EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
MR SEAN D'AUVERGNE **ME TARIQ KHAN** **MR KINGSLY CHIME** **ME KERWYN DYTE** **MR PETER COWARD**	**v**	**METROLINE TRAVEL LIMITED**

Heard at: Watford **On**: 23 and 24 February 2021

Before: Employment Judge Skehan

Appearances
For the Claimants: Mr D'Auvergne and Mr Dyte in person
For the Respondent: Ms Norris, (solicitor)

RESERVED JUDGMENT ON REMITTAL

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1. The claimants claim for unauthorised deductions from wages contrary to section 13 Employment Rights Act 1996 or a breach of contract complaint under Article 4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (Mr Coward only, in the alternative) is unsuccessful and dismissed.

REASONS

Miscellaneous matters

1. This was a remote hearing which had not been objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 200 pages, together with the witness statements and the

parties legal arguments and submission documents, the contents of which I have noted. The order made is described at the end of these reasons.

2. The parties experienced various technical issues at the commencement of the hearing. Mr D'Auvergne was unable to gain a satisfactory video link to the hearing but managed to join the hearing and participate fully by way of telephone link directly to the CVP platform.

Background

3. The claimants are bus drivers, all of whom claimed unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996. Mr Coward also claimed breach of contract in the alternative. Initially, this tribunal found that the claimants' claims relating to 'meal relief payments' when meal relief is taken at Hampstead Heath were successful. The relevant parts of the original Judgment are paragraphs 43-45. The respondent successfully appealed this Judgment to the Employment Appeal Tribunal (EAT) and the matter was remitted back to this tribunal by the EAT decision of Mr Justice Lewis sent to the parties on 18 February 2020. The parties attended a case management hearing on 14 September 2020 where directions were given for an agreed list of issues and written legal submissions.

4. The claimants were originally employed by Arriva and their employment transferred on 26/09/2015 from Arriva to the respondent along with the transfer of the 168 bus route under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended ('TUPE').

5. The respondent set out its position at the outset, that if meal relief payment would have been 'properly payable' by Arriva for meal reliefs taken by the claimants at Hampstead Heath prior to the transfer that, the respondent will be liable to the claimants for the meal relief payments taken at Hampstead Heath since the transfer. The main factual questions for the tribunal to decide were revisited at the commencement of the hearing and are:
    a. What is properly payable by the respondent to the claimants by way of meal relief payment?
    b. As of 25 September 2015 (the date of the claimants transferred to the respondent under TUPE) what were the eligibility criteria to be met in order for a driver to qualify for meal relief payment at Arriva.
    c. If the criteria was a 'recognised relief facility' what constituted a recognised relief facility.

6. The respondent accepts that Mr Dyte, and other drivers, were properly paid meal relief payment when taking meal relief at Hampstead Heath prior to 2010. The respondent says that at that time eligibility for meal relief payment was dependent on whether meal relief was taken 'away from garage'. The respondent says that the eligibility criteria applied by Arriva changed in 2011

to whether a facility was a 'recognised relief facility'. The respondent accepts that meal relief payments were properly paid to the drivers when they took their meal relief at Old Kent Road. The respondent says that initially these payments were made because the reliefs were away from a garage and following the policy changes introduced in 2011, Old Kent Road was not a recognised relief facility because it did not have a facility where drivers could take meal relief away from the public. The respondent says that the criteria applied by both Arriva and the respondent as to what constitutes a recognised relief facility at the date of the transfer of the claimant's employment to the respondent was the same.

The Evidence

7. I heard evidence from Mr D'Auvergne and Mr Dyte only on behalf of the claimants. I heard evidence from Mr Harris (Managing Director of Metroline Travel Limited) and Mr Topliss (Quality Assurance Assistant Manager with Arriva London) on behalf of the respondent. All witness evidence was given under affirmation or oath. Witness statements were accepted as evidence in chief and all witnesses were cross-examined.

