Case Number: 3202363/2015

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Nolan**

Respondent: **Breyer Group Plc**

Heard at: **East London Hearing Centre**

On: **9 March 2017**

Before: **Employment Judge Jones**

Representation

Claimant: Ms L Mullin, Counsel

Respondent: Mr S Jagpal, Consultant

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:-

1. **The Respondent made unlawful deductions from the Claimant's wages from the date of his transfer from Kier to the Respondent's employment on 25 August 2010.**

2. **The Claimant is entitled to a remedy.**

3. **The Respondent is ordered to pay the Claimant the following amounts:**

Unpaid toolbox talks: (2010 – 2015) =	**£1335.14**
Unpaid training: (2010 – 2015) =	**£800.21**
Shortfall of wages in 2010, 2011 =	**£11,000.00**
Carded and aborted jobs: (£3814.68 + £2137.14) =	**£5,951.82**

all other jobs between 2010 – 2015 where incorrect codes applied

£52,384.70

Total = £71,471.87

4 **The Respondent is ordered to pay the Claimant the sum of £71,471.87.**

REASONS

1 The liability Hearing of this matter was conducted by this Tribunal on 20 and 21 April 2016. Today was the remedy Hearing.

Findings of Fact

2 The liability judgment of the Tribunal was that the Respondent made unauthorised deductions from the Claimant's wages and breached Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The Tribunal ordered that the clauses of the Claimant's contract should be restored to that of his Kier's contract. The Tribunal also listed a remedy hearing on 11 July 2016.

3 The Claimant was ordered to provide a detailed schedule of loss and the Respondent to provide a counter schedule of loss by a set date.

4 On 6 July 2016, it became apparent to the Tribunal that the parties would not be ready to proceed to a remedy hearing on 11 July. That hearing was changed to a preliminary hearing so that the Tribunal could case manage the matter as required. A written summary of the hearing was promulgated by the Tribunal on 19 July. The remedy hearing was listed for 23 September. The issues raised in the parties' correspondence to the Tribunal prior to that hearing and in their submissions on 23 September showed that there was no agreement between the parties on the identity of the codes that had been applied by Kier, the transferor, during the Claimant's employment.

5 The hearing in September was adjourned again so that the Claimant could make all attempts to obtain information from Kier that would definitively identify the relevant codes.

6 The Claimant produced codes at the liability Hearing in April 2016 which he said were the version 6 codes applied to his case. He has consistently relied on the same codes throughout this case.

7 At the liability Hearing, the Respondent's position was that the Claimant was not entitled to be paid any version of the national housing federation (NHF) codes/schedules. Mr Prouten's evidence was that the information that the Respondent as the transferee received from Kier was that the Claimant was paid a flat rate of £370.80 per week. During the liability Hearing, the Respondent changed its position. The Respondent's evidence was then that the Claimant was paid using version 5 codes. During Mr Watts's evidence, he referred to information that he had discovered while investigating the Claimant's grievance which confirmed that the Claimant had been paid using version 5. He referred

to an email that the Respondent received from Kier. The Tribunal adjourned so that the Respondent could send the email to the Claimant and the Tribunal. This was clearly a document that should have been disclosed earlier as it was relevant to the matters at issue in the case. It was not a document that the Respondent had inserted in their bundle or brought to the Tribunal to assist their defence of the Claimant's claim.

8 Mr Watts arranged for the email and attachment to be sent to the Tribunal. It was an email dated 5 August 2016 from David Lovell, Commercial Manager of Kier Building Maintenance to Kikky Boboye at the Respondent's HR. The subject matter of the email was *"Newlon – direct employed ops paybook 100517 + 2% for July 2010".* In the body of that email it stated that the excel spreadsheet of the current bonus pay values to directly employed operatives on the new line HT contract was attached. The Respondent confirmed at the liability Hearing and today that the Claimant was one of those directly employed operatives. The email stated that there is a minimum bonus pay value for any single order at (£11.46 + 2% July 10 increase) £11.49. It then stated that this is per order i.e. if two operatives attend, they share the payment. The email then stated that on the Newlon contract there are the following local agreements: if an operative had an abortive visit on a pre-arranged appointment (not a cold call) they are paid the minimum bonus amount (as item 1 above). Also, if while on a specific job the material costs are in excess of the bonus paid, the operative would be paid the actual materials costs plus £14 per hour of their time.

