EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Mr S. Cox	v	Newrest Inflight UK Ltd.
(2) Mr G Smith		
(3) Mr B Majithia		
(4) Mr M White (all as lead claimants)		

PRELIMINARY HEARING

Heard at: Watford by CVP **On**: 27 and 28 April 2023

Before: Employment Judge George

Appearances
For the Claimant: Mr F Magennis counsel
For the Respondent: Miss A Crush Solicitor

RESERVED JUDGMENT

1. The claimants were not entitled under the terms and conditions of their contracts of employment with the respondent to be paid for a meal break in each shift.

2. The parties are to write to each other and the Tribunal within 14 days of the date on which this judgment is sent to them with proposals for the future conduct or disposal of the claims.

REASONS

1. At this preliminary hearing in public, I heard evidence from four witnesses.

   1.1 The respondents called Samantha Murphy (Administrative and Financial Director) and Harvinder Johal (HR Manager) who both adopted in

evidence witness statements which they have signed and upon which they were cross examined.

1.2 Mr Samuel Cox, the lead claimant of Group 1 claimants gave evidence with regards to an 18-paragraph witness statement dated 21 April 2023, which he adopted in which he was cross examined on.

1.3 Likewise, Mr Glen Smith, lead claimant of the Group 2 claimants, adopted a 19-paragraph statement and was cross examined on it.

2. The background to this litigation is as referred to in the previous preliminary hearing record which sets out the procedural history. I refer to that but do not repeat it so that these reasons should not be unnecessarily long.

3. At the hearing on 3 November 2022, by agreement, the claimants were divided into four categories. Mr Cox and Mr Smith are lead claimants of groups one and two respectively as I have already indicated.

4. Mr Bipin Majithia was unable to attend the preliminary hearing and he and the lead claimant in Group 4 rely on the same evidence and submissions as was advanced in support of the Group 1 and Group 2 claimants. The effect of the order sent to the parties on 8 November 2022 is that all other claimants are bound by my judgment in the cases of the lead claimants.

5. The parties had co-operated in preparing a joint bundle of documents which was 307 pages and page numbers in these reasons refer to that bundle.

6. During the course of Mr Cox's oral evidence he started reading from a document dated 20 August 2018 with which he had lately been provided. Although it had been provided to his solicitor, it had not been disclosed. It was admitted by agreement.

7. On Day 2 of the 2-day preliminary hearing, a further document was admitted by agreement. It was a Unite the Union report dated 21 March 2020 regarding a meeting with the respondent management on 12 March 2020. I'm grateful to the parties for the cooperative approach they took to the late disclosure of evidence.

8. After hearing the oral evidence, the parties exchanged written submissions and supplemented them and replied to each other's orally. Their written submissions are referred to as CSUB and RSUB respectively in these reasons.

9. Although it was originally hoped that the reduction of issues and the adoption by all lead claimants of each other's evidence would reduce the time estimate for the hearing, the need to deal with the late and unexpected disclosure of documents took time. In the end I was unable to reach a conclusion on the issues within the time available and reserved my decision.

The issues at the preliminary hearing

10. The issues to be decided had been clarified at previous preliminary hearings. As originally listed there were 2 issues to be determined as set out in paragraph 2 on page 67.

11. Miss Crush informed me at the outset of the April 2023 hearing that it was now accepted by the respondent that furlough pay had been calculated on the basis of basic pay from which a deduction had already been made for an unpaid meal break and therefore the second issue was no longer contested.

12. There were two other matters of common ground relevant to my decision which should be recorded. It was confirmed to me by both representatives at the outset of the hearing that, for the purposes of the preliminary issue to be determined this hearing, any differences between the contracts of employment which had led to the claimants being in different groups did not affect my decision.

13. The other relevant preliminary is that on 11 December 2022 the claimants' representatives wrote to the respondent and the tribunal and confirmed that "the Claimant's contractual entitlement to payment of meal breaks are an implied term of their contracts of employment." The respondent's representatives asked for clarification of that and in a letter that wasn't copied to the Tribunal, the claimant's representative said,

> "The Claimant's position is that the contracts of employments does (sic) not contain an express term in relation to paid meal breaks, and they assert that there was an implied term which override (sic) that express term."

14. As a result, the sole issue to be determined was whether the claimants were entitled under their contracts to be paid for a meal break during each shift by reason of an implied term.

Applicable Law

15. It is for the claimants to prove the existence of the implied term relied on. They rely on the principle that a term may be implied into a contract by a reason of custom and usage. They also advanced a secondary argument at the hearing that the implied term should be implied by reasons of business efficacy.

16. The parties have quoted extensively in their written submissions from a number of authorities but that which I found was most relevant to the decision that I had to make was the Court of Appeal decision in Park Cakes Ltd v Shumba [2013] IRLR 800 which analysed many of the earlier cases. In that case the Court of Appeal was considering whether enhanced redundancy terms had come to be part of the employees' contracts of employment by reason of custom and usage.

The Court upheld an EAT decision that a particular factual finding by the first instance Employment Tribunal in that case had, in effect, been perverse. Lord Justice Underhill does not say that in so many words in his judgment but, as set out in the headnote of the IRLR report, the EAT had apparently held that a finding that enhanced redundancy paid had been paid without exception had been evitable on the undisputed evidence and criticised the Tribunal's failure to make such a finding.