8. Mr Dyte told the tribunal that:
    a. When he started employment with Arriva in 2003, he was informed by Unite the union that if he had his meal relief 'away from the garage' when working on the 168 route, he would be paid a subsidy or meal relief payment. At this time, he had his meal relief at Hampstead Heath and was paid a meal relief payment. When he took his meal relief at the garage, this meal relief payment was not paid.
    b. He moved to Ashgrove garage for operational reasons in the September/October 2010. Initially a canteen was not available, and a subsidy was paid. This continued until a subsidised canteen facility was made available in the garage where hot meals were served. After this time, meal relief was only paid when meal relief was taken at Hampstead Heath.
    c. In 2011, Mr Dyte's meal relief point changed and was moved from Hampstead Heath to Old Kent Road, Tesco. Meal relief continue to be paid.
    d. Mr Dyte refers to a payslip dated 2 December 2011 that records 'cash adjustment' therein. This refers to meal relief payments made for meal relief taken at Hampstead Heath on that date. This payment shows the respondent's assertion of a change in the entitlement to be false.
    e. From the beginning of 2012, Mr Dyte took his meal relief at Old Kent Road. During this time Mr Dyte received meal relief payments. Mr Dyte says that the garage had the same setup as Hampstead Heath having a microwave, coffee machine running water and toilet facilities. Mr Dyte says there is no reason to differentiate between

the premises and that meal relief payments are owed to the claimant's in respect to meal relief taken at Hampstead Heath.

9. During the course of cross-examination:
    a. Mr Dyte was taken through the historic documentation relating to 'recognised relief facility'. Mr Dyte reiterated that when he started employment with Arriva, he was told that a 'recognised relief facility' was a garage that should have a canteen. He was told that there had to be a canteen where a hot meal could be provided. His arguments were based on that fact.
    b. Mr Dyte says that he did not question what a 'recognised relief facility' was with any union member his but based his answer upon what he was told when he started work in 2003.
    c. No evidence from the union was provided in support of the claim.
    d. Mr Dyte disputed that the Hampstead Heath facilities were closed to the public. He said that the public could see in the window and knock on the door and it would be rude not to answer them.

10. Mr Harris told the tribunal that:
    a. The claimants all transferred to the respondent along with the 168 bus route on 26 September 2015 from Arriva London North. Since this time the claimants take meal relief at Hampstead Heath.
    b. Hampstead Heath is a TfL facility. In common with other TfL facilities it has hot and cold water, a microwave fridge meeting and toilets. Some TfL facilities also have vending machines and storage cupboards.
    c. He has no reason to doubt the claimants' previous evidence that for just over a fortnight in 2018 the microwave could not be used but it was then replaced.
    d. Most of the respondent's garages do not have canteens. Cricklewood and Holloway, where the claimant have worked since the transfer, are the exception rather than the rule.
    e. The central factor for recognising the facility is the ability to get away from the public and take meal relief in private. Hampstead Heath meets the criteria. He believes that according to both Arriva, from 2011 and the respondent, Hampstead Heath is a recognised relief facility. Mr Harris refers to the email from Mr Topliss of 5 July 2018 that states, inter-alia:
        i) They criteria triggering this payment [meal relief allowance of £3.95 per duty] included the fact that there was nowhere for the drivers to go that was away from the public. At a relief points away from the home garage where there is a private rest room with seating, toilet facilities, access to water and/or a microwave oven, except Arriva would not pay any such allowance.
    f. In preparing for the original hearing, he did not understand the emphasis placed by the claimants on Mr Dyte's payslips from 2003-

2008 or the relevance of the reference to 'cash adjust' therein. This only became apparent during cross examination when Mr Dyte said that these related to meal relief payments for meal relief taken at Hampstead Heath years before the transfer. Neither he nor Mr Topliss had considered the historic (i.e. pre-2011) position. They concentrated on the position as of the date of transfer of the claimant's employment in 2015 and the criteria for a 'recognised relief facility'.