9 It is likely that the relevant codes were attached to that email as an excel spreadsheet. Kier provided this information to the Respondent as part of its due diligence in relation to the TUPE transfer.

10 At the liability hearing in April the issue was whether the Claimant's terms and conditions had been altered by the Respondent on the transfer and whether there was justification for doing so. There was limited discussion on the actual codes as that related to remedy. The Respondent maintained that they were version 6 codes that had been altered from the standard ones so that they were bespoke to Kier.

11 The email of 5 August 2010 was forwarded to the Tribunal with the codes attached. Those were printed off by the Tribunal clerk and given to the Judge. The Tribunal judge had them with her today. They are different from the document which the Respondent relied on today in its bundle, which started at page 8. That document also states that it is a set codes received from Kier attached to the email on 5 August 2010. Mr Prouten indicated to the Tribunal that those were the version 6 bespoke codes that the Respondent had received from Kier attached to the email of 5 August 2010. In addition, the Tribunal finds from today's Hearing that Mr Prouten sent an email to the Claimant on 1 June 2016 after the liability Hearing in April attaching yet another entirely different set of codes which he stated were the correct codes that needed to be applied to the Claimant's work following this Tribunal's judgment. The Respondent has therefore produced three different versions of the codes that it maintains it received from Kier.

12 Mr Prouten confirmed that the Respondent did have a practice of cutting and pasting documents to emails. Mr Prouten also confirmed this on 1 June during email correspondence with the Claimant about the codes that were now applicable to his work, following the liability judgment. The Tribunal finds the Respondent's evidence unreliable on which attachments were sent with the email from Kier.

13 The Claimant produced version 6 codes to the Tribunal as the applicable codes to his work when employed by Kier and the codes that should have transferred with him to the Respondent. Mr Prouten confirmed today that they are version 6 codes. The Claimant's copy has a separate page attached to the front which says that the attachment was created on 2 September 2010 at 16.03pm and that it was last modified on 22 September 2010 at 10.10am. That is part of the *properties* of the document. It also states that it was last modified by Jim Eyles who was employed by the Respondent in September 2010. The Claimant could not explain how Mr Eyles came to be modifying a document that he obtained from Kier. The Claimant was transferred from Kier to the Respondent in August 2010. It was his case and has been case throughout this matter that these codes were given to him by Kier and that they represent the codes that were applied during his employment with Kier.

14 At the liability Hearing this Tribunal found that the Claimant obtained a copy of his personnel file in November/December 2013 and discovered that the Respondent was in possession of all the documents supporting his claims. It is possible that he got a copy of the correct codes from that file. It was after this discovery that the Claimant presented a grievance to the Respondent about his pay. It was dated 13 October 2014 and made with the assistance of the union. In his response to the Claimant's grievance, Mr Prouten did not say that the Claimant had been paid in accordance with the codes or that the Claimant was better off. He accepted that the Claimant had not been paid the minimum payments for toolbox talks, training and aborted and carded jobs in accordance with his Kier contract. He stated that he Claimant and those who transferred with him had been transferred on a bespoke system that the Respondent were unable to adopt. The Respondent then tried to persuade the Claimant to accept changes to his terms and conditions of employment but the Claimant refused and insisted on his Kier terms. As the Respondent continued to refuse to pay him in accordance with his Kier terms the Claimant issued his claim in the Employment Tribunal.

15 Although the Claimant previously stated that codes applied to him at Kier were version 6 codes without any alterations, in today's hearing he confirmed that the codes applied to him when he was at Kier were version 6 codes with some modifications and additions to suit Kier's requirements. This accords with what Mr Watts' evidence at the liability Hearing that the codes sent to the Respondent by Kier were version 6 but with modifications. They have been referred to in these proceedings as a "bespoke" set of codes.