17. Of more importance for the present case, the Court of Appeal then went on to take the opportunity to make some observations about the proper approach to deciding whether or not particular term has been implied by custom and practice. Lord Justice Underhill, giving the judgement of the Court, analysed various authorities including Albion Automotive Ltd v Walker [2002] EWCA Civ 946 (which is relied on by the claimant) and Solectron Scotland Ltd v Roper [2004] IRLR 4 EAT (which is relied on by the respondent), before saying the following in paragraphs 34 to 36:

> "34: …the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles: the terminology of 'custom and practice' should not be allowed to obscure that enquiry.
>
> 35: Taking that approach, the essential question in a case of present kind must be whether, by his conduct is making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. … It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are of should be reasonably have been aware of it."

18. Lord Justice Underhill stressed that he was not setting out a comprehensive list of relevant circumstances, but stated that the following would typically be relevant

    a) on how many occasions and over how long a period, the benefits in questions have been paid;

    b) whether the benefits are always the same;

    c) the extent to which the enhanced benefits are publicised generally;

    d) how the terms are described;

    e) what is said in the express contract;

> "As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood."

f) Equivocalness, by which is meant whether the practice, viewed objectively, is equally explicable as an exercise of discretion rather than as compliance with a legal obligation.

19. The burden of establishing that the practice has become contractual is on the employee.

20. So as far as the principle of implying a term by reason of business efficacy is concerned, the approach is sometimes described as 'the officious bystander test' because the principle applies a term which is left not expressed because it is so obvious that it goes without saying. However, such a term should not be implied unless it is necessary, to give effect to the agreement.

Findings of fact

21. Mr Smith's continuous employment with Alpha Flight UK Ltd (hereafter, referred to as 'Alpha') started on 11 November 1997 so he has the longest continuous employment of the lead claimants. He seems to have had a number of roles, but latterly was employed as Food and Equipment Handler or FEH buffer. His contract was governed by terms and conditions at page 161 which came into effect on 11 March 2012. They include clause 9 (page 162) which provides

> "Your normal working days will be <u>As Per Rostered requirements agreed with your manager</u> each week.
>
> Your normal hours each week will be <u>As Per Rosta – 40 hours paid.</u>
>
> Rest breaks/meal breaks will be in accordance with statutory requirements and will be confirmed locally."

22. The parties have also adduced in evidence a contract of Mark Doherty which is dated 10 April 2000 between Mr Doherty and Alpha Catering Services Ltd (hereafter referred to as 'Catering'). The contract is on page 267. It is apparently common ground that this was the contract of the which Mr Doherty was employed at the point of the relevant transfer of his employment to the respondent. It expressly states that he is entitled to 1-hour unpaid meal break. It states that he has normal working hours of 40 hours per week. Mr Doherty is one of the claimants in the litigation (Case No: 3300226/2021).

23. Moving through the relevant chronology, in 2005, the Court of Appeal gave judgement in an appeal within a claim brought by employees against Catering. Mr Cox referred to that judgment in oral evidence as I'll explain below.

24. Mr Majithia started his continuous employment on the 21 July 2016. His contract is at page 233, and it provided (Cl.9 at page 234) that "your normal hours each week will be 40 hours".

25. Mr Smith gave evidence that during a round of pay negotiations, which appear to have been in 2018, the normal working hours were reduced by 30 minutes each week with no reduction in pay. This had the effect of giving the employees a pay rise. This was confirmed by the letter from Alpha with the subject "Alpha Flight BA Gatwick – Annual Pay Talks 2017/2018" dated 20 August 2018. This appears to set out at paragraph 2 the proposal for Year 2 of the proposed agreement period that there should be a "Reduction in the working the week by 30 minutes (based on a 40 hour week) with no lost of pay" and that the change was to be implemented with effect on 1 November 2018.

26. This would appear to have been effective to amend the contractual weekly hours of Mr Smith and Mr Majithia to 39.5 hours per week from the 40 hours originally in their contracts. So far as I'm aware, no updated written terms were issued but that was not expressly covered in the evidence before me.

27. Mr Cox started as a HGV driver on 15 April 2019. His contract (page 93 @ 94) states that his normal working hours are 39.5 hours per week and the wording which refers to breaks states "Rest breaks/meal breaks in accordance with statutory requirements and will be confirmed locally".

28. Just under 3 months later, according to Mrs Johal, the respondent started negotiations for a transfer of employment of the employees from Alpha to Newrest following the successful tender for a contract with British Airways Plc to provide catering services at Gatwick Airport. This led to a relevant transfer of an undertaking from Alpha to Newrest within the terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

29. At page 273 there are minutes of a meeting with payroll on 19 September 2019 which lead to the inference that the Newrest and Alpha teams agreed on action points that needed to be carried out to put the transitioning to affect. This document is produced by Mrs Johal (see her paragraph 5) where she describes it as going into detail on various operational and administrative matters. Certain payroll staff were to transfer to Newrest along with the transport staff.

30. One of the items on the minutes is at 9 'Additional items on payroll'. Seven points of detail which need to be incorporated into the Newrest payslips are detailed under that heading. The respondent relies upon the absence from those points of detail of any express reference to paid meal breaks as evidence supporting their assertion that they were not told during the negotiations prior to the transfer that the transport staff were legally entitled to paid meal breaks. They argue that it can be inferred that the Alpha did not consider themselves obliged to pay meal

breaks otherwise this would have expressively been mentioned in those negotiations, given that some specific obligations were mentioned.

