EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ahmed**

Respondents: **Docklands Buses Limited**
London General Transport Services Limited t/a Docklands Buses Limited

Heard at: **East London Hearing Centre** **On: 23 October 2017**

Before: **Employment Judge Allen (sitting alone)**

Representation

Claimant: In person

Respondent: (Counsel)

JUDGMENT

1 The Claimant's claim is dismissed.

REASONS

1. The Claimant brought this claim for unlawful deduction from wages against Go Ahead London (Docklands Buses Ltd). The Respondent states that its correct name is London General Transport Services Limited and that it is part of the Go Ahead Group. The Respondent's evidence is that trades as 'Docklands Buses Ltd'. This is odd as 'Docklands Buses Limited' is also said to be the name of a dormant company within the same group.

2. The Claimant's statement of main terms and conditions states that his employment is with Docklands Buses Ltd.

3. Rather than substituting London General Transport Services Limited for Docklands Buses Ltd, I will add London General Transport Services Limited as a Respondent. Where I refer to the Respondent below, I refer to whichever of these companies is the correct employer.

4. I heard evidence from the Claimant and from Angela Ryder for the Respondent (the appeal decision manager) and I was referred to an agreed bundle of 90

pages.

5. The Claimant has been (and remains) employed by the Respondent as a Bus Driver Operator since 31 October 2016 based at its Silvertown depot.

6. The Claimant brings a claim for unlawful deduction from wages for the period from 3 November 2016 and continuing and seeks a statement of his particulars of employment.

7. His claim is very simple and is based on his grade as stated in the "Statement of Main Terms and Conditions of Employment with Docklands Buses Limited" "incorporating written particulars of employment", two copies of which were signed by him and signed on behalf of the Respondent on 2 November 2016.

8. In that document:

   8.1 The date on which continuous service began is stated to have been 31 October 2016;

   8.2 The Claimant's grade having been typed as "DB01" has been crossed out and handwritten "GD04";

   8.3 Clause 3.1 states "The guaranteed weekly pay is based on 37.5 hours. Additional rostered time is paid at the basic hourly rate. Any rest day or overtime working will be paid at the overtime rate, providing there has been no sickness or unauthorised absence in the week."

   8.4 Clause 3.6 states "Whilst in training you will be paid the prevailing national minimum wage. The rates of pay are as shown below, and are subject to annual review:

   With effect from 26 September 2015

Service	Hourly rate (£ per hour)	Basic pay £ per week (37.5 hours)	Overtime rate (£ per hour)
From joining and up to 2 years (DB01)	£11.4849	£430.68	£12.4081
On completion of two years and up to 3 (DB02)	£11.8226	£443.35	£12.7685
On completion of three years and up to four (DB03)	£12.1605	£456.02	£13.1400
On completion of four years	Current DE02 terms and conditions"		

   8.5 Clause 9.4 states "Once you have completed two years service you would be entitled to company sick pay…"

   8.6 Clause 27 states "the company reserves the right to make reasonable changes to any of your terms and conditions of employment".

9 At the end of the document after the signature on behalf of the Respondent and before the Claimant's signature it states "I have read and accept this statement as an accurate record of my terms and conditions and accept that it constitutes the terms of my contract of employment. I undertake to make myself thoroughly acquainted with the companies rules and regulations from time to time in force so far as they relate to my duties and responsibilities and to observe and carry out such rules and regulations. I confirm that I have received a copy of the rule book."

10 Also on 2 November 2016, the Claimant signed a Working Time Regulations Maximum Weekly Working Time document on which his grade was referred to as DB01 and a Training Record in which his grade was also recorded as DB01.

11 GD04 is not referred to in the rest of the terms and conditions document or in any other paperwork signed by the Claimant. The Claimants oral evidence was that he did not know at the time of signing the contract what GD04 meant in terms of pay or grade but that he subsequently discovered that it included a higher hourly rate. The Respondent's evidence – which the Claimant could not challenge, was that other terms and conditions aside from pay differ between DB01 and GD04 and that parts of the rest of the Claimant's contract would have been different had it been a GD04 contract.