16 In preparation for today's hearing, as there was no agreement between the parties on what the actual codes were that were applied to the Claimant when he was employed by Kier, the Tribunal ordered the Claimant to seek disclosure from Kier of the codes and of copies of his payslips. The Claimant solicitors had some difficulty in obtaining that disclosure and they asked the Tribunal to order Kier to provide that information. On 21 January 2017 the Tribunal ordered Kier to produce *"copies of the SOR code used by Kier in calculating the Claimant's pay when he was employed from 1 October 2007 until his transfer to the Respondent in August 2010. Also, copies of his payslips and P60s from 2007 to 2010."* Kier was also asked to inform the Tribunal whether the Claimant was paid using version 6 of the National SOR codes when he was employed by Kier or whether they had their own bespoke set of codes from version 6.

17 Kier failed to respond to the Tribunal. However, Kier did provide the Claimant with copies of his payslips and P60s and those were disclosed to the Respondent.

18 There was further correspondence between the parties and the Tribunal in which the Respondent sought disclosure of copies of the correspondence between the Claimant's solicitors and Kier. From correspondence produced today the Tribunal finds that the Claimant's solicitors did disclose that correspondence to the Respondent and the Tribunal in an email dated 1 March 2017. Neither the Respondent's representative or the Tribunal had received those documents before today's hearing but having seen them, the Tribunal can confirm that the Claimant and his solicitors have complied with the orders.

19 The payslips that Kier disclosed to the Claimant do not show any breakdown of the amount paid or the rates at which the Claimant was paid. The 2010 pay slips show that the Claimant was paid at a basic rate leading up to the transfer and this confirms his evidence on that point.

20 We spent some time in today's hearing closely examining the actual codes that the parties rely on. The Tribunal finds that the codes the Claimant relies on show a total cost for the job, the applicable SOR code and a charge for the labour. That is the sum of the total costs minus the materials costs. It is the Claimant's case that when employed at Kier he was paid the labour charge in full and without any deduction. Mr Prouten who was the contract's manager for the Respondent, confirmed in is evidence that the codes relied on by the Claimant are version 6 codes. He also stated that if Kier had paid the Claimant in the way that the Claimant stated then it is unlikely that Kier would have made a profit on the job and it would not have been commercially sensibly to do so. Mr Prouten's evidence was that when the Respondent decided in June 2011 to pay the Claimant using the SOR codes it decided to deduct 40% from the total cost and pay the Claimant the balance. It was not his evidence that this was in keeping with the terms of the Claimant's contract with Kier. However, it was also the Respondent's case that the Claimant was better off in the way that it applied the codes rather than how he was paid while at Kier.

21 In support of that position the Respondent referred to its summary of the Claimant's yearly pay which they calculated from the payslips provided by Kier and the Claimant's P60s. They calculated that the Claimant was paid £30,044.74 for the tax year 2008/2009, £22,689.01 for the tax year 2009/2010 and £22,864.71 for the tax year 2010/2011. Mr Prouten agreed that the 2010/2011 amount was not the complete year as Kier had not provided all the payslips for that year. In contrast, the Claimant earned £31,260.71 for the year 2011/2012 at the Respondent and £45,693.70 in the tax year 2012/2013, £43,615.62 for the tax year 2013/2014 and £51,092.66 for the tax year 2014/2015.

22 The Respondent submitted that this proved that the Claimant was better off in the way that they paid him.

23 The Claimant's case was that this was misleading. His case was that the figures had been distorted because he had to do more jobs for the Respondent in order to maintain his level of earnings. The Claimant's evidence was that because the Respondent was taking 40% of the total cost before paying him, he was being paid less which meant that he had to work longer hours and do more jobs in order to make up his earnings. His evidence was that the Respondent was not comparing like with like. The Claimant confirmed that he paid to train himself to become a plasterer so that he could

offer to do a wider variety of jobs for the Respondent. The Respondent was unable to dispute that the Claimant had done more jobs since his transfer than he had done at Kiers.

24 It is likely that the Claimant did many more jobs since 2013 to make up his income as the costs of each job was subject to a deduction of 40% from the total before he was paid. The Claimant eventually left the Respondent's employment in October 2016.

25 The Respondents produced an additional witness today called Grant Cawston who had been employed by Kier between 2002 and 2008. Mr Cawston continued to have some contact with Kier post 2008 as he has been involved in City and Guilds training. However, Mr Cawston actual knowledge of the rates that were being charged was unclear to the Tribunal since he was not responsible for processing those papers or teaching people how to use the codes. He also left Kier some time before the Claimant's transfer to the Respondent. The Tribunal did not find his evidence helpful.