31. Two individuals who were formerly employed by Alpha worked on the Newrest payroll system setting up what have been described to me as 'rules' in that system to process information about the work carried out and the working hours of former Alpha staff. These were to allow data to be inputted into the Newrest system following the relevant transfer in order that a payslip was created and to ensure that the transferred employees were paid.

32. Mrs Johal and Ms Murphy produced (page 276 to 279) screen shots of shifts apparently created by members of then Alpha payroll administration team including one whose job role was Control Office Team Manager.

33. This I accept to be evidence that the Alpha payroll employees, when working with the Newrest team prior to transfer, set up the system at Newrest so that it would automatically deduct 30 minutes from any person working a shift for more than 6 hours before the number of hours in the shift was multiplied by the hourly rate to get the wages for that day.

34. Ms Murphy stressed that Newrest were putting in place a new system for managing time and attendance for the Alpha employees where they would be clocking in, and queries arose where people using the system did not clock in correctly or out correctly.

35. It appears that the rule to automatically deduct 30 minutes from the length of the shift (referred to page 276 to 279) was created 'due to employees not clocking in and out for their breaks' (see the annotation to the screen shot added by the respondents witnesses).

36. These screen shots tend to suggest that these rules were created on 17 October 2019.

37. According to Mrs Johal (her paragraph 10), the Alpha payroll staff who would have been privy to the Alpha employee's entitlement set up the respondent's system specifically to deduct a 30 minute break for any shift where more than 6 hours were worked 'knowing that it was Newrest policy to insist on a break being taken during a shift in excess of 6 hours – something that not all companies insisted on'.

38. The assumption seems to have been made that employees would not clock in and out for their breaks so that the respondent should automatically deduct 30 minutes break in order that it was not paid (indeed the timesheets in evidence do not show clocking in and out mid-shift). The respondent witnesses place weight on the lack of objection they encountered from the Alpha payroll staff who set up this rule. They infer that a system which automatically provided for unpaid meal

breaks would not have been set up by payroll staff who knew that their colleagues were entitled to be paid for meal breaks.

39. Mrs Johal and Mrs Murphy were adamant that this had been added voluntarily by Alpha staff in order to make the wages to paid to transferred staff the same as their entitlement from Alpha.

40. The claimants challenged this equally strongly and suggested or imply that it had been done because the payroll staff in question were themselves transferring to the respondent and had been directed to deduct the amount because the respondent did not pay for breaks, in general. There is no direct evidence of that. The willingness of Mrs Johal to consider paying for rest breaks where it was contractually justified suggests that the respondent was not unwilling to pay something they were obliged to pay and that is consistent with the payroll rules being set up voluntarily rather than under direction.

41. Questions were raised about the absence of oral evidence from the payroll staff in closing submissions, but there was no cross-examination of Mrs Johal or Mrs Murphy to find out if there was any particular reason for not calling either of the two employees concerned and I do not draw any inferences from their absence.

42. The relevant transfer to the respondent took place sometime in November 2019. Mrs Murphy said that the employees transferred at different times. This would appear to be consistent with the final payslips provided to Mr Cox and Mr Smith from their employment with Alpha. Ms Murphy said, and it appeared to be common ground that the claimants and their colleagues were paid weekly in arrears.

43. There is only one payslip available for Mr Cox from his employment with Alpha which is stated to be for a pay date of 9 August 2019 (page 103). It records

Earnings	Units	Rate	Amount
Basic pay (weekly)	39.5	12.7000	501.65

44. Mr Cox explained that that represented a payment of basic rate of pay for 39 ½ hours work.

45. The Alpha payslips produced by Mr Smith are a run of 3 weekly payslips at pages 169 to 171. The pay dates are 1, 8 and 22 November 2019, so they are not a continuous run.

46. Newrest were not given time sheets by Alpha to show which shifts were worked by the claimants during these weeks.

47. These are the only payslips which have been disclosed in this litigation by any of the claimants.

48. So far as far I am aware, no one has contacted Alpha to see whether they would voluntarily provide copies of the timesheets or additional payslips and no application for a third-party order has been made.

49. According to paragraph 6 at Mr Smith's witness statement, the first date on which deductions were made was 20 December 2019. He alleges that before that date, even after the transfer, he was paid for 39.5 hours per week, and points to page 213, the Newrest payslip for 6 December 2019.

50. However, the corresponding timesheet for that week which is the week beginning the 22 November (page 214) which was paid on the Thursday of the following week, namely the 6 December. It appears that Mr Smith worked 6 shifts which has been accounted for as 53 hours basic and 13 hours of overtime.

51. If you work out the number of hours between the time on which he clocked in and the time in which he clocked out, on each of those shifts on page 214 and compare it with the number of hours basic in the column with that heading, it appears that 30 minutes had been deducted. For example, on Sunday 24 November Mr Smith clocked in at 11 am and clocked out at 8 pm. There are 9 hours between those two times. Eight hours and 30 minutes appears in the basic column. So he did not, apparently, work 39.5 hours in the week for which he received pay on 6 December 2019.

52. The appearance of 39.5 hours basic on the payslip of 6 December 2019, is consistent with Mrs Murphy's evidence that Newrest were informed that the operatives were paid 39.5 hours a week regardless of whether they had worked 4 or more shifts during the week to even out the peaks and troughs caused by the rotating shift pattern.