g. The respondent does not dispute that meal relief payments were properly made to the claimants up to September 2011 when they were taking their meal relief at Hamptsetad Heath 'away from [Tottenham] garage'.
h. Mr Dyte's post 2011 payslips bearing the 'cash adjust' description correctly relate to meal reliefs payments for meal relief taken at Old Kent Road. Old Kent Road was considered 'away from a recognised relief facility'.
i. The tribunal case of *Brown & Others* is relevant as although the respondent was not a respondent in that case, the facts concerned whether meal relief payments were properly payable on routes operated by Arriva. It was found that when a meal relief facilities either did not exist or were inadequate, meal relief payments were made; but where drivers were using TfL facilities or equivalent they were deemed an 'agreed or recognised facility' that meal relief payments were not paid. This was with the agreement of Unite the union even though the drivers themselves had been unaware and unhappy about the implicit concession that use of a TfL facility meant no meal relief payment was due.
j. Even if the respondent had not won the route and Arriva reverted to operating from Tottenham garage, with the drivers taking their meal relief at Hampstead Heath, the drivers would not be entitled to meal relief payments from Arriva. There have been no changes to the terms and conditions in relation to meal relief payments, whether or not those payments are contractual, since the claimants transferred to the respondent in 2015.

11. Mr Topliss gave evidence in relation to the background to when a meal relief payment would be made by Arriva to a driver:
    a. I was referred to a letter dated April 2003 from Mr Quantrell, Operations Director of Arriva London North (ALN) to Tom Scanlon, Regional Industrial Organiser of the TGWU (later, Unite) which was the recognised drivers' union, proposing to implement a similar arrangement in ALN as was in place at its counterpart, Arriva London South (ALS) [Page 46/47]. This letter proposed a protocol for meal relief arrangements, noting in the letter that meal reliefs may have to be scheduled "away from a garage or a recognised canteen facility". At the bottom of that page, he confirms that "where appropriate, the agreed meal relief supplement will be paid

to affected staff". In his email of 8 December 2005 [page 60] Mr Quantrell refers to meal reliefs scheduled "away from garage/not at a recognised facility". Mr Topliss says that at that time, in 2005, the two descriptions 'away from garage' and 'not at a recognised facility' were used more or less interchangeably.

b. I was referred to the email from Dave Wilson of 19 September 2006 [page 108], that said, the meal relief payment is not really for "meal relief away from garage" but was, originally introduced to reflect the unavailability of a subsidised meal where no London Transport facility was available.
c. I was referred to the documentation surrounding 2011 negotiations, there is reference to financial difficulties within Arriva, and job losses were anticipated [pages 68-70]. Bob Scowen, Regional Managing Director proposed an "efficiency drive" and a "restructure" with the rates offered for existing drivers set out [page 71]. The existing meal relief payment was written as "a supplement of £3.95 if relief is scheduled away from garage" but the proposal was "15 minutes' payment if relief scheduled away from facilities". The same phrase "if relief scheduled away from facilities" was used for the new entrant offer [page 74].
d. In February 2013, a pay packet for new entrant drivers was imposed by Arriva [page 82] which included £3.95 minimum relief "if not at recognised facility" "per duty if agreed". The 2013 General Information Details signed off in March 2013, another two-year pay deal [pages 90 to 96] reflect this [page 91] with the confirmation that the scheduling agreement is for a minimum 40-minute meal relief "with supplement of £3.95 per duty for relief away from recognised relief facility".
e. Nonetheless, in October 2013, an email from Helen Milligan, a General Manager, to colleagues (pages 97-98) refers to "meal relief away from garage payment".

12. Mr Topliss told the tribunal that:
    a. The facilities available at Hampstead Heath TfL drivers' hut are sufficient to bring it within the description of a "recognised relief facility" for Arriva's purposes. Such criteria are common across all the London bus operating companies, so far as he is aware, including both Arriva and the respondent, though there is no written document setting out exactly what they are. Those companies that make meal relief payments do not make them when the drivers have access to such facilities.
    b. Arriva has not used the Hampstead Heath hut for meal reliefs for any routes for more than ten years so the question has not arisen, but where there is a private rest room, with seating, toilet facilities, access to water and/or a microwave oven etc Arriva would not pay any such allowance. If a particular item is out of order, e.g. if the microwave is broken, the facility would remain recognised and the

broken item should be reported to local management or TfL as applicable to be replaced.

c. Within Arriva, the Hampstead Heath facility being a TfL facility, will be recognised by default, but if it is not, there may be union/management consultation, with the expectation that it will be recognised if it contains the appropriate amenities. Since it is a TfL facility at Hampstead Heath, there would have been no need for any such union/management consultation.
d. Mr Harris is correct to say, therefore, that if Arriva had not lost the 168 route in 2015 or if they regained it now, and the drivers used Hampstead Heath once more for meal reliefs, they would be using a recognised meal relief facility and would not be eligible for meal relief payments.

