Appeal No. UKEAT/0214/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 13 December 2019
Judgment handed down 30 January 2020

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

METROLINE TRAVEL LTD — APPELLANT

(1). SEAN D'AUVERGNE
(2). TARIQ KHAN
(3). KINGLSEY CHIME
(4). KERWYN DYTE
(5). PETER COWARD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD OWEN-THOMAS (of Counsel)
For the Respondents	MR SEAN D'AUVERGNE MR TARIQ KHAN MR KERWYN DYTE (The Respondents in Person)

SUMMARY

CONTRACT OF EMPLOYMENT – Incorporation into contract

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

1 The claimants are bus drivers. They were originally employed by Arriva. They were entitled to payments, known as meal relief payments, if they had to take meals breaks away from a recognised relief facility. Until about mid 2010, Arriva paid meal relief payments to drivers who took their meal breaks at Hampstead Heath as that facility was not recognised. The bus route was transferred to the respondent in 2015 and the contracts of employment of the claimants also transferred in accordance with the **Transfer of Undertakings (Protection of Employees) Regulations 2006**. The respondent had an agreement with the recognised union recognising the Hampstead Heath facility. The respondent refused to pay the claimants the meal relief payments. The employment tribunal held that the claimants had a contractual entitlement to the meal relief payment when taking their breaks at Hampstead Heath as evidenced by the payments made prior to mid-2010. There was nothing to indicate that terms and conditions had been changed and therefore the claimants retained that contractual entitlement.

2 The critical question for the employment tribunal was how a facility came to be recognised under the terms of the contract of employment. In the absence of such a finding, it could not be established whether the facility had been recognised in accordance with the provisions of the contract. Further, the tribunal had not addressed the question of whether, if the process for recognition was included in a collective agreement, those provisions were apt for incorporation into the contract of employment of the individual claimants. The appeal was allowed and the matter remitted to the employment tribunal.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. This is an appeal against a decision of 15 March 2019 by an employment tribunal, Employment Judge Skehan, dealing with the entitlement of the claimant bus drivers to a payment referred to as a meal relief payment. Such payments are payable when meal breaks are taken away from a recognised relief facility. The employment tribunal found that the claimants had a contractual right to the payment when taking meals at the facility at Hampstead Heath as that facility was not a recognised facility within the meaning of their contracts of employment. Consequently, the employment tribunal held that the respondent employer had made unlawful deductions from wages contrary to section 13 of the **Employment Rights Act 1996** ("ERA") by failing to pay the claimants meal relief payments. The respondent employer appealed. In this judgment, the parties are referred to as claimants and respondent as they were in the employment tribunal below.

THE TRIBUNAL DECISION

The Relevant Factual Background

2. The claimants are five bus drivers. They had originally been employed as bus drivers on the 168 route by a company, Arriva North London ("Arriva"). On 26 September 2015, the 168 bus route was transferred from Arriva to the respondent, Metroline Travel Ltd. The claimants' contracts of employment also transferred from Arriva to the respondent so that, pursuant to the provisions of the **Transfer of Undertakings (Protection of Employees) Regulations 2006** ("TUPE") their contracts were treated as having been made with the respondent.

3. The claim related to a number of disputed matters relating to the claimants' pay although only the meal relief payment forms the subject matter of this appeal. The employment tribunal noted that there was limited information before it about the transfer. It also noted that the claimants' terms and conditions relating to pay were not clearly set out in any written document (see paragraph 15 of its Judgment). It had been referred to two documents. The first was headed:

> **"General Information Details for Arriva London North Full Time drivers**
>
> **Details as at January 201".**

4. That document referred to a number of matters including pay rates and pay intervals, definition of grades, notices of termination, special arrangements for night duties, hours of work and entitlements to annual leave and sick pay. In relation to meal breaks, it said "40 minutes unpaid, remainder paid". The document stated at the end that it was "a summary of prevailing agreements re conditions and payments and is not contractual."

