EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Aleksejs Bogdanovs	**v**	Tesco Stores Ltd

Heard at: Bury St Edmunds **On:** 12 and 13 May 2025

Before: Employment Judge K J Palmer (sitting alone)

Appearances
For the Claimants: In person (assisted by a Russian Interpreter Ms Munton)

For the Respondent: Mr Singer (Counsel)

Judgment having been sent to the parties after having been given extemporarily in Tribunal and reasons have been requested they are hereby attached on 2 July.

REASONS

1. This matter came before me listed for a two day hearing as a Full Merits Hearing. The matter had previously been before me listed as a one day hearing, but for the reasons set out in my Case Management Summary at that hearing, it was necessary to postpone that hearing and relist the matter for a two day hearing.

2. The Claimant presented his claim to this Tribunal on 19 September 2024. In it he pursues a claim for unlawful deduction of wages. It is very important to be clear about the nature of the Claimant's claim that is before me. The reason or this is that during the course of this hearing the Claimant has expanded upon arguments that went way beyond the nature of the claim in his ET1. I have to very much take into account that the Claimant does not speak English and has presented and managed to run his case through the offices of a Court appointed Russian interpreter, that is Ms Munton to whom I am most grateful for her assistance. However, it is important that I make it clear that the Claimant's claim is confined to that which is contained in his ET1. There was an application before me which I dealt with at the outset of this hearing yesterday for unspecified and unparticularised discrimination

claims to be added to this claim which application I dealt with and I rejected the application to amend. Those reasons were given in detail yesterday.

3. So the claim before me, which has not been case managed, is a simple and straightforward claim for unlawful deduction of wages under section 13 and 23 of the Employment Rights Act 1996. Essentially the Claimant who had worked for DHL, a company contracted to the Respondent between 2007 and 2017 when the Respondent took those contracted services in-house, at which point the Claimant became an employee of the Respondent due to the operation of the Transfer of Undertakings Protection of Employment Regulations 2006. From October 2017 the Claimant was then employed by the Respondent.

4. In May 2024 the Claimant transferred to the nightshift in the warehouse where he now works for the Respondent. His claim for unlawful deduction of wages is based on his assertion that he should be paid an unsociable hours' rate or specific night rate associated with nightshift work. The Respondents argue that no such additional shift pay for night shift is payable pursuant to the terms of a collective agreement which is expressly or impliedly incorporated into the terms of his contract of employment. That, in a nutshell, is the claim before me. There is no other claim before me.

BACKGROUND

5. In or around 2007 the Second Respondents entered into a third party service agreement with DHL. This concerned a distribution centre of the second Respondent and that agreement specified that DHL run and managed that distribution centre. That distribution centre is at Daventry. The Claimant was a DHL employee assigned to that contract. He continued to work under it. In the bundle before me I have copies of the Claimant's contract of employment with DHL. The latest version prior to the transfer of undertakings to the second Respondent is dated 7 May 2017. An earlier version, in almost identical terms, was dated in 2007. The Claimant was uncertain about whether the contract in 2017 was his contract but suggested that little mattered or turned on that because it was, in identical terms, to the one he enjoyed in 2007, save for some changes in salary etc. It is clear to me that the document before me in the bundle dated 7 May 2017, was the Claimant's latest contract prior to the transfer of undertakings to the Respondent. I make a findings of fact in that respect. The terms of that contract include the following wording as part of the early preamble to the list of main terms and conditions of employment:

> "There is a collective/partnership agreement with USDAW in place which affects your employment with the company".

6. This is essentially a collective agreement negotiated between the Union USDAW and the employer. This is referred to in the Claimant's contract of employment prior to transfer and there was in place a cite agreement, which is the name given to the collective agreement at that time, which had been in place since about 2012. It is the Respondent's case that at the point of

transfer in October 2017, the Claimant's employment transferred together with all existing terms and conditions from DHL to the Respondent and that part of the terms and conditions so transferred, included the collective agreement negotiated with the Union. The nub of this case is that in March 2023, that collective agreement was renegotiated by the Union with the Respondent and certain changes were made, one of which was that those who had transferred in 2017 from DHL would not be entitled to unsociable hours premium payments when working on the night shift. Others, who were not DHL transferees, were entitled to a premium for unsociable hours work, ranging between 25% and 33.33% by way of uplift. There are also many other differences in the collective agreement between those DHL TUPE workers and others. It is common ground between the parties that many of those other differences favour and/or are beneficial to the DHL TUPE transferees and are better than terms accorded to others who are not DHL TUPE transferees. The issue here is whether the 2023 collective agreement is incorporated into the Claimant's terms and conditions of employment. He says they are not, the Respondents say they are. If the Respondents are right then the Claimant is entitled to no additional payments for the nightshifts he has worked since May 2024. If the Claimant is right, then he may be entitled to additional payments and the amount of those would have to be assessed based upon which terms and conditions the Tribunal considered were part of the Claimant's contract of employment. That is all this claim is about.

7. I heard evidence from the Claimant through the interpreter and from a Steve Wilson, a workplace relations and reward partner of the Head Office Team who is responsible for the Distribution Department. The Claimant gave evidence through Ms Munton and seemed often to be confused by some of the questions put to him in cross-examination by the Respondent's Counsel. Notably, the Claimant gave evidence that he was not a member of the Union at the time of transfer and said he had only recently joined the Union but when taken to documentation in the bundle, evidencing meetings at the time of the transfer where the Claimant had clearly indicated he was a member of the Union, he seemed to relent and accept that he had been throughout. Prior to doing so, however, he did question the authenticity of some of those documents and whether the signature at the bottom of them was actually his or not. When pressed, he accepted that they were his signatures. I of course must take into account the difficulty the Claimant experiences in being cross-examined when English is not his first language and everything is being done through a Russian interpreter.

