work he undertook for customers, and subsequently claimed for. Therefore, as he was not available to cover the call out needs of the respondent's customers during a period of absence from work due to ill health, he was not entitled to payment of call out fees for this period.

Conclusions

51. Given the findings of fact I have made above, I remind myself of the issues to be determined and set out above and therefore for completeness confirm as follows:

a. **Did the respondent fail to adhere to an agreement in June 2009 that it would pay the claimant the sum of £10,000 in addition to salary and instead only paid £5,000 and did this amount to an unauthorised deduction from the claimant's wages in accordance with ERA section 13?**

52. As I have found that there was no agreement between the respondent and the claimant in June 2009 that it would pay and continue to pay the claimant an additional sum of £10,000 and therefore no contractual entitlement to be paid such a sum, these sums were not payable to the claimant (as defined by section 27(1) Employment Rights Act (1996).

b. **Did ceasing all additional payments from June 2019 onwards When the claimant was absent by reason of illness amount to an unlawful deduction of wages?**

53. As I have found the claimant was not entitled to be paid on call payments if no such on call work was carried out, then when he was off work and not carrying out on call duties, no on call payments were payable to him. This would apply to any payments claimed from June 2019 until the termination of employment. The respondent's failure to pay such sums to the claimant was not a deduction from wages under section 13(1) Employment Rights Act (1996).

c. **If so, how much was deducted and to what compensation is the Claimant entitled?**

54. On the basis I find that there was no agreement to pay £10,000 in addition to salary in 2009, and there was no entitlement to on call payments during a period of absence from work ill, I find the respondent has not made a deduction from wages. There is no need for me to go on to consider the provisions of section 23 (4A) of the Employment Rights Act (1996).

55. The claimant's complaint of unlawful deduction of wages is dismissed.

I confirm this judgement has been electronically signed.

Signed by: Employment Judge Beck
Signed on: 8/6/21