13. Both Mr Topliss and Mr Harris were cross-examined in relation to the origin of the information they provided to the tribunal. Mr Harris conceded that the information he had relating to the meal relief payments Arriva came from Mr Topliss. Mr Topliss said that the information he provided to the tribunal was from his own general knowledge and the documentation provided within the bundle. There was no additional documentation available from any schedules officer/schedules department either within Arriva or the respondent.

14. Mr D'Auvergne' s evidence, within his 10 page witness statement, can be summarised as follows:
    a. Terms and conditions within the industry vary from bus company to bus company and from garage to garage the route to route. All bus routes have different facilities and therefore what makes a meal relief payment payable changes from bus route to bus route.
    b. Mr Quantrell in his letter of 12 March 2010 carved out the position of the drivers are Barking garage and states that 'the situation with regard to these drivers will be determined once the east London bus group pay review has been concluded', this shows that agreements are not the same from garage to garage.
    c. Arriva/the respondent had an obligation to produce documentation setting out the claimant's entitlement when the claimants transferred to the respondent in 2015.
    d. The terminology used in the email from Mr Quantrell of December 2005 refers 'meal relief scheduled away from garage' and considerable emphasis is placed upon this email.
    e. Reference is made to the letter from Mr Quantrell to Mr Scanlan of 11 April 2003.
    f. Reference is made to the email correspondence between David Fleet and Suzanne Stevens of June July 2012, relating to routes other than the 168, and in particular the reference to the schedules department holding information relating to adjustments that are made for meal relief payments. He highlights the lack of information from Arriva's/the respondent's schedules department and questions

why similar emails for the Tottenham and Ashgrove garage have not been released as the referred to the 168 route. If any changes were made there would at least be an email regarding the 168 route and meal relief. He believes that this would be found in the Arriva London North scheduling department as stated in the email by Suzanne Stevens regarding meal relief changes [page 77.]

g. The respondent had an obligation to set out for terms and conditions and other arrangements relating the rate of remuneration and the intervals on which remuneration paid. They have not done this. They have produced documents going back to 2003 but they've not produced the documents that the respondent were obliged to produce on the transfer of the claimants employment in 2015. Where are the documents for the 168 route?
h. It can be shown that drivers received meal relief payments for meal relief taken at Hampstead Heath and in August 2003 Hampstead Heath was not recognised by Arriva as a recognised facility
i. Reference is made to the handbook provided by the respondent in 2015.
j. Reference is made to the payslips of Mr Dyte [pages 117 – 119] ranging from 2008 to 2010, when meal relief for stops at Hampstead Heath have been previously paid.
k. Reference is made to the letter to Mr Khan dated 29 July 2010 [page 120] and in particular to the reference to payments and deductions and cross reference is made to Mr Dyte's payslip of Dec 2010 stating 'cash adjust' showing the Hampstead Heath was still not a recognised facility at that time.
l. Reference is made to Mr Dyte's payslips and ongoing references to 'cash adjustments ' including up to 25 September 2015.
m. The payslips show that meal relief payments have always been part of the 168 scheduling and these were properly payable and should have been paid to the claimants from September 2015 to date.
n. Reference is made and particular emphasis is placed upon [pages 136-139] minutes from the meeting of 27 November 2017 that the claimants had with Mr Harris, who was the operations director at the time. The minutes note "S.H 3.95 away from recognised meal relief" Mr Harris states "If Arriva choose to pay outside T+C their choice" Mr D'Auvergne told the tribunal that this shows Mr Harris acknowledges the fact that Arriva chose to pay the claimants the meal relief payment as claimed and it was now not open for the respondent to refuse to pay it.
o. Mr Harris seems to be confused between agreements between the respondent and their unions in relation to different companies garages and routes. Nothing has been produced from the respondent that shows any discussion relating to meal relief payments from the 168 route.

