Appeal No. UKEAT/0136/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 10 November 2016

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

MRS V BROWN & OTHERS — APPELLANTS

(1) LONDON GENERAL TRANSPORT SERVICES LIMITED
(2) BLUE TRIANGLE BUSES LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

Revised

APPEARANCES

For the Appellants	MR PARAS GORASIA (of Counsel) and MRS LOUISE MANKAU (of Counsel) Instructed by: Prolegal Solicitors 6 Agar Street London WC2N 4HN
For the Appellant Mr S Taylor	The Appellant in Person neither present nor represented
For the Respondents	MR RUSSELL BAILEY (of Counsel) Instructed by: Moorhead James LLP Kildare House 3 Dorset Rise London EC4Y 8EN

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

Bus drivers were transferred under **TUPE** by the Respondents. They claimed entitlement to meal allowances payable for any day when they were rostered to have a break away from the garage at which their route was based, and to disturbance allowance if they had a compulsory move from one garage base to another that was distant from the first. The contractual documentation was sparse, since it related to terms arising from service with the transferor any definitive record of which was lost in history. The Judge dismissed the claims for meal allowance, but gave reasons which did not appear to apply the law he had set out as applicable, did not engage with the Claimants' case as to one of the bus routes, did not explain how he had reached his conclusions, and did not rectify these failings in a Reconsideration Decision.

An appeal was allowed on the basis that the reasoning was inadequate. A cross-appeal against the conclusion in respect of disturbance allowance was also allowed, again for inadequacy of reasons, for failure to deal with an argument that had been raised, and for dealing with a point which had not been raised, which he then appeared to use to support his conclusions.

In the first case the whole issue was remitted to be dealt with by a fresh Tribunal; in the cross-appeal, however, the employer argued that on the evidence and given the way in which the case had been argued, not only was the conclusion the Judge reached impermissible but he would have been bound to reject the claim. This relied upon the Claimants having each said they wished to be transferred to another garage from which the bus route on which they worked was thereafter to operate, and understood in requesting this that they would not be paid disturbance allowance. The Judge had based his decision on this being an unconscionable bargain, but

during the hearing duress had specifically been disavowed by the Claimants, and nor had they run an argument based on the effects of the implied term of trust and confidence; and an argument based upon the agreement being a breach of **TUPE** since it varied pre-existing terms was not clearly advanced. Except in the case of the two Claimants who had indicated that they wished to move with their regular bus route under protest, it could not be said that the apparent agreement to a move to a different base without payment of disturbance allowance was ineffective to render the non-payment of that allowance an unlawful deduction - it was one the Claimants concerned had agreed to. Accordingly, the decision in respect of the Claimants other than the two was reversed. If the two wished to argue their case they had not given effective consent, that issue would be remitted too on their cases alone.

THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. Fifty five bus drivers claimed an unlawful deduction from their wages in three respects from their employers. First, they claimed they were entitled to disturbance allowance because they had to change their home garage to one considerably more distant; secondly, that they were entitled to meal allowances for meal breaks rostered away from their home garage or at least one with canteen facilities; and thirdly, that they were entitled to certain additional payments that were not paid. Not all of the 55 made the same claims: at the time of their claims they worked on eight different bus routes and out of two different home garages. It was thus perhaps obvious, or should have been, that the circumstances of some might differ from those of others.

2. The case came before Employment Judge Mahoney at Watford Employment Tribunal. In a reasoned Judgment of 6 August 2015 he upheld the claims of 14 of the Claimants to the disturbance allowance; he rejected the claims of all who had made them to the second of the matters I have mentioned; the third did not arise in the circumstances of the case as it then was. The Claimants appeal in respect of the rejection of the claims for meal allowance. The Respondents appeal in respect of the decision in respect of disturbance allowance.

Initial Observations

3. Where an unlawful deduction is asserted, the Claimant must establish an entitlement to be paid the sum in question. The only basis suggested in the present case was contractual. An employment contract is individual between the worker concerned and the employer. It is to be construed objectively and in context, and, just as it is reached by agreement, a contract or a term

of it may be varied by agreement. Secondly, I observe that where there is a multiple claim involving a number of Claimants who are or may be in different factual circumstances, it is generally incumbent upon the parties and a Tribunal to distinguish clearly between the situations of each of those, otherwise focus may all too easily be lost. In this particular case it may be that part of the difficulties arises by running together the situations of all of the Claimants rather than distinguishing carefully between them.

The Underlying Facts

4. The claim in respect of disturbance allowance related to those Claimants who worked on route 20. Route 20 was a route that had been operated by Arriva and was transferred from the Arriva base of operations to the First Respondent at Rainham. Given the geographical distance between the garage at which the Claimants had been based and Rainham, they were paid disturbance allowance. The Claimants continued to work on route 20 as before. In mid-May 2013 a number of further routes were to be based at Rainham garage. This was to take place at short notice. To ease the space at Rainham, a decision was made to move the home garage of route 20 from Rainham to Northumberland Park on 15 June. The drivers were told that they could transfer with the route if they wanted to, but this would be on a voluntary basis and therefore the transfer would not attract disturbance allowance. It was voluntary because they did not have to go since they could remain at Rainham and transfer on to another route that had formerly been operated by Arriva, namely route number 462.