53. So, the timesheet for the week beginning Friday 29 November 2019 (page 215) shows Mr Smith apparently working 5 shifts, 4 of which appear to have been for 10 hours. However, in 'Basic' column he is credited with 9 hours 30 minutes of work to be paid at the basic rate. One of the shifts apparently worked in that week appears in the overtime column.

54. The payslip for that week (page 212) showing that he was paid on 12 December 2019 has 39.5 hours at the basic rate. It can be seen from the above that an analysis of the timesheets from Mr Smith's case appears to show that 30 minutes was being deducted from the number of hours between clocking in and clocking out in order to calculate his pay right from the first week after his employment transferred to Newrest.

55. I therefore reject Mr Smith's evidence that the first deductions were made in the payment on 20 December 2019. It is not supported by the documentary evidence.

56. Mr Cox's alleges that he was paid for 39.5 hours' of work prior to 3 January 2020.

57. The week beginning Friday 22 November 2019 (the first week when he appears on the Newrest timesheets) does not appear to be representative because Mr Cox was sick. The following week, that beginning Friday 29 November 2019, he only worked 1 shift of overtime (see page 143). Again, that timesheet appears to show 30 minutes being deducted from each shift before adding up the basic hours to get the total for the week. The related payslip is page 140.

58. I am not at this stage to reach a conclusion about whether unauthorised deductions were made or not but whether or not payments were made for meal breaks is relevant to the issue of whether there was a legal obligation to do so. The claimants' case is that they were paid for their meal breaks by Newrest until a particular point a number of weeks after the transfer, when their regular pay dropped and that this is explicable by Newrest deciding to introduce deductions. The inference they argue I should make is that Newrest knew that they legally required to pay for meal breaks – so paid them immediately after the transfer – and then knowingly removed them unilaterally.

59. If I accept the evidence of Ms Murphy and Mrs Johal that the rule introduced by the Alpha payroll staff described at para.32 above came into effect as soon as any individual employee started to be paid by Newrest, then that suggests that the belief on part of the respondent that the claimants were not entitled to paid meal breaks, was something that they have held all along. Such a belief would appear to be consistent with the entries on the timesheets for both Mr Smith and Mr Cox. Those timesheets are inconsistent with the claimants' assertions.

60. Between 27 and 28 December 2019, there was an exchange between the Newrest payroll administrator to a former Alpha payroll employee who had apparently newly been transferred to their role in Newrest. The former Alpha payroll employee, amongst other things, raised the following (page 281)

> 'As a last bit, one of the biggest complaints from our staff is the missing meal break payments, If this is never going to be paid can we do a letter to all transport staff explaining this case?'.

61. The response from the Newrest payroll administrator (page 280) is,

> 'As to paid breaks, I will need to leave this with HR and Peter to resolve as we don't pay breaks and if a letter needs to be issued HR will be able to do that. I have cc'd Harvinder in so that she is aware of the request.'

62. I do note that the formerly Alpha employee describes the meal break payments as 'missing' and that this is 'one of the biggest complaints from our staff'.

63. There was also an attempt by the respondent to put in place new rosters. I am not concerned with the detail of these but, one of the 2 documents added in evidence on day 2 of the preliminary hearing was a report which shows that the respondent wished to introduce a 5 days on 3 days off roster. This was not agreed to by the work force and page 284 shows a formal failure to agree being registered under the collective dispute resolution procedure by Unite the Union. This is clearly limited to the imposition of new rosters and there is no mention of paid/unpaid meal breaks at all.

64. The next document of significance is an email dated 18 February 2020 from Mrs Johal at page 287. It includes a table which includes Mr Smith's name, and the email begins 'below are the Alpha drivers who have paid breaks in their contracts'.

65. On 21 February 2020 (page 287) an administrator, who had transferred from Alpha to Newrest and who was the author of one of the rules referred to in para.32 above, circulated an email to Mrs Johal and Mrs Murphy with an attachment which he describes as 'my Findings for the back Paid for the Brakes (sic).' The Excel spreadsheet at page 289 was the attachment to that 21 February email. It sets out sums totalling sum £6,000, which are described in the column headed 'back pay'. It appears to be the total sum which would need to be paid had Newrest accepted that the individuals concerns were contractually entitled to paid meal breaks.

66. Mrs Johal explains these documents in her paragraphs 17. I accept that, as she said in oral evidence, had Mrs Johal thought that this back pay was payable at the time, they would have paid it because, as she explained, in the context of the relevant transfer of 300 employees, £6,000 was a comparatively small sum.

67. In para.17 of her statement she explains that, initially. she saw there was

> "one type of contract which 27 employees had, [which] stated that the employees were entitled to '40 hours worked, and 40 hours paid'. I initially saw this and thought that I needed further clarify (sic) what this clause meant."

68. I accept her oral evidence that she initially thought that the form of wording, as is in Mr Smith's contract, '40 hours worked, and 40 hours paid' meant that those 27 employees were a category of employees who were entitled to be paid for their meal breaks. However, on reflection Mrs Johal

> "determined that what the clause actually meant was that in order to be paid for 40 hours they needed to 'work' for 40 hours (and breaks did not count towards hours 'worked')".

69. At some point, she advised the union that the respondent would not pay back pay for meal breaks to any categories of employee and this was communicated to the transport department. A collective grievance was raised on 2 March 2020 (page 292). Some 77 employees were apparently on the collective grievance and they largely overlap with the 53 claimants in this multiple claim.