5. A second document (referred to in this Judgment as the 2015 document) is headed:

> **"General Information Details for Arriva London North Full Time Drivers.**
>
> **Details as at 01/01/2015".**

6. That document dealt with similar matters to the 2013 document, albeit that the format and the figures were different. Under a heading "Allowances" the 2015 document said this;

> **"<u>Meal Relief Payments</u>**
>
> **A supplement of £3.95 per duty for relief away from a recognised relief facility".**

7. The 2015 document states at the end that:

> **"*This is a summary of prevailing agreements re conditions and payments. In addition there is another document which carries the rates for non-traditional and rail replacement work which should not be sent to other operators. This work is done on a voluntary basis only and as such the rates are not contractual*".**

8. The evidence of one of the claimants, Mr Dyte, was that until sometime into 2010, the drivers on the 168 route took their meal breaks at a facility at Hampstead Heath. Arriva paid them the meal relief payment for meal breaks taken there. From some time in 2010, the meal breaks were taken at Old Kent Road (and Arriva also paid the meal relief payment in respect of meal breaks taken there).

9. At a date which is not identified in the employment tribunal decision but was before the transfer of bus route 168 to the respondent, the respondent agreed with its recognised union that meal relief breaks taken by its drivers at Hampstead Heath would not attract meal relief payments: see paragraph 44 of the decision.

The Relevant Findings by the Employment Tribunal

10. In light of the findings made, and the limited evidence before it, the key findings of the employment tribunal are set out in paragraphs 43 to 45 in these terms:

> **"43. Mr Dyte's evidence in relation to the arrangements for meal relief while he was employed with Arriva is accepted. …. In viewing the evidence as a whole in relation to this point, I conclude that Mr Dyte has shown on the balance of probabilities that he received meal relief payments for meal stops at Hampstead Heath while employed by Arriva. I conclude that the claimants had a contractual entitlement to meal relief payments in respect of meal relief that was taken at the Hampstead Heath employed by Arriva. There is no suggestion that there was any change to the claimants' contractual entitlement to meal relief payments for stops at Hampstead Heath while employed by Arriva. There is no suggestion that there was any change to the claimants' contractual entitlement to meal relief payments for stops at Hampstead Heath while employed by Arriva.**
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> **44. I turn now to the claimant's contractual entitlements when working for the respondent. I note the respondent's evidence in relation to the adequacy of the meal relief facility at Hampstead Heath. It is obvious that when the Hampstead Heath facility is not available to the claimant's, and the claimants are required to take a meal relief break at Hampstead Heath, they have a contractual entitlement to a meal relief payment. The respondent says that the facilities within Hampstead Heath simply do not meet the contractual trigger for the meal relief payment. However, there is considerable room for debate as to what actually constitutes a 'recognised relief facility'. It is possible for the employer to agree either individually or collectively with its staff that particular sites either constitute or do not constitute a recognised relief facility therefore triggering or excluding the meal relief payment. In circumstances where I accept that the claimants have previously used this particular meal relief destination and received contractual meal relief payments and both parties say that there has been no change to terms and conditions I conclude that the previous practice of the claimant's employer read alongside the express wording as set out above, provided the claimants with a continuing contractual entitlement to meal relief payments when taking their meal relief at Hampstead Heath.**
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> **45. I accept that prior to the claimants' transfer to the respondent, the respondent had agreed with its recognised union that meal relief stops taken at Hampstead Heath would not attract meal relief payments. However, when the claimants transferred with their terms and**

conditions intact. It was not argued that the claimants' contractual entitlements were [not] altered in any way post transfer by the respondent's existing agreement with its recognised union. Therefore, I conclude that the claimants' terms and conditions of employment include a contractual entitlement to meal relief payments when the meal relief is taken at Hampstead Heath."

11. The employment tribunal therefore held that the failure to pay the meal relief payment amount to an unauthorised deduction from wages contrary to section 13 of the **ERA**.

THE APPEAL

12. The respondent appealed. The grounds of appeal included the following:

(1) The employment tribunal erred in concluding that the claimants had a right under their contracts of employment to the classification of a recognised relief facility as fit or unfit for meal breaks and erred in requiring the respondent to adopt that classification (grounds (i) and (ii));

(2) While it was agreed that the claimants had a contractual right to a meal relief payment when required to take a meal other than at a recognised relief facility, the designation of a facility was not apt for incorporation into the contract of employment (ground (iii));

(3) The employment tribunal failed to make sufficient factual findings as to why the Claimant had a contractual right to meal relief payments for meals taken at Hampstead Heath (ground (iv));

(4) The tribunal erred in finding that the claimants had such a contractual right given that the respondent and its recognised union had agreed that the Hampstead Heath facility was a recognised relief facility (grounds (v) to (vi)); and

(5) The employment tribunal's reasons were inadequate (ground (vii)).