5. A number of Claimants transferred: the 14 to whom I have already referred. Of those, some did so signing the agreement without which they would not be transferred but under protest; others did not sign under protest. For those drivers who did not respond to the letter saying that they wished to transfer to Northumberland Park it was to be assumed that they

wanted to stay at the Second Respondent rather than transfer to the First Respondent. If so, their terms and conditions would not change but they would be allocated to another route operating out of Rainham.

6. The claim to meal allowance related to four routes, one of them route 20, the others routes 462, W4 and 491. As to 462, the evidence before the Tribunal was that when operated by Arriva, those on route 462 had received a meal allowance. They did so under the terms of a letter written to the Union Convenor on 23 June 2008 by the Commercial Director of Arriva. In its material part the author explained that it was in the commercial interest of the company to provide meal allowance rather than spend the resource necessary to allow the driver to travel back to the home garage to have his meal break. It was envisaged that the break would be taken in Ilford town centre. The evidence before the Tribunal as to the precise contractual terms relating to disturbance allowance and meal allowance were sparse. There was no document that set out in clear and definitive terms, I infer, that there was a general policy applicable to all employees of Arriva as to the precise terms upon which payments would be made.

7. As to disturbance allowance, which I shall deal with first, the Judge noted that the issue was what the contractual trigger was for the entitlement to disturbance allowance at the time when each of the 14 relevant Claimants transferred from Arriva and moved to Northumberland Park. I note that it was accepted that they had transferred under a transfer or service provision change to which the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") were applicable. Thus their terms and conditions of employment necessarily remained unchanged in the hands of the transferee as they had been in operation with the transferor.

8. Those who had worked on route 462 had worked with meal breaks taken in Ilford town centre. The evidence before the Tribunal was that they continued to work, albeit now from Rainham, on a route in which the meal break was again taken in Ilford town centre. Whereas they had prior to the transfer been paid the meal allowance, they were no longer to be paid it. As to the disturbance allowance, they were paid on transfer to Rainham, but they were subject to the operation of the agreement to which I have already referred, which they signed (though some under protest), noting that when they were to transfer to Northumberland Park no disturbance allowance would be payable.

9. As to disturbance allowance, the Tribunal concluded that there was relevant text in documentation common to the employers and the relevant Claimants (paragraph 4.11). It read:

> **"Payable for 52 weeks while employed. If it becomes necessary for a second, or subsequent transfer to be made, a new, disturbance allowance, based on the distance from the original garage and in place of the existing allowance, will be paid for a period of 26 weeks from the date of the second or subsequent transfer, or for the balance of the original 52 weeks, whichever is the greater."**

10. At paragraph 4.12 the Judge recorded that this allowance originated in times when the London bus companies (as they now are) were in public ownership. The Tribunal had a document, dating from what it called pre-nationalisation but I think meant to say pre-privatisation, that described disturbance allowance as follows:

> **"Disturbance allowance is paid to staff for a period of 52 weeks under the following conditions:**
>
> **1. On the closure of a garage.**
>
> **2. On compulsory transfer of conductors or crew drivers as a result of O.P.O (one person operated) conversion."**

11. As to meal allowance, the Judge said this:

> **"4.7. Each year an annual negotiation takes place between Unite and the respective bus operating companies at which an agreement is reached as to pay and all other terms and conditions. No formal signed document in respect of any such negotiations was produced to the tribunal. The only documents produced were general information details in respect of the Arriva 2010 pay deal. The claimant's copy of this document dated November 2010 appeared**

> **at pages 59-63. A similar document also dated November 2010 was produced by Miss Tilley which, however, included … an additional entry which read:**
>
> > **"MEAL RELIEF AWAY FROM COMPANY CANTEEN**
> >
> > **£3.85 per duty"**
>
> **Miss Tilley could not explain how she had obtained her document.**
>
> **4.8. The respondents produced a similar Arriva document dated December 2010 … in respect of the drivers on the W4 route.**
>
> **4.9. What is stated about both the disturbance allowance and the meal allowance is identical in the document provided by the claimant and the document provided by the respondents.**
>
> **4.10. The tribunal finds all these documents are genuine but on the balance of probabilities considers what is set out in the claimant's and respondents' respective documents reflects the terms and conditions on these subjects at all material times relevant to this case."**

I note the use of the word "reflects" rather than the word "records".

12. The Judge dealt, further, with the historical origins of the meal allowance at paragraph 5. This had originated in the days when bus garages had staff canteens that provided a proper hot cooked meal for a subsidised price. If a canteen happened to be shut at the time of a particular driver's meal break, no meal allowance was payable. Canteens were originally provided at bus garages in the days when neither fast-food outlets nor the modern style of bus station currently operated by Transport for London ("TfL") existed. Since privatisation, it has become commonplace for drivers' breaks to be taken at certain bus stations, and at these particular bus stations a drivers' room is provided by TfL.