70. The grievance was presented shortly before the national lockdown due to the coronavirus pandemic and on 1 April 2020, the employees were placed on furlough. It is now accepted on behalf of the respondent that furlough pay was calculated on the basis of pay from which a half hour deduction for an unpaid meal break had been made.

71. The claimants allege that their furlough pay was calculated on the basis of their previous 12 weeks' pay. The respondent alleges that furlough pay was an average of all of the weeks since the relevant transfer - which was slightly more than 12 weeks. That is not a dispute that I need to resolve at today's hearing.

72. No answer to the collective grievance having been received, on 7 June 2020 a follow up email was sent by Jamie Major, the Regional Officer for Unite the Union (page 291).

73. On 28 August 2020, Mrs Johal responded to the union (page 300). She stated

> "I can confirm that I have reviewed contract of employment, the data provided as part of the TUPE transfer, and I can find no evidence of an agreement to paid meal breaks for staff.
>
> When the TUPE transfer was completed, it was not stipulated as a non-discretionary or negotiated payment. No staff, other than a few drivers have raised this issue. In light of this and in the absence of any evidence, I am confidence that Newrest have not unlawfully deducted any wages from salary payments."

74. By this time Mr Cox had been redundant. There is no challenge to the redundancy within these proceedings. It is well known that the coronavirus pandemic was particularly challenging for the aviation industry and other satellite industries that are dependent upon it. The other lead claimants have also been made redundant by the time of the hearing before me.

75. As I have already, said it is common ground that the claimants paid weekly in arrears on a Friday. Therefore, the hours worked in one seven day period Wednesday to Thursday were due to be paid on the Friday of the following week. Overtime was payable at 1.5 times basic rate.

76. It is relevant that Mr Cox was an HGV driver. He was bound by the Department for Transport regulations for rest breaks which mandate that HGV drivers should

have 45 minutes period away from work during the particular period. This does not necessarily need to be taken in a single break.

The parties' submissions

77. The respondent made the following submissions:

77.1 They did not accept that Alpha had, as a matter of fact, paid employees in the transport department for meal breaks and, if such payments were ever made, they did not accept that Alpha considered themselves legally obliged to make them.

77.2 They argued that the meaning of the express term "Rest breaks/meal breaks in accordance with statutory requirements and will be confirmed locally", found in Mr Cox's contract (amongst other places) was that the worker must receive a 20 minute uninterrupted break if they were working a shift of longer than 6 hours as mandated by the Working Time Regulations 1998. They argued that the express term did not support the inference that there was a requirement to pay for this break.

77.3 RSUB para 6 states that the contract indicates that the employer's intention as far as meal breaks goes is to comply with the law and no more. They point to Alpha issuing that contract to Mr Cox 6 months before the relevant transfer.

77.4 They argued that the evidence before the Tribunal does not prove that meal breaks were in fact paid because 'there is no evidence to corelate the few payslips provided with the actual working evidence for those weeks' (RSUB para 11).

77.5 They argued that, applying the other relevant circumstances set out by Underhill LJ in Park Cakes Ltd v Shumba: the scant evidence available does not show that the alleged benefits were always the same and there had been no publication of any intention to pay for breaks by Alpha prior to the TUPE transfer.

77.6 If there had been payment by Alpha to the employees which was not accepted, there was nothing to say that it was understood by both parties that that was an entitlement enforceable at law.

78. The claimants argued that the following:

78.1 The alleged implied term fulfils the requirement in the case law that it would be 'reasonable, notorious and certain'.

78.2 Reasonableness was demonstrated by the considerable objection provoked from the union when the payment was removed (in other words the level of objection meant that the term contended for was self-evidently reasonable).

78.3 Payment of meal breaks was the general rule rather than the exception and 'everyone' knew how paid meal breaks had come about (CSUB para 11).

78.4 The custom was clearly defined to be a 30 minutes paid per shift.

78.5 The proposed implied term was not inconsistent with the express term because the latter was silent on whether meal breaks would be paid for.

78.6 The Working Time Regulations 1998 do not require the break to be unpaid.

78.7 The claimants argued that if the implied term was removed the effect was one of a breach of the express term relating to contracted weekly hours (CSUB para.24). There was a point after which a hard ceiling of 37.5 hours for basic hours was imposed; thereafter the basic pay was reduced by 2 hours a week. The claimants argued that this corresponded to 4 X 30 minutes breaks for each of 4 shifts worked in a 7-day period which a claimants gave evidence was their normal pattern while at Alpha.

78.8 The claimants effectively alleged that it should be inferred that they were previously paid for meal breaks from their evidence that there was a reduction in basic pay equating to 2 hours a week from some point after transfer.

78.9 The claimants further alleged that the payment was communicated by Alpha to their employees in the payslips every week. All the payslips state that there is payment of 39.5 hours (subject to the respondent's argument one of Mr Smith's payslips). They do not specify whether those are hours worked or inclusive of lunch breaks.

78.10 Alternatively, "the 'custom' in fact constituted or was evidence of a formal variation of any express term that provided for unbreak paid breaks as the actual custom at Alpha and for at time at the Respondent, required paid lunch breaks on existing shift patterns if the workers were actually to be paid their contracted hours" (CSUB para 29). Mr Magennis accepted that he could not go behind the concession by the claimants' solicitors on their behalf that they did not rely upon an express term and it seems to me that this argument tested to breaking point his acknowledgment that the claimants were bound by that concession. In any event, since the only evidence of any alleged express variation was the custom relied upon as giving rise to the implied term, the argument adds nothing to the principle issue.