p. The respondent has failed to produce documentation relevant to the 168 route but has produced evidence from 2005 and from garages and routes that have nothing to do with this case.
q. Reference is made to the emails of 2005 and the claimants can show that they have received meal relief payment over a 12 year period. The respondent cannot show when Hampstead Heath became a recognised facility. There is no explanation as why there is no note in scheduling the respondent has not produced sufficient documentation.
r. The claimants terms and conditions should be protected under TUPE. Meal relief payments were paid the day/night before the transfer.
s. Reference is made to the ***Brown and Others*** case. This case is based on the same elements that we are discussing, meal relief. The clear difference between the claimants on those routes [pages 160-200] and his case is that the claimants on the 168 route have documentation to prove that meal relief payment has always been part of the scheduling regarding payment when taking a meal relief on the 168.

Deliberations and conclusion

15. The EAT's decision directs the tribunal to analyse the conditions in which the Claimants were entitled to be paid a meal relief payments by Arriva immediately prior to the transfer and potentially ascertain whether they were contractual. I make findings of fact on the balance of probability on the evidence placed before me. I make findings taking into account all witness evidence and considering its consistency or otherwise considered alongside the available contemporaneous documents.

What was the eligibility criteria for meal relief payment up to 2011?

16. The respondent does not dispute Mr Dyte's evidence that he was properly paid meal relief payments when he took meal relief at Hampstead Heath on the 168 route prior to 2011. I find that Mr Dyte was told when he commenced work, the correct criteria for being paid a meal relief payment was taking meal relief 'away from the garage'. This was correct at that time. At all times prior to 2010 the expressions in relation to meal relief payments at recognised facilities referred to facilities that were 'away from the garage'. Hampstead Heath was 'away from the garage' and obviously qualified under this criteria and meal relief payments were properly paid by Arriva. This is not now contentious.

17. I note that within my previous decision, considerable weight was placed upon this this finding and in the absence of evidence relating to any change within Arriva's position since this time, led me to find in the claimant's favour. The respondent say they concentrated on the position in 2015 and did not appreciate the argument made by the claimants relating to the period prior to

2011 in preparation for the previous hearing and had not addressed this historic position, leaving the tribunal with an incomplete picture.

What was the eligibility criteria for meal relief payment post 2011 and in particular in September 2015?

18. Did the criteria for meal relief payments of 'away from a garage' change? I have considered the available documentation surrounding 2011 negotiations. The background to these discussions is documented financial difficulties within Arriva, and anticipated job losses. Mr Scowen, proposed an "efficiency drive" and a "restructure". Within this proposal, the existing meal relief payment was written as "a supplement of £3.95 if relief is scheduled away from garage" but the proposal was "15 minutes' payment if relief scheduled away from facilities". I find that the proposal intended to introduce a change of the criteria from 'away from a garage' to the more restrictive 'away from facilities'. The 2013 General Information Details for Arriva London North full-time drivers signed off in March 2013 recordd meal relief "with supplement of £3.95 per duty for relief away from recognised relief facility" and supports the respondent's position that the change of criteria was adopted.

19. The claimants say that there has been no change to the criteria for paying meal relief payments as alleged. They claim that they were at no point informed of any such change nor were they made aware of any such change prior to their transfer to the respondent. I find that there was no communication directly to the claimants in relation to any change. This concession and acceptance of 'recognised facilities' would have been made by the union. The absence of knowledge on the claimants' part does not assist the claimant's argument. It is unsurprising, when considering numbers of bus drivers and lack of comprehensive documentation, that the drivers not practically affected by such a change agreed by the union would be unaware of it. It was found in ***Brown and others*** it is not uncommon for bus drivers to be unaware of the specific arrangements reached between management and Unite. The claimants have not sought to produce any evidence from the union as to the union's understanding of criteria for meal relief payments within Arriva, prior to the transfer to the respondents.