13. The Judge observed at paragraph 6 that the documents to which he had referred had relevant text under the heading "SCHEDULING AGREEMENT". A scheduling agreement sets out the detail of a daily duty. In particular, it deals with the maximum spell on the bus and the minimum rest times. In part of that and as part of the detail in respect of times and entitlements it reads:

> **"Minimum relief - 40m [minutes] with supplement of £3.95 per duty for relief away from garage."**

14. There is no issue but that the "minimum relief" in effect refers to a lunch or meal break. The meal allowances were paid on some routes but not on others. It is important to note that the Judge found that none of the Claimants had a contractual right to work any particular route. They could be required by their employer to work any. The Judge set out the routes on which no meal allowance was paid and noted that that was because driver's rooms or equivalent rest facilities were available on those routes. On another route, 128, a meal allowance had always been paid although rest facilities were available, and when route 20 had been operated by Arriva prior to the transfer to Rainham from Edmonton garage no meal allowance was paid, because the garage had a canteen. The drivers' rooms to which he referred were described in paragraph 9 as including, normally, a microwave oven, a tea/coffee vending machine and a limited number of tables and seating, very similar to those bus garages that had canteens when the canteen was shut.

15. I need for the purpose of this appeal refer at this stage to no further finding of fact.

The Tribunal's Conclusions

16. The Tribunal set out a number of propositions of law in paragraph 14, none of which were attributed to any particular case. I do not understand that there is any contention, however, that the propositions such as they are are in error. The point made by Mrs Mankau for the Claimants is that the Judge simply did not indicate at any stage in his Judgment how he applied those principles to the matters in issue before him. Having set out the basic legal principles, the Judge then added this at paragraph 14.4, expressly under the heading "Voluntary transfer":

> **"14.4. It appears to the tribunal, when a TUPE transfer is contemplated and effected by an employer, that the employees to be affected by that transfer should not be the subject of what the law of equity would describe as an unconscionable bargain, in that in overall terms it is oppressive to the claimant; that the claimant is suffering from certain types of bargaining weakness and that the employer has acted unconscionably in the sense of having knowingly taken advantage of the complainant."**

17. The conclusion that the Judge reached was in these terms:

> **"15. <u>Disturbance allowance</u>**
>
> **15.1. The contractual trigger for the payment of disturbance allowance is as set out at paragraph 4.11. I conclude that a disturbance allowance is payable when the transfer is compulsory and not voluntary.**
>
> **15.2. In my view the transfer of the claimant and 14 other relevant drivers on Route 20 in May 2013 from Rainham to Northumberland Park Garage (and therefore from the second respondent to the first respondent) was a TUPE transfer which was compulsory. The very short period of time given to these claimants to make a decision (which in particular meant they could not seek proper advice in time), the total lack of information about details of duty times, rota schedules and other information, the clear misrepresentation by management of availability of work on route 462 [the Judge found earlier that there were only two posts available] all lead me to the conclusion that this transfer was not voluntary. Therefore a disturbance allowance is payable by the first respondent.**
>
> **16. <u>Meal allowances</u>**
>
> **16.1. The tribunal's clear view is that the payment of a meal allowance by Arriva (except in the case of route 128) were exceptions [sic]. These exceptions are negotiated on a case by case basis between the union and the relevant bus operator. Where it becomes apparent that no adequate drivers' room facility exists for the drivers on a particular route Unite will make a case to the management for the payment of a meal allowance to the drivers on that particular route. Where the case is made out management agree to the payment and the special circumstances are duly recorded. A good example of this is the agreements reached on bus route 135 and 462 set out above. That was the contractual trigger for entitlement for meal allowance.**
>
> **16.2. The tribunal finds the payment of a meal allowance on route 128 to be an anomaly.**
>
> **16.3. The documentation set out at paragraph 4.7 to 4.10 was not a collective agreement. Further, there was no implied term to be paid a meal allowance.**
>
> **16.4. It is further clear to the tribunal that over the years it has been agreed between Unite and respective managements that the words "away from garage" have been interpreted as meaning "away from garage and where there is no adequate recognised facility". I also find that the expressions "agreed facility" and "recognised facility" have been treated as interchangeable by management and the union. These facilities are the drivers' rooms described in this judgment. I conclude that that was the custom and practice in respect of meal allowances which had been adopted in the London bus region by Unite and Arriva at the time of the transfer of routes 20 and 462 from Edmonton to Rainham.**
>
> **16.5. In those circumstances all the claims for meal allowance fail."**

<u>The Appeal and Cross-Appeal</u>

(1) The Appeal

18. The appeal argues that those reasons are insufficient for the finding that the Claimants were not entitled to payments for meal allowance. The Appellants aver that the Judgment does not identify the relevant law, state how the law was applied to the facts, explain why the allowance on route 128 was an anomaly, gives no legal or factual basis nor explanation for the

conclusion that "documentation set out at paragraph 4.7 to 4.10 was not a collective agreement", which in any event, it is submitted, was contradictory to the finding that the documentation "reflects the terms and conditions on these subjects" made at paragraph 4.10; that it was not explained what contractual status the documents actually held, and, if contractual, no clear explanation why the claims for unlawful deductions failed; that the Tribunal failed to discuss the law as to whether there was an implied term as to a meal allowance to justify its conclusion that there was no implied term; and failed wholly to address the Claimants' submissions as to route 462 and explain why having been paid a meal allowance prior to the transfer, and still taking a break at the same location, drivers on that route were no longer paid a meal allowance. Accordingly, they argued that the Judgment was not compliant with **Meek v City of Birmingham District Council** [1987] IRLR 250.

