



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Clavier  
**Respondent:** DHL Services Limited  
**Heard at:** East London Hearing Centre (via CVP)  
**On:** 27 November 2023 and 12 January 2024  
**Before:** Employment Judge Emery

**Representation:**  
Claimant: In person  
Respondent: Mr D O'Dempsey (Counsel)

## JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages in the period November 2022 to December 2023.
2. The respondent shall pay the claimant £7,056, which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

## REASONS

### The Issues

1. Judgment and reasons were provided at the hearing, written reasons were requested.
2. There is one issue: After the TUPE transfer of the claimant to the Basildon depot, did the respondent underpay the claimant on his contractual wages in from November 2022 to date?
3. The claimant asserts his contractual terms did not change on transfer, the respondent asserts that on transfer the claimant became part of the Collective Agreement at Basildon Depot, requiring some elements of his wages to reduce.

### Procedure and witnesses

4. The hearing was listed originally for 1 hour. It became apparent from the amount of contested evidence that this was a day's hearing. This meant unfortunately the claimant was part-heard in his evidence at the time we adjourned on the first day, recommencing 6 weeks later.
5. The hearing was conducted by cvp. There were occasional connection difficulties. At the outset of the hearing the claimant did not have access to an electronic bundle. When one was provided to him, all witnesses had access to the bundle and statements, and all were able to listen and ask and answer questions without apparent difficulty.
6. This judgment does not recite all of the evidence I heard, instead it confines its findings to the facts relevant to the issues in this case. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

### The facts

7. The claimant has been employed as a LGV Driver of the respondent since October 2011. He is a well-regarded employee with a positive work record.
8. On 1 July 2022 the claimant transferred to Basildon Depot at Pipp's Hill, on a TUPE transfer. It is fair to say he has been unhappy following this transfer and has been constantly seeking a transfer to Maidstone Depot. I heard a lot of evidence on this issue, and it seems that a transfer may be a possibility.
9. The claimant was not given a contract of employment specifying the change of location and changes to his contractual terms until 30 May 2023 (49). The claimant asserts that his prior employment contract terms carried over on his transfer to Basildon depot, including his rates of pay. He does not accept the contractual terms given to him in May 2023.
10. At the date of transfer, the claimant's role involved delivery and installation on behalf of Argos. His salary was £39,411 (47). This included a weekly sum of £208 for installing washing machines on behalf of Argos. It also included an element in London weighting. Unfortunately, there is no 'pre-transfer' wageslip in the bundle of documents, the claimant asked us to refer to his January 2022 wage slip as an example.
11. Following transfer to Basildon Depot, the claimant says his role remained the same, he was delivering and installing washing machines on behalf of Argos. He was paid his old salary in the month following transfer, end May 2022. His salary remained on his pre-transfer rate until October 2022. The claimant was paid what he believed was his pre-transfer salary until October 2022.
12. There is a reference in one of the TUPE consultation meetings to a change in the way the claimant's salary would be calculated. The notes show the claimant was told his currently salary was £39,411, it would increase post-transfer to

£39,561 based on receiving London Weighting “for every hour you work”. There is a discussion as to how this would affect his holiday pay (33).

13. The respondent’s case to the claimant is that it was evident from the several TUPE consultation meetings that he would receive “a lower rate of basic pay” but additional London weighting for every hour worked (i.e. when not on holiday etc). The respondent says that this meant he was receiving a “higher hourly rate” at Basildon than his prior depot, that this was “explained in consultation” on 29 April 2022.
14. The respondent’s case is that Basildon Depot is governed by a collective agreement – the National Transport Agreement 2019 (NTA) Agreement. The case put to the claimant was that “you would have been aware” that his employment would be governed by the NTA post-transfer.
15. The claimant denied knowing so. I note that nowhere in the TUPE consultation meeting notes with the claimant, does it suggest the depot was governed by a collective agreement post-transfer, or that it was foreseen that his wages would significantly reduce in certain circumstances post-transfer.
16. Prior to, on, or after transfer, no documentation was given to the claimant saying what changes were proposed to his contract terms.
17. These are clearly issues that should have been discussed with the claimant and backed up in writing.
18. The claimant went on sick leave in November 2022. In his November 2022 wages the claimant was paid approximately £709 a month less. The respondent’s case is that because he was on sickness absence he was not entitled to London Weighting, hence his sickness absence was paid at basic pay only. The claimant says it was only then that he became aware the respondent had put him on different terms, that he was not receiving his usual salary when sickness absence,. He says that at his old depot his salary would not have gone down when on sick leave.
19. The employment contract given to the claimant dated 30 May 2023 contains the first written reference to a collective agreement, stating that where there is a conflict between the contract and [the NTA], the NTA will prevail (52-3). He says prior to this date he was not aware there was a Collective Agreement in place at Basildon, it was not mentioned to him. During evidence the respondent accepted the NTA was not referred to in consultation meetings. The respondent’s case is that the NTA would have been clear from notice boards at the Basildon depot.
20. The claimant was not aware of the terms of the NTA, stating he would get “normal basic pay” when on sickness absence (89). He said his “normal basic pay” would be his salary of £39,411.