The Law

26 Regulation 4 of the Transfer of Undertaking Protection of Employment Regulations 2006 states as follows at 4(2) – "Without prejudice to paragraph (1), but subject to paragraph (6) and Regulations 8 & 15 (9), on the completion of a relevant transfer –

(a) all the transferors right, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised group of resources of employees, shall be deemed to have been an act or omission of or in relation to the transferee(b) is not relevant."

At 4(4) "Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is

(a) The transfer itself, or

(b) A reason connected with the transfer that is not an economic, technical, or organisational reasons entertaining changes in the workforce"

At 4(5) "Paragraph (4) shall not prevent the employer and his employee whose contract of employment is, or will be, transferred by paragraph (1) from agreeing a variation of that contract if the sole or principal reason for the variation is –

(a) A reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or

(b) A reason unconnected with the transfer."

Applying Law to Facts

27 It is this Tribunal's judgment that the Respondent failed to pay the Claimant in accordance with the bespoke version 6 codes that it received from Kier and that this resulted in him suffering unlawful deduction of wages. It has never been the Respondent's case that it paid the Claimant in accordance with the information it received from Kier.

28 Which codes should have been applied? In this Tribunal's judgment, the Respondent received the correct codes from Kier during the TUPE transfer process in August 2010. However, these were never disclosed to the Claimant and he was never paid in accordance with them.

29 In this case, the Respondent has produced at least three versions of the codes. The Respondent had the correct codes from Kier since August 2010. However, it was not until the second day of the liability hearing in April 2016 that it disclosed this to the Claimant. In this Tribunal's judgment, it is highly likely that the Respondent was attempting to conceal this information from him. Although they had the codes and the information from Kier, they failed to pay the Claimant the correct amount on any codes even after he brought a grievance and subsequently issued his claim in the Tribunal.

30 Contrary to the Respondent's position at the liability Hearing, the Claimant had not always been paid at a flat rate of £370.80 per week when he was employed by Kier. The Respondent has since confirmed the Claimant's evidence that this was the amount that he was paid by Kier as the contract was wound down before the transfer took place. Despite knowing this, the Respondent continued to pay the Claimant that amount for a year before he brought a grievance and persuaded it to restore him to the codes. Even then, they did not pay him in accordance with information that they had from Kier but chose to deduct 40% from the total costs thereby reducing the amount due to him. While at Kier the Claimant had never been paid using the version 5 codes, which was Mr Prouten's position during the liability Hearing. There was no reference to version 5 codes in today's Hearing.

31 Mr Prouten confirmed in evidence today that the information provided by Kier in the 5 August 2010 email does not refer to any deductions that Kier took off the amount that should be paid to the Claimant. Even so, the Respondent's decided to make a 40% deduction. The Claimant was an employee who transferred to the Respondent under the TUPE Regulations. As such, the TUPE Regulations confirm that his contractual rights are to remain the same. During the discussions that the Claimant had with Mr Prouten and Ms Layvis before the transfer, it was confirmed to him that his terms and conditions would not change that being would remain the same.

32 It is this Tribunal's judgment that on balance, the version consistently provided by the Claimant throughout this case is the correct version that should have been applied to his work with the Respondent.

33 In this Tribunal's judgment, the terms and conditions in relation to pay were as follows:

33.1 That the Claimant would be paid according to Kier's SOR codes version 6.

33.2 That he would receive a minimum pay of £11.49 for the following:

(a) no access to appointments (no calls)

(b) jobs aborted because the job specification is wrong or works cannot be undertaken under self certification agreement.

(c) Appointment aborted as only minor(s) present in property (i.e. under 16 years of age.

33.3 That he would be paid for toolbox talks and for training.

34 The Respondent has failed to comply with all those terms.

35 The Respondent's counter schedule purported to shows that the Claimant has been paid for toolbox talks and aborting jobs. However, in the liability Hearing, the Respondent's position and Mr Prouten's evidence was that it does not pay for toolbox talks, training and aborted calls. This was also the position in its response to the Claimant's grievance dated 12 December 2014. The two positions are contradictory and the Respondent's case is inconsistent and unreliable.