19. There was a Reconsideration Hearing, conducted by the Judge, at which the Appellants raised similar points. He determined these by Reasons given on 9 December 2015, which are relatively short, consisting of one substantial page in a two-page Judgment, which clarified the fuller Judgment that had been given earlier by saying that the finding in it that the contractual trigger for the meal allowance was negotiated on a case by case basis was because the Tribunal accepted the evidence of Miss Helen Milligan on that issue, which was "in part supported by documentary evidence". No details of this particular evidence were given, nor were the documents identified, complained Mrs Mankau. It repeated that the findings at paragraphs 4.7 to 4.10 were findings of fact that the documents referred to in those paragraphs were not part of a collective agreement. The Tribunal:

> **"2.3. … accepted the evidence of Miss Milligan that they were not intended to set out the terms on which the sums were payable. In any event, no evidence adduced by the claimants was accepted by the tribunal as to these documents being part of the collective agreement"**

20. At paragraph 2.4 it explained that the Tribunal's finding of fact that the payment of meal allowance was negotiated on a case by case basis led to the conclusion that there was no implied term entitling those Claimants to a meal allowance, and the conclusion that "away from garage" now meant "away from garage and where there is no recognised facility", derived from the Tribunal's findings of fact on that point. It does not make it clear what particular findings of fact the Judge had in mind.

(2) The Cross-Appeal

21. The cross-appeal argues that the Judge relied upon **TUPE** when it was not pleaded, did not form part of the agreed list of issues and required factual determinations that required evidence from witnesses not at the hearing; and that it was an error of law for the Judge to fail to identify what the basis was of the Claimants' contention that they had not consented to the transfer of Rainham and had not consented to the non-payment (that is, deduction) of the disturbance allowance. In making his submissions, Mr Bailey took issue with the way in which the Judge had approached the question of voluntary transfer at paragraph 4.1, arguing that the matters that the Tribunal referred to there were insufficient to render a transfer compulsory when the Claimants had as a matter of fact been offered the alternative of remaining at Rainham and indeed had acknowledged that they had been so offered by signing a document to that effect, all to be seen against the background that they had no contractual right to be assigned to any particular bus route.

Submissions and Discussion

22. For the Claimants Mrs Mankau advanced the appeal, and in due course Mr Gorasia, who had appeared below, resisted the cross-appeal. The Respondents were represented on both by Mr Bailey of counsel. The law was common ground, though counsel placed different emphasis

upon the particular factors that emerged from the cases. Both relied upon **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, a decision of the Court of Appeal, Lord Phillips MR presiding. In the course of that he had said:

> **"19. … if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. …**
>
> **21. … The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."**

23. The Respondents for their part emphasised a postscript at paragraph 118 in which Lord Phillips MR added this:

> **"118. In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the claimants should have appreciated why it was that they had not been successful, but may have been tempted by the example of *Flannery* [*v Halifax Estate Agencies Ltd*]'s case [2000] 1 WLR 377 to seek to have the decision of the trial judge set aside. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."**

24. The only other statement of authority to which it is necessary to go to is that arising in the judgment of Sedley LJ in **Tran v Greenwich Vietnam Community** [2002] IRLR 735 at paragraph 17:

> **"17. … no employment tribunal and no advocate or representative practising in the employment field should imagine that a decision as short on reasoning as the present one complies with the legal obligation, if asked, to explain *how* the tribunal has got from its findings of fact to its conclusions. It may be done economically, but simply to recite the background and the parties' contentions and then to announce a conclusion is not to do it at all; and an opaque reference to the evidence which has been given does not save it. …" (Original emphasis)**

25. In short, there are three principal reasons why it is an error of law not to provide adequate reasons. They are: first, that a party is entitled in justice to know why they have lost; secondly, an appellate court is entitled to see the reasoning so that it may know whether that reasoning contains an error of law or approach; and thirdly, the discipline of giving reasons acts

as an aid to ensuring that the Judge deals accurately and appropriately with the law and the facts before him. It might be said that there is a fourth purpose, though it differs little from the first, in that, a hearing being a public hearing and the courts pursuing a public function, the public are entitled to see and understand how justice is being applied in the cases in their courts.

26. It is clear from the authorities and the passages that I have cited that there may be many Judgments which contain infelicities of which it might be said that they might have said more (or should in some cases have said less) and where some of the phrasing may be opaque, yet there is no error of law. Taken as a whole, bearing in mind that Judgments may not be the finest pieces of legal draftsmanship but are made often in circumstances where there is pressure of time and the convenience of the parties demands speed and brevity, and have to be read in that light. It is impermissible to view one part of a Judgment in isolation from all the rest. However, it is equally clear that if, after making such allowances, a Judgment does not sufficiently address the cases of either party and does not sufficiently explain its reasoning, then there will be an error of law, and there is then no alternative but that that case must be remitted to the Tribunal for further consideration. In this case, there has been a reconsideration, to which I have already referred, but it is said by the Claimants that that adds nothing significant to the quality of the reasoning in the original Judgment.