## Closing arguments

21. The respondent's case put by Mr O'Dempsey is that in consultation "it was clear there would be changes to terms and conditions ... it is clear there were going to be different terms and conditions", referring in particular to pages 39-41. The respondent's case is that the claimant's contract terms are in the collective agreement, at pages 88-89. "In the real world, at this time the claimant is on-site and knows or ought to know that the NTA applied and that the terms of the NTA were available ... once someone working in this Depot knows that terms and conditions are subject to a collective agreement, they are on notice ..." of a change of terms to their contract terms.
22. Being on notice is evidence of an "implied agreement to the change in terms." Mr O'Dempsey argued that this knowledge would be of "different and less beneficial terms", it was clear that the claimant was told he would be on "Argos contract" terms, and the claimant "continued to work without clear objection" after this.
23. On whether a lack of objection by the claimant to his wages post-termination were because he was not aware his wages had changed, the respondent again referenced page 33 and the reference to London Weighting "for every hour worked"; "So there is actual knowledge."
24. On whether the claimant accepted the changed terms, Mr O'Dempsey accepted that the acceptance must be "unequivocal", in this case "there is only one construction" that the claimant went to Basildon "knowing there are site specific terms and conditions which he knows are less favourable and he did not object." As he did not raise an objection when he knew the terms would be different, this is "indicative of implied acceptance." This is "unequivocal acceptance" as he continued to work to these changes.
25. Mr Clavier argued that there is nothing in his contract that says that his salary will change if he moves location – e.g. the mobility clause in his 2017 contract page (146). From November 2022 his salary reduced. At the consultation meeting the issue was raised about holiday pay, not sick pay. Mr Clavier made it clear, as he had done in evidence, that he had objected to the new contract, he did not want to work at Basildon and had asked repeatedly to move to Maidstone, which has been held out by management as a possibility.

## The law

26. *Employment Rights Act 1996*

*s.13 Right not to suffer unauthorised deductions.*

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

...

### **Conclusions on the evidence and the law**

27. The respondent relies on the NTA supervening the claimant's contractual terms. I find that the claimant's contractual terms which applied on his transfer are those set out in his 2017 contract at page 144 onwards. No other contract terms were given to him, albeit some changes were discussed during the consultation process.
28. The 2017 contract makes no reference to a collective agreement applying. It specifies that his sick pay entitlement is based on "basic salary", paid at "26 weeks full and 26 weeks half pay" (146).
29. At no time during the consultation process was the claimant told in writing what the proposed new contract terms would be, or the implications of the proposed contract, no mention was made about the implications on sick pay entitlement at any stage, no reference was made to a collective agreement applying at any stage.
30. The ET1 Box 8.1 has ticked "arrears of pay". The claimant remains in employment. This is therefore a s.13 Employment Rights Act claim for arrears of pay.
31. The claimant's written contract at 144 was superseded only in respect to agreed increases to the claimant's rate of pay. At the date of transfer his salary was £39,411.

32. S.13 Employment Rights Act is specific – a deduction from wages can only be made in specified circumstances. The respondent does not rely on a statutory provision, and a collective agreement is not a statutory provision in any event. There is nothing in the claimant’s 2017 contract authorising such a deduction, and the claimant has not previously said in writing he consents to such a deduction.
33. I therefore reject the respondent’s argument that it was contractually entitled to pay the claimant a basic wage less London Weighting from November 2012 onwards; the wage and sick pay terms are set out at page 146. While payment of salary is discretionary, once the discretion has been exercised in favour of the claimant, the agreement is to pay basic full salary, in the claimant’s case £39,411, divided by 52.

**Remedy**

34. The claimant argues that the total he has been underpaid since 1 November 2022 is £7,056 gross wages. Monthly, the claimant received a gross wage of £2,783 (evidenced by wage slips in the bundle). His wages prior to November 2022 were £3,492. The claimant accepts that being on sick leave means his sick pay would have reduced to ½ pay in May 2023.
35. I did not have a lot of documents showing the difference in pay rates, for example, earlier wage slips. The best I could do from the evidence was that the claimant’s wages reduced by £709 pcm from November 2022. His contract specifies a reduction to ½ pay after 6 months sick absence.
36. My calculation is that the claimant’s loss is as follows:
- a. £709 pcm loss from November 2022 – April 2023 - £4,254
  - b. £354.50 pcm loss from May – December 2023 - £2,802
37. Total award: **£7,056.00.**
38. The respondent indicated that it is unsure that this calculation is correct; we discussed a timetable for the respondent to provide its observations and for the parties to seek to agree an alternative calculation or seek a further hearing. I have heard nothing from the parties in the meantime.

**Employment Judge Emery  
Dated: 4 March 2024**