20. I have considered how the claimants or Arriva could have known whether a meal relief facility was recognised? It is open to any party to check with the trade union and/or local Arriva management. There is no evidence available from the union. There is no evidence to show any reasonable effort on the part of the claimants to check this position with the union. The claimants made repeated reference to the void of information from the schedules officer/ schedules department, who is expected to hold a list of changeover points used by Arriva which includes details of whether or not meal relief payments apply. Mr Topliss has given evidence, based on his knowledge and belief setting out the position as of September 2015 as it is understood by Arriva management.

21. It is common ground that in 2011 the claimants were informed that the meal relief change over point would be moved from Hampstead Heath to Old Kent Road. There was no private facility available for the drivers at Old Kent Road and therefore, regardless of whether or not the change as alleged by the respondent was made, meal relief payments continued to be properly payable to the drivers when they took meal relief at Old Kent Road. Therefore, the meal relief payments made to the claimants for meal relief taken at Old Kent Road up to 2015 and shown on the claimant's payslips as 'cash adjust', do not assist the claimants' case.

22. I find on the balance of probabilities, reviewing the entirety of the evidence, that criteria for payment of meal relief payments to the claimants did change from 'away from a garage' to the more restrictive 'away from recognised facilities'. This new criteria was adopted by the management and unions at some point following the proposal documentation of 2011 and before the issue of the 2013 drivers' information. In any event it had changed prior to the claimants' transfer to the respondent in September 2015.

23. I was referred Mr Dyte's payslip dated December 2011 as contained within his witness statement, and in particular the reference to 'cash adjust' said to relate to a meal relief stop at Hampstead Heath. The claimants say this is proof that meal relief payments continued to be made by the respondent following their alleged change in criteria. While there is no way of determining where the meal relief was taken by reference to the payslip, Mr Dyte has been consistent in his evidence throughout and I find that he is likely to have received that payment for meal relief taken at Hampstead Heath as claimed. This is the last payment made to Mr Dyte in respect of meal relief taken at Hampstead Heath. There is no evidence as to exactly when the change in criteria was introduced by Arriva, but I have found that the change has been adopted by 2013 at the latest. Even if it is the case that the meal relief payment to Mr Dyte in December 2011 was paid after the implementation of changed of criteria, I do not consider this payment alone to be of sufficient weight to cast doubt on the above findings. The most likely scenario is that the payment was made by the respondent in circumstances where there was no entitlement to that payment and paid in error. This is the scenario, referred to by Mr D'Auvergne and reflected within the minutes of the meeting held between Mr Harris and the claimant's [pages 136-139] where Mr Harris states "If Arriva choose to pay outside T+C their choice". I conclude that it would be open to Arriva, pre September 2015, or the respondent following transfer to properly apply the agreed correct criteria and refuse to pay meal relief for stops at Hampstead Heath. Correction of errors is not prohibited by TUPE and reference is made to the case of *Smith & Others v Trustees of Brooklands College EAT 0128/11*.

What was meant by Arriva in 2015 by a recognised facility?

24. I note Mr Dyte's argument that there needed to be a canteen where a hot meal could be provided for any establishment to be considered a recognised

facility. I accept that Mr Dyte is likely to have been told this when he commenced in employment and it corresponds with the information referred to by Mr Wilson in September 2006 [108], however I accept the respondent's evidence that the existence of a canteen is now the exception rather than the rule. I find the balance of probability, in light of the entirety of the evidence, that the link between the availability of a canteen where a hot meal could be provided to the drivers and meal relief payments had been changed by agreement between the union and Arriva management some time prior to the claimants' transfer to the respondent in September 2015.

25. Mr Topliss told Mr Harris in his email of 5 July 2018, and his evidence to the tribunal was that the criteria for a recognised facility at relief points away from the home garage was where there is a private rest room with seating, toilet facilities, access to water and/or a microwave oven, the main criteria being space away from the public. There is no available documentation reflecting this position. Mr Topliss' evidence is accepted on the balance of probabilities.

How is a facility recognised?