27. Though these principles are general to cases both in and beyond those of employment appeals, before this court they have further emphasis in the Rules of the Tribunal themselves. Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** says at paragraph (5):

> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

28. It is that latter phrase upon which Mrs Mankau principally relies. The conclusion that I have recited in full bears no obvious relationship to the principles of law that are set out. They are accurate principles, insofar as they go, but how they relate to the conclusions is unclear. They may not do so at all directly, but if so it is difficult to know what point there was in setting them out. Secondly, in the course of the case below the Claimants argued that the meal allowance was contractual and that the contract could be derived from the documents and evidence accepted by the Tribunal. There is no reflection in its Judgment of either that case or why the Tribunal rejected it. In particular, the Tribunal's conclusion at paragraph 16.1 did not deal with the specific evidence it had been given in relation to bus route 462. It said that exceptions were negotiated on a case by case basis. How one gets from that conclusion to the conclusion that there was no claim for meal allowance in any of the present cases and present routes is unclear. The Claimants said that there was no proper way to understand why the Tribunal had concluded that "The documentation set out at paragraph 4.7 to 4.10 was not a collective agreement" nor any implied term, nor could it be identified what the "custom and practice" at paragraph 16.4 related to.

29. Mr Bailey in response began, rightly in my view, by submitting that the Judgment would not win any prizes and that if the Judgment stood alone in absence of the submissions and material that had been before the Tribunal he would struggle to uphold it. He invited me to concentrate on what the real issues were and whether the Judge had addressed them. Dealing with the grounds in turn, he argued that it was not necessary for a Judgment to refer to case law, and upon that I entirely agree.

30. The issue here, however, was whether the Tribunal had correctly applied the law that it did set out, and there is no obvious link between its setting-out of the law and its conclusions.

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31. As to the ground that the Tribunal had accepted the evidence of Ms Milligan, and it was not clear what particular evidence, it is said that this was indeed obvious and would have been obvious to the parties. I was taken to the witness statement of Ms Milligan. I hasten to add that she gave evidence and one of the difficulties with presenting witness statements to this Tribunal is that it represents the evidence-in-chief. It is only possible to know definitively what a witness has said by reference to the Tribunal's own findings, which would include reference to cross-examination, and neither party in this case has asked, as they might have done, for the Judge's Notes of Evidence to be produced. In any event, she said under the heading "Meal allowance" that she was not aware of any document that set out the criteria as to how it was applied (paragraph 19); and that her experience, although there were apparently different views, was that there was always a negotiation to be had with the union before this happened; it was not simply automatic, and there were a number of local agreements. She went on to say that it was not the case that the meal allowance always applies when drivers are away from a garage or a home garage, nor is it the case that the meal allowance is always paid when a driver has their relief away from a subsidised facility for food. It has nothing to do with access to a canteen. Mr Bailey invites me to suppose that the evidence that the Judge had in mind by reference to Ms Milligan consisted of these comments and that he did not need to explain how **TUPE** operated, because it was agreed that the Claimant's contractual rights had not altered after the transfer from Arriva to the First Respondent.

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32. As to route 462, in his skeleton Mr Bailey set out reasons why the allowance might not have been paid. They related to evidence that is, so far as I can see, nowhere clearly reflected in the Tribunal's Judgment, to the effect that in Ilford town centre there is a street known as Hainault Street at which there is a restroom for drivers. There was a facility introduced that was recognised by other bus companies than the Respondents. Route 462 drivers used it too.

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Accordingly, they were no longer entitled to such facilities. The difficulty with this point is that, so far as I can see, it has no reflection in the Tribunal's record of the process by which it reached its decision. It might have been the reasoning, but if so, it was entirely silent on this particular point.

33. As to paragraph 2(b), he pointed out that the evidence in respect of route 128 was clear and it was that those drivers were paid a meal allowance despite there being a drivers' restroom at the meal relief point, and no witness could explain why. I am happy to accept that route 128 was different to other routes in this respect and that justified the Judge's comment that it was an anomaly, and I think that use of the word "anomaly" is sufficiently explained if one has regard to the Judgment as a whole.

34. Mr Bailey continued in similar vein to deal with the other points of appeal, arguing that when the Tribunal came to deal with implied terms, though the decision was a little muddled, what it meant in paragraph 16.3 was that the documents relating to meal relief were not collective agreements as such. What the Judge was trying to reflect there was a view that they represented statements made in the course of pay negotiations, which were annual, and therefore did not set out the terms and conditions upon which particular allowances were to be paid. That was what the Judge must have meant by the first sentence of paragraph 16.3 as to there being no implied term (although it was, I think, common ground that a term could not be implied on the ground of necessary implication to justify an entitlement in circumstances where it represented a payment for a meal). What the Judge had meant was that he did not draw from those documents that there was such an entitlement as the Claimants had complained.

35. It will be evident from those last remarks that one has to struggle with paragraph 16.3 to understand precisely to what the Judge was referring.

36. In assessing these submissions, I would observe this. First, the claim is contractual. Where there is a claim based upon contract and where that contract is, as employment contracts are, individual to the employee concerned, care must be taken to look at each employee separately from each other. They may share common terms and conditions, but they may not. In the present case, if the Judge's conclusion as to the way in which meal allowances were organised was correct, different routes would have different terms and conditions or different meal allowance provisions relating to them. If contractual, therefore, this would represent different contractual terms and conditions. Where it is established that there is a contract, the first question then is what the terms of the contract are so far as they can be ascertained. One of the difficulties for the Tribunal here was that there was no clear evidence. It is a matter of surprise to me that the parties do not seem to have begun by reference to the particular statements of terms and conditions of the individual employees and progressed from there to why it was said that there was a contractual entitlement to the payments that they claimed but which had not been paid.