12 When the Claimant was applying for employment with the Respondent, the Respondent operated a policy whereby in grading new applicants, it would take into account service at the current employer. The Claimant had worked for Stagecoach for 7 years between 2009 and April 2016 – but after a 2 month gap, his current job at the time of application was for CT Plus from July 2016.

13 The Claimant's oral evidence was that at his interview on 13 October 2016, it was explained to him that his starting rate of pay would be in the region of "£11 something" per hour. However he said that there was no reference to the precise grade.

14 By email dated 14 October from the Claimant to Keith Wood, Respondent's resources manager, the Claimant stated:

> "It was brought to my attention at my interview the current service related pay does not apply to me, as it's taken into account current bus company.
>
> I was also informed at my interview had I not changed bus companies I would have gone straight to the top rate in Silvertown instead waiting five years.
>
> Because of two months, I would now need to wait five years before I could progress the top grade, I kindly request if you could take the above into consideration and allow me to start on the top grade."

15 Mr Woods replied on the same day stating:

> "I'm sorry but we have been quite clear about how the current offer works and it only applies to current service - we are not taking the kind of overall service with other companies.

> You will need to decide if you feel that the rates and pay structure offered at Silvertown is acceptable to you. To reaffirm, you will join us at the year one rates and progress from there. Note that the rates you have been offered will not increase until you have completed two years service at Silvertown.
>
> Let me know if you wish to continue with your application."

16 The Claimant responded, also on 14 October 2016:

> "Thank you very much for a quick response. After leaving Stagecoach, Go Ahead Silvertown was my first choice, unfortunately you was not recruiting for that garage and when I was offered Silvertown at my Interview I accepted without hesitation.
>
> I can confirm I'm still interested and I'm looking forward to starting on 31st October."

17 The Claimant's payslips referred to his grade as DB01.

18 According to the Claimant's oral evidence, as his employment progressed, he learned that a grade GD04 was a higher paid grade (although no one at Silvertown was one this grade). Therefore on 25 November 2016 the Claimant emailed a query to his manager, Hassan Reza, complaining that he was being paid at DB01 but that his contract stated that he was meant to be on GD04 grade. Mr Reza responded on 25 November 2016 stating:

> "I have looked into this and can confirm that your current pay grade is DB01, I have verified this with recruitment. Your pay grade has taken into account the length of service at your last employer, which was CT Plus. I have confirmed with recruitment that the length of service at any employer prior to this will not be included when determining your grade.
>
> I have looked at your contract and can see that DB01 was crossed out and replaced [with] GD04, I have again confirmed with recruitment that this is an error, and should not have happened. The grade GD04 does not exist at Docklands/Silvertown, you will therefore remain on the DB01 grade."

19 The Claimant brought a formal grievance which was dealt with by Nick Faichney after a lengthy delay. The outcome dated 30 March 2017 was sent to the Claimant in April 2017. The Claimant's grievance was rejected. He appealed and the appeal was dealt with by Ms Ryder who upheld the original decision in her outcome letter dated 15 May 2017.

20 Sections 1, 11, 13 and 23 Employment Rights Act 1996 are applicable:

> **1 Statement of initial employment particulars**
>
> (1) Where an employee begins employment with an employer, the

employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of –

(a) the names of the employer and employee,

(b) the date when the employment began, and

(c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of –

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),

(d) any terms and conditions relating to any of the following –

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay, and

(iii) pensions and pension schemes,

(e) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,

(f) the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a

fixed term, the date when it is to end,

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,

(i) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and

(j) where the employee is required to work outside the United Kingdom for a period of more than one month –

(k) the period for which he is to work outside the United Kingdom,

(l) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(m) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(n) any terms and conditions relating to his return to the United Kingdom.

(5) Subsection (4)(d)(iii) does not apply to an employee of a body or authority if –

(a) the employee's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new employee information concerning the employee's pension rights or the determination of questions affecting those rights.