26. Mr Topliss says that recognition of a facility may be subject to union/management consultation, with the expectation that it will be recognised if it contains the appropriate amenities, with TfL facilities recognised by default. Mr Topliss says that since the Hampstead Heath facility is a TfL facility, there would have been no need for any such union/management consultation. There was no evidence produced by the claimants from the Union to cast any light on either the correct criteria for a 'recognised facility' triggering meal relief payments or how facilities came to be recognised as of September 2015. Mr Dyte relied only on what he was told at the commencement of his employment. Mr D'Auvergne told the tribunal that he had sought assistance from the union but, for reasons that were unclear to the tribunal, no information or assistance was provided. In the circumstances I am obliged to weigh up the available evidence on the balance of probability and conclude that a facility is recognised in the way as set out by Mr Topliss above.

27. I have also considered whether, if on a temporary basis a particular amenity was unavailable, the facility would cease to be recognised. Mr Topliss said that if a particular item is out of order (e.g. if the microwave is broken) the facility would remain recognised and the broken item should be reported to local management (or TfL as applicable) to be replaced. Taking the entirety of the evidence into account, and on the assumption that the main criteria of the public being denied access to the facility throughout continued to apply, Mr Topliss' evidence is accepted. I find that the broken appliance, for example a microwave, would not change the designation of an otherwise 'recognised facility'.

Is Hampstead Heath a recognised facility?

28. As Arriva, for operational reasons, moved its meal relief point away from Hampstead Heath in 2011, it did not have to determine this question. Did

Hampstead Heath provide space away from the public? Mr Dyte said it did not, as passengers could see the drivers through a window and knock on the door with drivers feeling obliged to answer and interact. I do not accept that the existence of a door or window or an ability to see drivers inside a room, in circumstances where the public do not have access to that room, detracts from the private nature of the space. This differs from public spaces where meal relief was taken by the claimants such as the public café in Old Kent Road. I find that Hampstead Heath meets the key criteria of being a private space away from the public.

29. The respondent's evidence that the Hampstead Heath facility had a private rest room with seating, toilet facilities, access to water and/or a microwave oven is accepted on the balance of probability. In the absence of any evidence to the contrary I also accept that Hampstead Heath is a TfL facility and likely to be a deemed recognised facility. Taking the entirety of the evidence into account, on the balance of probability I conclude that Hampstead Heath was in 2015 and remains a recognised facility for the purposes of assessing whether meal relief payments are payable.

30. In assessing the likely position as set out below, I have considered the employment tribunal judgment in *Brown & Others V London General Transport Ltd and others 3301904/2014.* This is not binding but covers similar ground to the present circumstances. The claimants accept that this case relates to entitlement to meal relief payments. The respondent was not one of the three respondents in the case, but the common transferor was Arriva.

Conclusion

31. In light of the above findings, I conclude, that in September 2015 immediately prior to the transfer, should the claimants have been required by Arriva to take meal relief at Hampstead Heath, they would not have had any entitlement to meal relief payments. As there was no entitlement to payment of meal relief payments for meal relief taken at Hampstead Heath immediately prior to the transfer, and the respondents apply the same rules, there can be no entitlement to meal relief payments for meal relief taken at Hampstead Heath since the transfer.

32. In light of the above findings, the tribunal adopts the respondent's submissions in that it is not necessary to consider whether the meal relief entitlements and/or the process for recognition of facilities were included within a collective agreement or whether those provisions were apt for incorporation into the claimants' employment contract. The respondent's position is noted in that it accepts that if these payments were 'properly payable' by Arriva prior to the transfer, they would have been 'properly payable' by the respondent on the basis that both companies apply the same rules and such payments would be recoverable as unauthorised deductions from wages under S13 of the Employment Rights Act 1996.

33. The Claimants are unable to show that they are entitled to a meal relief payment by the respondent in the sum of £3.95 per day when their meal relief is taken at Hampstead Heath. The claimants' claims for unauthorised deduction from wages and/or breach of contract in the alternative (where applicable) are unsuccessful and dismissed.

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Employment Judge Skehan

Date: 23 March 2021

Sent to the parties on: .....

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For the Tribunal Office