37. If, however, there is a contract, and its terms are established or sufficiently evidenced, the next question is the meaning they bear. Here, given the absence of direct evidence as to particular terms, possibly because the precise terms had been so historical that they had been lost in the industrial negotiating past that lies behind these cases, the exact wording was no longer clearly available. That makes ascertaining the meaning of the contract all the more difficult. Nonetheless the Judge came to a conclusion at paragraph 4.10 that what was set out in a document saying "MEAL RELIEF AWAY FROM COMPANY CANTEEN", "£3.85 per

duty", reflected the terms and conditions. It must follow that that was some evidence at any rate that there were terms and conditions to broadly that effect.

38. That has to be read, however, together with the other evidence that the Tribunal had and in particular that which is set out at paragraph 6. That contemplated, albeit in the context of annual pay negotiations, a payment of £3.85 per duty for "relief away from garage". What such words may mean is not necessarily as simple a question as it might seem at first blush. In well known passages in **Investors' Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28, Lord Hoffmann set out his five rules in respect of interpretation. The first of those is:

> **"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."**

39. He went on to describe what the "meaning" of a document was. It is not the same necessarily as the meaning of its words, but was what the parties using those words against the relevant background would reasonably have been understood to mean. In the present context, looking at the contract objectively and not subjectively as a matter of that which the parties now say they intended, that is the meaning that would have been conveyed to the employer and the employees making the initial agreement at the time they did and in the light of the facts as they then would have seen them.

40. "Away from garage" is a phrase that is so broad and general in its terms that it may cover a number of possibilities and allow for a number of understandings that are taken as read by the parties to the agreement. However, to reach a conclusion that the words mean other than they appear to say on the face of it, if those indeed are the terms to be derived, requires some evidence, and some application of principle using the approach identified by Lord Hoffmann or

some identical approach, and there is no evidence that the Judge in the present case adopted such an approach..

41. I have considerable difficulty in understanding how the Tribunal moved from paragraph 16.1 to its conclusion at paragraph 16.4. It took a view that meal allowances, in effect, were negotiated on a case by case basis. That is all very well, but each individual employee would have been in one or other of those cases. The particular case would depend on the particular terms of that particular negotiation. A good example might be said to be route 462. As to that, Mr Bailey may well be right that the reasons why route 462 drivers were no longer paid meal allowance was because it was now recognised that there was a facility equivalent to a canteen, but this would only mean that they no longer were entitled to such an allowance if the contract provided that by using the expressions it did, and meant and would have been understood by the parties at the time it was made to mean, that where there was such a facility as apparently, I am told, exists at Hainault Street the drivers would no longer be entitled to claim a meal allowance. None of that is set out. The Judge does not deal with the Respondents' case any more than, it seems to me, he deals with the Claimants' case.

42. The reference to custom and practice at paragraph 16.4 is puzzling, because there is no clear argument here, nor do I understand any to have been advanced, that there was a custom and practice in respect of meal allowances. The Judge's conclusions in any event would have meant that there was no custom that was clear, notorious and certain, because it varied from case to case, such that in any event it could not have supported the practice being of contractual effect. It may be that the Judge meant that it was to be agreed, or not, by a trade union whether a given facility was an appropriate place to take a meal break and if so, and if the driver had in the course of his route the opportunity to take a break at an appropriate time at that facility, that

he would not then be entitled to a meal allowance, for the reasons or similar reasons to that which the Judge set out. But that is not what the Judge actually said. It may be, on the other hand, that he meant that there was no particular reason why those on route 462, having been paid the allowance at one time later ceased to be paid the allowance though their circumstances did not alter. A Judge deciding this point would need to bear in mind that if a payment is made as part of the regular payment of an employee then unless it can be properly said that the payment is made by mistake or by way of accidental overpayment, the fact that the employee receives it and expects to continue receiving it will within a short time be strong evidence that there is a contract between the two to the effect it is obligatory to pay it, albeit that neither can point to any particular document but only to the conduct of each.

43. It follows that, in my view, the appeal is well founded.

44. I turn then to the cross-appeal. Sadly, the Judgment in respect of the cross-appeal seems to me to suffer from many of the defects that in general terms I have identified in respect of the appeal. The Judge's reasoning, complains Mr Bailey, proceeded on the basis that there was a **TUPE** transfer, but there had been no pleaded case to this effect. Nor when the matter was raised was any application made to amend it. I reject that ground of appeal as it stands, because, as Mr Gorasia has pointed out, the Judgment did not rely upon there being a transfer under Regulation 4(4) of **TUPE** that would have the effect that to cease to pay a disturbance allowance when it would otherwise be payable would be a variation of contract and therefore impermissible since it would have been a variation made because of the transfer.

45. In any event, it seems to me it would have been a difficult argument to make that if the employees were not contractually entitled to work on any particular bus route they would be

varying their contract by agreeing that there would be no disturbance allowance paid when they were transferred unless the transfer was compulsory. One comes back, therefore, to the question of whether the transfer was or was not compulsory. Mr Bailey complains that there is here no proper basis for the Judge concluding that the transfer was anything other than voluntary. Once it was established that the employees did not have a right to be assigned to any particular route, the fact that they were offered the opportunity of either going with route 20 to Northumberland Park or staying at Rainham to work on 462 or some other route would mean that any decision to go would be voluntary. The fact that drivers might make that decision without knowing the full details of what was proposed as an alternative is by the by. It could not amount to duress or oppression in any sense known to the law and would not deprive the employee concerned of the ability to consent.