My Conclusions

79. I start my conclusions with considering what the correct interpretation of the express term should be. By this, I mean the express term in Mr Smith, Mr Cox and Mr Majithia's contracts of employment that "Rest breaks/meal breaks will be in accordance with statutory requirements and will be confirmed locally".

80. The claimants argue that Mrs Johal's initial interpretation of the contracts of some employees that they were entitled to meal breaks dented the respondent's now argument that the implied term contended for was contrary to an express term. "She could not reasonably have reached such a conclusion if, following her careful scrutiny, it was found to have contradicted any terms of the contract" CSUBs para.23. This presupposes that Mrs Johal made her judgment that meal breaks were payable based on an implied term. She didn't.

81. I accept her evidence that she initially thought that that was the meaning and effect of the express term. By implication, the claimants (and in particular the group 2 claimants whose contracts include the 40 hours worked 40 hours paid term) now accept that the express term does not have the effect of making those claimants entitled to paid mail breaks. Otherwise, the concession that the argument is based on an implied term only would not have been made.

82. Besides, the fact that Mrs Johal originally thought that that express term might mean that there was a legal obligation to pay those workers for meal breaks is only one piece of evidence about the meaning of that clause. The claimant's now accept that there is no difference in the cases run by the different groups of claimants. On the other hand, the express terms may not include an obligation to pay for meal breaks but neither do they expressly preclude it. In that sense the implied term contended for does not conflict with a specific express term. It is, however, inconsistent with the express term because the legal obligation is to provide statutory minimum required breaks and the statutory minimum is to unpaid breaks. Paid breaks are more than the statutory minimum.

83. The claimants argue that it is only if there is an implied term that meal breaks should be paid that the express term as to working hours makes sense. CSA para.24 "rather than the existence of the implied contradicting the express terms of the contract, rather it is if the implied term is removed that the effect is one of a breach of the express term relating to contracted weekly hours." That presupposes that "normal hours each week will be 39.5 hours" means that the individual will be paid for each of those 39.5 hours when they are required to be at work. It presupposes the existence of the implied term that needs to be proven and is not an argument I give weight to for that reason.

84. The argument also seeks to over complicates the term as to working hours. That has the effect that the normal hours that an employee will be expected to be at the unit, on site each week are 39.5 hours and during that time they are entitled

to breaks. In practice, the shift patterns meant that 39.5 hours were not worked every week by a full time employee who was not absent through sickness or annual leave. The question of whether those breaks are to be paid for is not expressly addressed in that the work "paid" or "unpaid" does not appear before the words "Rest breaks/meal breaks"

85. I reject the argument that it is necessary to imply a requirement to pay for those breaks on the basis that to do otherwise would put the respondent in breach of the term that normal hours are 39.5 hours.

86. Mrs Johal's gave evidence about her understanding of the reference to "in accordance with statutory requirements and will be confirmed locally." She understood that to mean that there was an obligation to provide statutory minimum breaks as to frequency and duration and that the time of breaks would be confirmed locally depending upon business need . It is very common, in my experience, for there to be such a term for the timing of breaks to be set by local managers and I found Mrs Johal's evidence that the term was common in the industry plausible and accept it.

87. I do not merely look at the express term about rest breaks to see what they meant but also consider its operation in practice and all the evidence of what the parties understood it to mean. Mrs Johal's evidence as to her understanding of it is that of person in the industry; she was not one of the parties to the contract at the time it was agreed on and during its operation prior to transfer.

88. When considering how the term as to rest breaks operated in practice I now turn to whether I accept the claimant's evidence that Alpha were as a matter of fact paying for meal breaks. A separate question is, if there were, were they doing so because they considered themselves to have a legal obligation to do so?

89. I have already referred to the scant payslips provided by the claimants from their employment by Alpha. There are no timesheets showing the hours worked in the weeks which are paid by those payslips. As I say at para.43 above, Mr Cox's (page 103) shows that he was paid Basic pay of 39.50 units at £12.70 per unit (or hour). The payslip is from week 18 and is dated 9 August 2019.

90. Mr Smith's first payslip (page 169) is dated 1 November 2019 and shows Basic pay of 39.50 units at £10.5128 per hour. The next payslip (8 November 2019) shows Basic pay of 39 units at £10.5128 and overtime at the standard rate of pay (OT-1) for ½ hour and at time and a half for 14.50 units. Mr Smith claimed that that entry for 39 units of Basic pay was an error and the ½ hour OT-1 was a correction. I find that implausible. Had there been a mistake in the week 31 payslip then it is far more likely that it would have been corrected in the week 32 payslip (which is unavailable). In the absence of timesheets it is not possible to understand what has happened. One payslip in the run is missing and then the 22 November 2019 payslip for Mr Smith (page 171) shows Basic pay for 39.50

units. Again, there is no evidence of the shifts that he worked that week (week 33).

91. A payslip for 39.5 units of basic pay is consistent with the contractual normal working week and with 3 shifts of 10 hours and 1 shift of 9.5 hours. There was evidence that Alpha operated a shift pattern which required those 4 shifts.

92. On the other hand, there was also indirect evidence from Ms Murphy that, at Alpha, they were paid 39.5 hours regardless of hours worked in that particular week.