36 This Tribunal does not accept the Respondent's counter schedule. It is this Tribunal's judgment that the Claimant was not paid for toolbox talks, training and aborted jobs contrary to the terms of his contract with Kier. The Claimant was subjected to unlawful deductions of wages in relation to the toolbox talks, training and aborted jobs.

37 The Respondent's case was that the Claimant was better off with their arrangements. It was never the Respondent's case that it had complied with TUPE Regulations.

38 It is this Tribunal's judgment that the Respondent has failed to comply with the TUPE Regulations. The Claimant has suffered losses because of this. The Claimant should have been paid upon his transfer in accordance with the version 6 SOR codes that Kier provided to the Respondent and the Claimant provided to the Tribunal.

39 The Tribunal had not found the Respondent's case to be credible. The Tribunal has found the Claimant's case more credible in that he has been consistent in the case he presented in these hearings. He has explained the calculations in his Schedule of Loss when challenged during the remedy Hearing and in correspondence between the parties as disclosed to the Tribunal.

40 It is this Tribunal's judgment that the Claimant suffered unlawful deductions of wages because of the Respondent's refusal to pay him in accordance with the codes Kier provided to it at the time of the TUPE transfer in August 2010. The Claimant had to do many more jobs to supplement his income and to keep it at the same level as before. Since 2011 the Respondent's decision to deduct 40% from the total costs has reduced the sums due to him and this was in contravention of the TUPE Regulations. The Claimant

has suffered unlawful deductions of wages and the Respondent is ordered to pay him the amounts claimed.

41 The Respondent confirmed today that it did not challenge the Claimant's calculations and that they are correct.

42 The Tribunal therefore orders the Respondent to pay the Claimant in accordance with the schedule of loss which totals £71,471.87.

43 That amount is made up as follows:

44 The Claimant has lost £52,384.70 in earnings between 2011 and 2015. From the date of transfer in August 2010 to 2011 the loss of earnings was approximately £11,000 as the Claimant was paid a flat rate of £370.80 per week for the first year of his employment with the Respondent. The Respondent failed to pay the Claimant in accordance with the codes it received from Kier when the Claimant transferred in 2010, in breach of the TUPE Regulations.

45 The Claimant is also owed the following for unpaid training/toolbox talks.

46 For unpaid training he is owed as follows: For 2011 - £313.56. For 2013 he is owed £72.99, for 2014 he is owed £342.12 and for 2015 the figure for training is £71.54. The total owed for training is £800.21.

47 For unpaid toolbox talks: The Respondent confirmed that there were ten toolbox talks in 2010 - the Claimant is therefore owed £172.90 as he was paid an approximate hourly rate of £17.29. For 2011 he should have been paid £191.62 for 11 toolbox talk at the rate of £17.42. For 2012 he should be paid £291.36 for 12 toolbox talks and for 2013 should be paid £291.96 for 12 toolbox talks at the rate of £24.33. For 2014 he should be paid £285.10 for ten toolbox talks at the rate of £28.51, and lastly, for 2015 he should be paid £102.20 for five toolbox talks at the rate of £20.44. The Claimant worked out his hourly rate by dividing his annual salary for each year by the number of hours worked over 224 days and then multiplying it by the number of hours the number of toolbox talks he attended which lasted approximately an hour each. Total amount for toolbox talks is £1335.14.

48 The Respondent failed to pay the Claimant for carded jobs which was part of the terms and conditions of his contract with Kier prior to the transfer. The contract stated that he would be paid the minimum rate of £11.49 for each of these. The amount due for carded jobs between 2010 and 2015 is £3814.68.

49 The Respondent failed to pay the Claimant for aborted jobs. The Claimant's contract with Kier stated that he was to be paid £11.49 for each of these. The amount due for aborted jobs is £2137.14.

50 The total due to the Claimant as a remedy for the Respondent's failure to comply with the TUPE Regulations is as follows:

51 £2137.14 + £3814.68 + £1335.14 + £800.21 + £11,000.00 + £52384.70 = £71,471.87.

52 The Respondent is to pay this amount to the Claimant forthwith.

Employment Judge Jones

12 June 2017