SUBMISSIONS OF THE PARTIES

13. Mr Owen-Thomas for the respondent submitted that the primary question for the employment tribunal to address was how the contract permitted the recognition of a relief facility. He submitted that the most likely means was by way of collective agreement but that the procedure was unlikely to be apt for incorporation into the individual contracts of employment, relying on **Malone v British Airways Plc** [2010] EWCA Civ 1225. He submitted that the employment tribunal had failed to address this issue and failed to give adequate reasons for its conclusion on this issue. Further, he submitted alternatively that the contractual obligation included in the individual contract of employment between the claimants and Arriva was the obligation to give effect to a recognition agreed between the employer and a union. That obligation transferred to the new employer, the respondent. There was an agreement between the respondent and its recognised union recognising Hampstead Heath as a relief facility. The claimants' contract of employment included the obligation to give effect to the recognition of a relief facility agreed to by the respondent and the union.

14. Mr D'Auvergne, who is one of the claimants, represented himself and the other claimants. He made a clear and forceful argument that the employment tribunal was right to find that he and the other claimants were contractually entitled to a meal relief payment when taking their breaks at Hampstead Heath. The drivers were paid the meal relief payment when employed by Arriva. That, he submitted, must mean that they had a contractual right to the payment as Hampstead Heath was not a recognised relief facility under their contract of employment with Arriva. When bus route 168 transferred to the respondent, the claimants were entitled to have their existing terms and conditions, including the right to a meal relief payment when having to take their breaks at Hampstead Heath, preserved by reason of **TUPE**. Mr D'Auvergne submitted that nothing had happened to change that position. No agreement had

been reached with any union acting on behalf of Arriva drivers to recognise Hampstead Heath as a relief facility.

DISCUSSION

15. The fundamental problem with the decision of the employment tribunal is that there is no clear finding as to what were the terms of the contract between Arriva and the claimants. In particular, the employment tribunal does not address the means by which, under the contract, a facility becomes a "recognised" relief facility.

16. There was evidence from which the tribunal could infer that there was a contractual entitlement to a meal relief payment if neither the employee nor Arriva considered that there existed a recognised meal facility and that, at least until about some time in 2010, Hampstead Heath was not treated by either party as a recognised relief facility. The tribunal could infer that from the evidence of Mr Dyte, and from his payslips.

17. The issue in this case, however, turns on how, contractually, a relief facility becomes recognised so that Arriva as the then employer could refuse to pay a meal relief payment. That required a close consideration of the contractual terms. Did those terms provide a definition of "recognised" (e.g. recognised by the employer)? Did it provide a set of criteria by which facilities could be determined to be adequate (e.g. size, available facilities or even the purpose of the facility) so that, if those criteria or purpose were met, it was to be recognised as a relief facility)? Alternatively, the contract might have provided a mechanism by which a facility could become a recognised facility, e.g. by agreement between a recognised union and the employer.

18. Until the actual provisions governing the means of recognising a relief facility are identified, it is not easy to determine whether, in the circumstances, recognition had been made in accordance with those provisions. To give a simple example, the contract between the employees and Arriva may (as the employment tribunal recognised) have provided for the employer to agree collectively what facilities were to be recognised. The contract of employment, therefore, may in effect have provided that a recognised relief facility was one which the employer and a union had agreed to recognise. If so, following transfer of the contracts to the respondent, there may be a recognised relief facility available because the employer and the union have agreed to recognise one. That may not have been a change to the contractual terms. Those may have remained the same, that is, the contract continued to provide that where the employer and the union had recognised a relief facility, the employee would not be entitled to meal relief payment. Deciding whether a facility was recognised might involve no more than applying the existing contractual terms to the facts. It may be no more than the practical working out, or implementation, of the contractual mechanism included in the contract of employment to the facts.

19. Mr D'Auvergne submits that a union did not consult with them about whether to agree to recognition. He submits that they should not be subjected to an agreement between a union who did not represent and did not consult the drivers formerly employed by Arriva. He submits that all that is known from the facts is that the respondent agreed with a union at some stage prior to the transfer (and not after transfer and not on behalf of drivers who would then have been employed by a different company). Consequently, he submits, the decision not to pay the meal relief payment did involve a change to the terms and conditions of employment.

20. That illustrates the practical difficulties in this case. Until the contractual mechanism for recognition is identified, it is not feasible to determine whether what happened was the

working out of the terms of the contract of employment or whether it involved an impermissible attempt to change the terms of condition after the transfer.