46. These are, in my view, strong points, but, in my view, it cannot be clearly said that there was only one conclusion to which this Judge could come. That is because the terms of the contract and their meaning have to be identified. The terms are set out at paragraphs 4.11 and 4.12. That, I think, is where the description "compulsory" comes from. However, the approach in **ICS** to which I have already referred must be adopted. This necessitates some analysis as to what was understood by the parties as being the meaning of disturbance allowance by reference to the terms set out at paragraph 4.11. What would the ordinary employee bus driver, and, for that matter, the employer, objectively have understood? This is not a question as to what they actually thought the contract meant but a question as to what, viewed as a reasonable person in the particular circumstances and with the particular background that they had, they would have made of it. It seems to me open, in those circumstances, to draw a different conclusion as to the entitlement. It seems to me open, given that conclusion, to put a particular force upon the word

"compulsory", which means that it is not simply a binary question as between that which voluntary on the one hand and that which is compulsory on the other.

47. It is said by Mr Gorasia that the transfer should be assumed to be compulsory because the transfer from the Second Respondent to the First Respondent was effected under **TUPE** and that, as such, the drivers assigned to the particular undertaking would be transferred with it. Again, this gives a meaning of "compulsory" that is different from that which might be understood by focusing upon the dictionary meaning of the word itself.

48. In **Nokes v Doncaster Amalgamated Collieries Ltd** [1940] AC 1014 Viscount Simon said at page 1020:

> **"a fundamental principle of our common law [is] that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent."**

That has been adopted in the employment jurisdiction by Balcombe LJ in **Secretary of State for Employment v Spence** [1986] ICR 651, 660G-661D, and see also **Humphreys v University of Oxford** [2000] ICR 405 CA, at paragraph 6. This reflects the wording of the **TUPE Regulations** themselves, which provide expressly that an employee has the choice whether to transfer or not. Though it is a choice that comes with consequences, it is nonetheless a choice and in that sense it is voluntary. The effect of the consequence in an "ordinary" **TUPE** case that an employee will lose the right to be regarded as unfairly dismissed unless one of the exceptions applies, may have the practical effect of meaning that most employees feel compelled, in a colloquial sense, to accept the transfer of employment, but it should be pointed out that the fact that they could have lawfully chosen not to transfer was not sufficient in the circumstances of this present case to prevent the Respondent in its ET3 dealing with the question of the background to the case of asserting that there was a **TUPE** transfer

from Arriva to the Second Respondent and that disturbance allowance was paid to those subject to it because it was compulsory, and said to be compulsory because it was a **TUPE** transfer. "Compulsory", therefore, was not used in the same sense as it would have been used where there is no choice, where an employee has no freedom but is in effect a slave to his employer.

49. That is simply to demonstrate that even upon the facts of this particular case the expression "compulsory" may have shades of meaning. One way of understanding what the Judge was attempting to say was that because in this particular case the economic necessities of life were such that the Claimants were effectively presented with no alternative but to choose to transfer meant that they had in effect to sign the document saying that they understood no disturbance allowance would be paid but that did not in fact deprive them of that entitlement that otherwise would have existed. The transfer would be compulsory in a real and practical sense even if simply as a matter of choice the individual had another choice, which depends, it seems to me, entirely upon the evidence that there is as to the reasons why the employees chose to go or the nature of the transfer, evidence as to the general background and what was to be expected in context.

50. That said, it is difficult to understand from where the Judge derives the principle that he expressed at paragraph 14.4.

51. The argument that there had been an unconscionable bargain was not advanced by either party; nor did the Judge raise it with the parties. He referred to voluntary transfer, taking into account an argument that had not been raised, immediately prior to the paragraph in which he drew his conclusion as to disturbance allowance. In paragraph 15.2 he reflects in the last but one sentence aspects of the matters which in paragraph 14.4 led him to conclude that what had

happened was "an unconscionable bargain", though quite why a **TUPE** transfer required a bargain when there should be no change of contract at all is difficult to fathom. It may, therefore, have been that he was simply saying that there was here a degree of practical compulsion that was within the contemplation of the parties, and would have been at the time that the contractual entitlement to disturbance allowance was first made, as being the sort of circumstance in which it would be made. Again, as is often the case in industrial agreements, the circumstances in which disturbance allowance would be paid are not clearly defined. Much, I suspect, is for the particular understanding employees and employers would have had at the time, objectively assessed, as to which there seems to have been precious little evidence before the Judge.

52. It follows that, because he referred to voluntary transfer immediately before dealing with disturbance allowance, I cannot accept Mr Gorasia's attempt to suggest that the two had no relationship, that one did not follow on from the other and that paragraph 15 was simply a conclusion of fact. It seems to me that the Judge appears to have raised an argument of his own without reference to counsel and to have adopted it as the reasoning that led to his conclusion on disturbance allowance. Alternatively, I accept the fallback submission of Mr Bailey that the Judgment here simply suffers from the same difficulty as identified on the appeal: that it does not clearly explain the reasons why the Judge came to the conclusion that here the transfer was compulsory so as to attract disturbance allowance, which would be paid only in the event of a compulsory transfer. It follows that I allow the cross-appeal too.