8. It was also not entirely clear to me whether the Claimant accepted that the earlier collective agreement had formed part of the terms and conditions of employment he had enjoyed with DHL. On occasion he seemed to say that he did accept it. The Claimant also gave evidence throughout that he had no knowledge that a new collective agreement had been negotiated in March 2023 through the Union at which he was a member. For the reasons that I have indicated and the number of contradictions in the Claimant's evidence, I find myself having to treat his evidence with some degree of caution. Where, therefore, there is a dispute on the evidence I prefer the evidence of Mr

Wilson. In those circumstances I accept Mr Wilson's evidence that the Claimant had the opportunity of understanding that there had been negotiated a new collective agreement in March 2023 and could have furnished himself with the details of it had he attempted to do so. He was a member of the Union, the Union negotiated the collective agreement and went through all proper protocols of consultation in so far as I can ascertain from the evidence in front of me.

9. The question then is, whether the collective agreement is incorporated into the Claimant's terms and conditions and the key issue is whether the wording that I have set out above, effects that incorporation. I have been referred to various authorities by both parties for which I am grateful. Mr Singer took me through those authorities in some detail. I have also considered the authorities listed by the Claimant where they were relevant to the issues. It is a matter of law that terms derived from several different sources can be expressly incorporated into individual contracts of employment where there is a reference contained in the employment contract to the particular source in question. However, simply because of an extraneous document or policy is referenced, it does not necessarily mean that the entire document or policy becomes incorporated. Only such terms as are act for incorporation become incorporated and are thus capable of enforcement by the individual or the employer under the employment contract. In the case of Alexander and Others v Standard Telephones and Cables Ltd [1991] IRLR286, Mr Justice Hobhouse stated that where a document is expressly incorporated by general words, it is still necessary to consider, in conjunction with the words of incorporation, whether any 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. In the case of Hussein v Surrey and Sussex Health Care NHS Trust [2011] EWHC 1670, guidance was given by Mr Justice Andrew Smith. The Judge observed that there was no single test as to whether an employer and employee intended to agree that the provisions of an agreement such as the disciplinary procedure in this case should be contractual as opposed to being merely advisory. He set out certain issues to be considered. I have taken those into account although I do not repeat them here. In this case the Claimant raised complaints and grievances once he had moved on to the nightshift in May 2024 and realised that he was not being paid an additional premium for those unsociable hours. In June of that year he was offered the opportunity to change his contract of employment to become a Tesco employee who was not afforded the terms afforded to previous DHL TUPE transferees. This would have given him a premium on the nigh shift work under the terms of the 2023 collective agreement of 25%. He refused this offer. When I asked him about that he said that he refused it because many of the other terms applicable in that collective agreement to DHL TUPE transferees were advantageous over and above other employees.

CONCLUSIONS

10. I have to determine whether the terms of the 2023 collective agreement are incorporated into this Claimant's employment contract which transferred in October 2017 under the TUPE provisions. That is the nub of the case.

11. It is my judgment that the wording of the contract is clear and does incorporate expressly the terms of the collective agreement. That collective agreement in those terms under the legal test is apt for incorporation as it goes to the heart of the employer/employee relationship.

12. On the evidence before me the Claimant was fully aware of this at the point of transfer. He attended meetings, understood the nature of the transfer and received a detailed letter explaining the effect and nature of the transfer and how the terms of the then collective agreement were incorporated into his terms and conditions of employment. He was therefore bound by those terms within that collective agreement and bound by the terms of the renegotiated collective agreement in March 2023. It is my judgment, therefore, that the collective agreement of 2023 and its terms concerning unsociable payments are incorporated into the Claimant's terms and conditions. The Claimant was given an opportunity to step out with those terms but refused that opportunity because essentially he wanted to have his cake and eat it. By retaining the advantageous terms applicable to DHL TUPE transferees but not those that were not advantageous.

13. It is important that I just say something about the TUPE Regulations. This is not really a TUPE case. The transfer took place some years ago and indeed 6 years before the renegotiated collective agreement and 7 years before the Claimant switched to the night shift, the renegotiated collective agreement is dealt with under TUPE Regulation 4(5B) which stipulates that paragraph 4 of TUPE does not apply in respect of any variation of the contract of employment insofar as it varies a term or condition incorporated from a collective agreement, provided that the variation of the contract takes effect on a date more than one year after the date of the transfer and that following that variation the rights and obligations in the employees contract, when taken together, are no less favourable than those which applied immediately before the variation. It is my judgment that that Regulation is firmly engaged here, that that disengages sub-paragraph 4. But in any event, even if 5B were not to be engaged there is, on the evidence before me, nothing to suggest that the variation was in any way connected with the transfer and therefore Regulation 4 of TUPE is not engaged in that respect.

14. Accordingly, and for the reasons I have set out above, I make a declaration that there was no entitlement by the Claimant to an additional unsociable hours premium for the night shifts the Claimant worked from May 2024 onwards, there can therefore be no unlawful deduction of wages and the Claimant's claim for unlawful deduction of wages fails and is dismissed.

Approved by:

Employment Judge K J Palmer

Date: 2 July 2025

Sent to the parties on: 21 August 2025

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For the Tribunal Office.