21. Mr Owen-Thomas identifies a second problem with the decision of the employment tribunal. He submits that it did not address the question of whether any provision in a collective agreement governing recognition was apt to be incorporated in the contract of employment with the individual employees.

22. The law is set out in cases such as **Alexander v Standard Telephone Cables Ltd. (No. 2)** [1991] IRLR 286, **Kaur v MG Rover Group Ltd** [2005] ICR 625 and **National Coal Board v National Union of Mineworkers** [1986] ICR 736. As Hobhouse J., as he then was, said in **Alexander** at paragraph 31:

> **"The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."**

23. The employment tribunal would need to determine if the terms of the contract of employment between the claimants and Arriva was intended to incorporate the provisions of a collective agreement governing a process of recognising relief facilities. Whether such a provision was "apt to form part of the individual contract" would be an important part of that enquiry.

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24. Mr Owen-Thomas submission is that the tribunal has not dealt with the question of whether any relevant provision of any collective agreement was apt to be incorporated. In particular, he submits that the process of recognition of a relief facility may not be apt for incorporation. He relies on the decision in **Malone v British Airways Plc** [2010] EWCA Civ 1225. There, two provisions were in issue. One provision governed the crew complement on an aircraft, i.e. how many cabin crew were required to be present on particular types of aircraft, and one governed an entitlement to a payment if one member of staff were absent. The court held that the former provision fixing the crew complement was not incorporated into the contract of employment. An employee would not be entitled to refuse to work on the aircraft because the number of crew on the aircraft fell below the collectively agreed complement. The second provision, giving a right to an additional payment if there were less staff on the flight than that provided for by the collectively agreed complement, was contractually enforceable.

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25. I have some difficulty in understanding how these submissions would apply to the facts of this case. The respondent accepts that if both parties are of the view that there is no recognised facility (or if, presumably, the facility was unavailable because it had to be closed because of an emergency such as flooding or a fire) there would be a contractual right to a payment. But Mr Owen-Thomas submits that the fact the facility has been recognised under a collective agreement (and so a payment would not be due) would not be incorporated into the contract.

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26. There may be two difficulties with that. First, the respondent is itself seeking to argue that a meal relief payment (which would otherwise be due) is not due because the facility has been recognised. The respondent is itself seeking to qualify what would otherwise be recognised as a contractual right by reason of the fact that the facility has been recognised under a collective agreement. In other words, the respondent itself appear to be seeking to argue that

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the collective provisions governing recognition of a facility are part of the contract of employment as it is seeking to use that fact to determine the scope of the contractual rights. Further, the situation may be different from **Malone**. There, there were in truth two distinct, but interrelated, matters at issue in that case. One was the number of cabin crew who had to be present on a plane. The second was the financial consequences for individual employees if the right number of cabin crew were not present. The two things could be separated out and, logically, it was possible to incorporate one but not the other into the contract.

27. Here the question of whether or not a relief facility is a recognised relief facility is a necessary part of a single exercise. The payment arises because a meal cannot be taken at a recognised relief facility. There may be different reasons why a meal relief payment is or is not payable: for example, a recognised relief facility may be not available (e.g. it is closed, or none exists) or a recognised relief facility is available (because the mechanism for recognition has resulted in recognition of the facility). Those different states of affairs are different parts of the single question – is there a recognised relief facility available for a meal to be taken? It may not be possible to separate out logically the question of recognition from the question of entitlement: both may be an inherent part of a single exercise.

28. In any event, it is not necessary to reach a concluded view on that question. That will depend in large part on where the provisions for recognition are contained and, if in a collective agreement, whether they are apt for incorporation. Those facts should be identified before any decision on aptness for incorporation is taken.

29. In the circumstances, however, the employment tribunal has erred in law. It failed to identify what the relevant terms of the contract are and to determine whether or not any recognition of the Hampstead Heath facility involved the implementation or working out of

those terms. If it finds that the provisions governing recognition are to be found in a collective agreement, it has not addressed the question of whether the relevant provisions are apt for incorporation into the individual contracts of employment. In the circumstances, it has not given adequate reasons for its conclusion that there is a contractual entitlement to a meal relief payment taken at Hampstead Heath. Those are, essentially, grounds (iv) and (vii) of the grounds of appeal. No submissions were made on grounds (i) and (ii) and I do not allow the appeal on those grounds. Grounds (iii), (v) and (vi) require further factual findings before a decision could be reached.

30. For those reasons, the appeal must be allowed and the matter remitted to the employment tribunal to reconsider in accordance with the terms of this judgment.