Disposal

53. As a result of the conclusions I have reached, the case must be remitted to a Tribunal for redetermination. It will, unfortunately, have to be determined by another Tribunal, particularly

bearing in mind that the Judge had the opportunity to reconsider but added nothing of real clarity in his Judgment on reconsideration to assist. On that remission, the Tribunal will begin by adopting that which has not been the subject of appeal before me today, which is that there is no contractual right to any employee to be assigned to any particular bus route.

54. As to remission, I indicated at the conclusion of argument that both the appeal and cross-appeal would be remitted. Mr Bailey complained, with justification, that I had not dealt with an argument that he had raised, based on the evidence before the Judge, which is referred to at paragraph 10.3, that the individuals who were offered transfer were told that they would remain on their current terms and conditions but would not receive any disturbance payments because the transfer, since it would be classed as a voluntary transfer. It was indicated that the offer was a limited one, and so a reply was necessary within a limited timescale. The drivers were invited to complete a slip beneath the operative part of the form, which identified them by name, and said simply, "I wish to transfer over to Northumberland Park with the route 20 on 15th June 2013". Mr Bailey contended before the Tribunal that the effect of that was to disentitle any Claimant who had signed such a form from any entitlement to such an allowance.

55. That argument was not dealt with by the Judge, which is a further reason for allowing his appeal, but Mr Bailey says it additionally has this force: that, given the state of the pleadings in the case and the way it had been presented, a Judge hearing this case could come to no other finding than that those employees had signed away what would otherwise have been their right to an allowance (if indeed an allowance was payable, albeit that is in dispute). Accordingly, he argues that there is no case to be remitted.

56. This depends upon the pleadings. He points out that there was no pleaded case that the signed form had been secured by any form of duress. He did so early in the proceedings. The response made on behalf of the Claimants was that no such case was advanced. It was clearly open, and indeed held expressly open, as I understand it, for the Claimants to amend their case to make such an argument. They did not do so. Accordingly, no argument was put before the Judge to the effect that the agreement made by the employees by their signature to the form should not be effective in disentitling them from then receiving what they would otherwise have had if the transfer were to be held compulsory and not voluntary.

57. The response made to this by Mr Gorasia is that the finding was essentially a factual finding, that, the Judge having found that the Claimants were significantly at a disadvantage, this would entitle a Tribunal ultimately to conclude in the light of the way in which the matter had been advanced and pleaded that the consent should not be given effect.

58. I confess concern that this Judgment should not be understood as saying that in a situation in which an employer puts pressure on, or puts an employee in a position in which the circumstances themselves in practice pressurise, an employee into making an agreement that is disadvantageous to the employee, there is necessarily no right that the employee can claim has been infringed. It may be that in an appropriate case, for instance, the actions of an employer putting an employee in such a position might constitute a breach of the implied term of trust and confidence, which would have the effect, by one or other route, of negating the effect of any consent that had been given on the face of it. It may be that in an appropriate case the pressure is so intense that the court feels able under one principle or another to negate the effect of the signature and agreement. However, where there is nothing to do so, and those arguments have deliberately not been raised, as in this case, the position is different. This court has no

right to fashion an argument for a party; its object and purpose is to determine the arguments that the parties have themselves raised. The way in which the matter was put below fell far short of any recognisable principle of oppression or duress, and such was disavowed. No question of breach of the implied term of trust and confidence was raised. Mr Gorasia, in my view, did not find it easy to find an answer to the submission beyond in effect to suggest that if the matter were remitted the Tribunal might find facts and might find a route to reach the same result. He did not suggest what those facts might be, or that route was.

59. Despite my reservations, therefore, and repeating my warning that this case may well not be a precedent for others, I have concluded that at least so far as those Claimants are concerned who did not express any reservation when indicating their wish to transfer over to Northumberland Park their claims can proceed no further on this point. I do not know the details, because none was spelt out, of those who signed under protest or the nature of the protest that was indicated - much may depend upon that - but it seems to me that in respect of those there may be grounds for supposing that they were consenting to or asking for the transfer over but were objecting at the time to the condition in respect of non-receipt of disturbance payment. If that be so, it seems to me to be open to the parties to argue that point out on the evidence in the particular case.

60. So, the effect is that those individual cases in which there has been a signature expressly under protest may, should the Claimants so wish, be heard again before the Tribunal, but I would caution this: that they need to give very careful consideration to the terms of the protest and whether there really is an argument in the case of that particular person that the consent is not a viable consent for some reason related to the protest. Only in those cases - and I shall discuss with the parties the means by which they may identify one or the other, who they are

A and the terms of which they are, because I do not know the details of individual cases at the moment - will there be any prospect of remission.

B 61. Perhaps the safest thing for me to say for the moment is that the appeal in respect of meal allowances is to be remitted. The question of remission of the issue of disturbance allowance in the case of those who have signed under protest will be adjourned pending the parties identifying whether they wish to proceed with the remission in respect of the class, however big it is, that I have identified and as to which I have no doubt further discussions between the parties may help.

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