11 References to employment tribunals

(1) Where an employer does not give an employee a statement as required by section 1, 4 or 8 (either because he gives him no statement or because the statement he gives does not comply with what is required), the employee may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where –

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed

deductions purporting to comply with section 8 or 9, has been given to an employee, and

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part, either the employer or the employee may require the question to be referred to and determined by an employment tribunal.

(3) For the purposes of this section –

(a) …

(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.

(4) An employment tribunal shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made –

(a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.

(5) Section 207A(3) (extension because of mediation in certain European cross-border disputes) applies for the purposes of subsection (4)(a).

(6) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) also applies for the purposes of subsection (4)(a).

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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer

23 Complaints to employment tribunals

(1) A worker may present a complaint to an [employment tribunal] –

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))

. . .

21 The parole evidence rule is a rule of contractual construction which states that extrinsic evidence cannot be used to vary the terms of a written contract. However, this rule is little more than a presumption that the written contract

contains the entire agreement between the parties. The presumption can be rebutted and the rule does not apply where rectification is being sought in which case extrinsic evidence relating to the alleged error in the contract can be adduced.

22 Rectification is the equitable remedy of correcting of mistakes made in recording agreements. By its nature, rectification is only applicable in the case of written contracts.

23 If the parties agree to rectification, they may correct the mistake by entering into a deed of rectification. It is necessary to apply to court for an order for rectification if either there is a dispute or the parties wish to ensure that rectification has retrospective effect. The burden of proof is on the party seeking rectification who must be able to produce convincing proof that the agreement does not reflect the intentions of the parties and the agreement as rectified will reflect those intentions.

24 This tribunal has no equitable jurisdiction – and this is not a breach of contract claim. However principles of contractual construction can assist the tribunal to determine the correct particulars of employment.

Conclusions

25 It is not for the tribunal merely to decide what a contractual term should be – based on justice or equity or evidence as to the parties intentions in the period running up to the contract. It is for a tribunal to determine under s11 ERA 1996 what particulars are where a question arises as to the particulars which ought to have been included – as long as those particulars are the ones listed in s1 ERA 1996 (or other sections which are not relevant to this case). Grading is not specifically listed in s1 ERA 1996 – but where grading effectively determines pay, a finding as to grading is effectively a finding as to pay as required by s1(4)(a). If the tribunal had found that the Claimant should have been paid at grade GD04 level, it could then have gone on to calculate his correct pay and made a findings as to any unlawful deduction under s23 ERA 1996.

26 Where there is ambiguity in the express terms of a contractual document, a tribunal can go behind the contract to look at other material to discern what the actual intention of the parties was when they signed up to those terms in order to determine what the term is.

27 If there is a mistake in a written contract, it is for the Respondent to produce convincing proof that the agreement does not reflect the intentions of the parties.

28 In this case, it is clear to me that the inclusion of the grade GD04 in the terms and conditions document signed on 2 November 2016 was a mistake. The Claimant was aware that he was to be employed on the entry level year one rate and he was aware that his hourly rate of pay was to be “£11 something”. The table at clause 3.6 of the terms and condition makes it clear that this grade is DB01 as do the documents signed on the same day as the terms and conditions.

29 In light of the ambiguity between that section of the contract and the stated grade of GD04, it is appropriate to look at the context in which the contract was

signed – including the interview, the exchange with Mr Wood, the Working Time Regulations Maximum Weekly Working Time document and the Training Record (both dated 2 November 2016) on which the Claimant's grade was referred to as DB01. Having done so, it is apparent that the intention of the parties was to enter into a contract with an initial rate of pay at grade DB01 – starting at an hourly rate of £11.4849 per hour.

30 This is the rate at which the Claimant has been paid and therefore it follows that the Claimant's claim for unlawful deduction from wages fails.

31 The Tribunal was unimpressed with the Respondent's handling of this matter internally – which involved an overly lengthy process.

Employment Judge Allen

2 November 2017