93. The contract provided that most overtime was to be at 1.5 times the hourly rate (although the template provides for some exceptions which are not specified). If Alpha were not paying for breaks and the working hours of 39.5 included rest breaks then a payment for 39.5 hours would possibly include at least some overtime. However, the Alpha payslip at page 169 suggests that some overtime was at the basic rate as does Mr Cox's timesheet with Newrest at page 143.

94. The different pieces of evidence do not fit cleanly with either party's contention. In any event, the recurrence of a payment for 39.5 hours in 3 of the 4 payslips disclosed might be explained by Alpha's practice of smoothing out peaks and troughs rather than by the employee having been at work for 39.5 hours in the week in question during which they took paid rest breaks. The requirement for Mr Cox and Mr Smith to take different amounts of rest break is a complicating factor. In the case of Mr Smith, over 4 shifts he was entitled to 4 X 30 minute breaks. In the case of Mr Cox he was entitled to statutory breaks but there was a health & safety requirement that he take 4 X 15 minute breaks and 4 X 30 minute breaks. In the absence of timesheets I cannot judge between the two competing explanations of the hours on the payslips.

95. Mr Cox gave oral evidence that he was positively told by a trainer when starting his employment that they were paid for meal breaks. As Ms Crush points out (RSUBS para. 25) there is no good reason why such potentially important evidence was not mentioned before. His oral evidence that he had other payslips from Alpha in his possession turned out to be mistaken and that damages his reliability.

96. The claimants also rely upon the collective grievance as indicating that there were 77 individuals who thought that they had previously been paid for meal breaks. This must be set again 374 employees whose employment transferred. I consider that 77 could be described as a sizeable minority but I do not know how this number compares with the total numbers in the transport department.

97. I also weigh in the balance that Mr Cox apparently thought that they benefited from paid meal breaks because of the 2005 case. His employment started in 2019 and this may have been what he was told. The 2005 employment tribunal

claim is not directly relevant to the issues in the present claim. The respondent was Catering and the relationship between Catering and Alpha has not been explained to me. What is absolutely clear is that the 2005 claim wasn't about *being paid for* meal breaks. It established that the employees should be entitled *to take breaks* – that the "downtime" did not meet the statutory entitlement to breaks. That context is entirely consistent with updated contracts being issued to say that employees were contractually entitled to statutory breaks but the fact of the 2005 employment Tribunal claim is not particularly helpful in deciding whether the employees were entitled to be paid for the breaks.

98. I accept the respondent's submission that Mr Cox appears to have misunderstood the effect of the 2005 case; it may have been common understanding but it is an example of how a common understanding can be mistaken.

99. Overall, I'm not satisfied that the claimants were consistently paid for meal breaks. There are other possible explanations for the few payslips which have been provided. There is no proper or sufficient explanation for the lack of further payslips in evidence. Mr Cox's oral evidence was that they had been given to the Trade Union or to OH Parsons who are still representing the claimants. But he may not have been referring to his own payslips or to payslips from his employment by Alpha. The fact that he misremembered having his payslips at home means that I cannot rely upon his explanation for the lack of further payslips.

100. Mr Cox may have been told by a trainer that they had paid meal breaks but that does not mean that the explanation of what he was being paid was correct. It would have been in excess of that provided for in the express wording of his contract of employment.

101. I accept that express term refers to an entitlement to the statutory minimum breaks as to duration and frequency. In fact, those employees who, unlike Mr Cox, were not in any event entitled under the Working Time Regulations 1998 to more than a 20 minute break because of nature of their work) took a 30 minute break. I did not hear argument on whether it was an implied term by reason of custom and practice that a 30 minute unpaid break was permitted although there was evidence which could have supported that.

102. I accept Mrs Johal's explanation of the wording of email of 18 February 2020 (page 287) namely that when she stated that the names Alpha drivers had paid breaks in their contracts that was based on her assessment of the actual wording in the contracts such as Mr Smith's which stated that the normal hours were "40 hours paid" (see para.67 & 68 above). As I have explained, from August 2018 onwards, the normal working hours were 39.5 hours. I do not need to reach a conclusion on what that clause meant because it is not contended by the

claimants that it means that any particular cohort were entitled to paid breaks nor that the differences in contract wording is material to my conclusion.

103. I accept that the rules demonstrated by the screenshot at page 276 was genuinely the work of Alpha employees including the Control Office Team Manager and had been designed by them to implement on the respondent's system the entitlements that Alpha payroll believed former Alpha employees to be entitled to.

104. I accept that this system was implemented from the moment that the employment of a particular member of staff was transferred from Alpha to Newrest. An analysis of the timesheets tends to suggest that time was deducted from the hours between clocking in and out before the units to be paid are calculated right from the first week. I reject Mr Cox's evidence that immediately following transfer Newrest paid the breaks. They did not. Although the analysis is not entirely clear cut, in that the deductions made are not of 30 minutes without exception, there always were deductions. It is not the case that Newrest have ever accepted that they were obliged to pay for rest breaks and they have never paid any of the claimant's for rest breaks.

105. The change perceived by the employees is explicable by the evidence from Ms Murphy that there was an initial failure to paying 39.5 hours' per week in accordance with Alpha's custom to even out peaks and troughs of each week which was agreed to be changed. I accept that evidence.

106. How sizeable was the dispute about failure to pay rest breaks? Does it show widespread belief by employees that they were entitled to the payment? I accept that Mr Cox believed that they had been paid for rest breaks but in the light of all the other evidence I do not accept that that Alpha did so because they believed there was a legal obligation to do so. Mr Cox appears to have been mistaken about the basis for what he was told. A widespread belief on the part of the employees would not, in my view, be sufficient. In addition the evidence about the comparative scale of the dispute is equivocal. Although there were some 77 names on the collective grievance and 53 claimants have brought employment tribunal claims, as Mrs Johal explains in her para.19, that is not representative of the numbers who are actively committed to pursuing a claim that they had a legal entitlement to paid rest breaks.

107. On the other hand, the statement on the collective grievance is clear; it is clear that those signing are putting their names to a statement that they believe that it is unlawful behaviour by Newrest to fail to pay for rest breaks.

108. Drawing together those factors:

    108.1 I am not persuaded that Alpha did pay employees in the transport department for their meal breaks or that they considered themselves to

be legally obliged to do so. The evidence certainly falls short of showing that the benefit paid was always the same.

108.2 I find that Newrest did not at any time since the transfer pay the transport workers for meal breaks.

108.3 The express term does no more than state that there is a minimum requirement as to frequency and duration of rest breaks. It is surprising that the written terms are silent if the intention had been for the employer to be legally obliged to pay for rest breaks. All that they have agreed in writing to provide are the statutory minimum breaks and although the Working Time Regulations 1998 do not prohibit an employer providing more generous terms the statutory minimum rights are rights to unpaid breaks. To that extent, the proposed implied term is inconsistent with the express term.

108.4 The claimant's evidence falls short of showing that the implied term was notorious because the basis for Mr Cox's belief that there was an entitlement to paid breaks was a mistaken one (see paras.97 & 98 above).

108.5 This mistake also undermines his evidence that the implied term was notorious because 'everyone' knew how paid meal breaks had come about: if there had been a change in 2005 then surely Mr Smith would have given evidence about it and it appears that those who spoke to him about the 2005 employment tribunal claim were under a misapprehension as to what had been at issue. The suggestion that there was communication from Alpha to the employees of this entitlement by the payslips is rejected: the scant nature of the payslip evidence means that this argument is self-serving.

108.6 On the other hand, the evidence relied upon by the respondent of the way the Alpha employees set up the payroll rules suggests that there was not a widespread belief beyond some transport employees that this was a legal obligation. That is supported by the contemporaneous documentary evidence of the minutes at page 273 (see paras.29 & 30 above).

108.7 There is no evidence of a variation of this contractual term – in particular Mr Cox entered into his contract in March 2019, only a few months before the transfer and no evidence has been provided of any significant event during that time which is relied on as a variation.

109. Taking all that into account and reminding myself of the guidance from Park Cakes set out in para.18 above, I reject the claimant's argument that there was an implied term that they were entitled to paid rest breaks.

110. As to the subsidiary argument that it is necessarily by reason of business efficacy for such a term to be implied, I reject that also. The statutory system works perfectly adequately in many cases and there is no business need for a term such as that advocated for.

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Employment Judge George

Date: …12 July 2023……..

Sent to the parties on: ..18 July2023

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For the Tribunal Office

Case Number	Claimant Name
3300223/2021	Mr Samuel Cox
3300224/2021	Mr George Apiagyei
3300226/2021	Mr Mark Doherty
3300229/2021	Mr David Brown
3300230/2021	Mr Glyn Bates
3300232/2021	Mr David Radford
3300233/2021	Mr Jucio Da Costa
3300235/2021	Mr Barry Bryant
3300236/2021	Mr Ian Callagan
3300238/2021	Mr Roger Cranford
3300241/2021	Mr John Kearn
3300242/2021	Mr Khalid Mehmood
3300244/2021	Mr Trevor Paling
3300245/2021	Mr Ajay Sharma
3300246/2021	Mr Bryn Stephens
3300247/2021	Mr Mark Taylor
3300249/2021	Mr Giuseppe Todaro
3300250/2021	Mr Mark White
3300251/2021	Mr Peter Willcox
3300252/2021	Mr Allan Wright
3300253/2021	Mr Keith Young
3300254/2021	Mr Pawel Zak
3300255/2021	Mr Alex Taylor
3300256/2021	Mr Jonn Richardson
3300258/2021	Mr Barry Biggs
3300260/2021	Mr Andy Skinner
3300261/2021	Mr Nuno Gama
3300262/2021	Mr Malcolm Edwards
3300264/2021	Mr Neil Day
3300265/2021	Mr Scott Ingram
3300267/2021	Mr Huw Flynn
3300268/2021	Mr Szymon Radoslaw Krecz
3300269/2021	Mr Ian Nicoll
3300270/2021	Mr Michael Yardley
3300271/2021	Mr Mahendra Nayee
3300273/2021	Mr David Orchard
3300274/2021	Mr Jaunius Talacka
3300275/2021	Mr Terence McAloon
3300277/2021	Mr Stuart Penn
3300278/2021	Mr Alfred Barnham
3300279/2021	Mr Philip Breach
3300280/2021	Mr Glen Smith
3300281/2021	Mr Bipin Majithia
3300282/2021	Mr Stephen Ellis
3300284/2021	Mr Pawel Krzyzanowski

3300285/2021	Mr Uzman Rafique
3300286/2021	Mr Simon Callagan
3300287/2021	Mr John Tierney
3300291/2021	Mr Andrew Bennett
3300292/2021	Mr Andrew Parker
3300293/2021	Mr Lulezim Ballabani
3300294/2021	Mr Louis Alexis
3300295/2021	Mr Trevor Baker