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**: 11,12 and 13 February 2019

Before: Employment Judge Skehan

Appearances
For the Claimants: In person (With Mr D'Auvergne acting as lead claimant)
For the Respondent: Ms Norris, (respondent's In-house solicitor)

RESERVED JUDGMENT

1. The claimants' claims for unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 are successful to the extent set out below in respect of 'meal relief payments'.

2. This matter is listed for a remedy hearing on 1 November 2018 to be heard at Watford Employment Tribunal.

3. The remainder of the claimants' claims are unsuccessful and dismissed.

REASONS

1. At the outset of the hearing and again on various occasions during the course of this hearing, the Employment Tribunal with the assistance of the claimants, acting mainly through the first claimant, Mr D'Auvergne and the respondent's representative, examined the parties' list of issues in detail. As the claimants were unrepresented, considerable time was allowed by the

Employment Tribunal to ensure that the list of issues accurately reflected the claimants' claim. During this process, Mr D'Auvergne told me that the claimants claim did not include the following matters. To the extent these claims were included within the claimants' original claim, they were withdrawn by the claimants:

1.1. The claims relating to failure to pay correct hourly rate of pay (other than that caused by the dispute in respect of the method of calculation of such pay set out below) or the rate of pay at weekends set out in paragraph 4.3 4.4 4.5 4.6 4.7, 4.8 and 4.9 of the case management summary following the hearing of 06/11/2017;

1.2. Any claim in respect of discrepancy or errors between what has been paid by the respondent and what should be paid by the respondent other than that caused by the dispute in respect of correct method of calculation of the claimants pay set out below;

1.3. Any claim in respect of 'Safe Driving' payments;

1.4. Any claim relating to the calculation for bank holiday on Good Friday pay;

1.5. Any claim relating to 'stabilisation pay';

1.6. any claim relating to a percentage pay rise triggering uplifts in elements of pay that attract cash values.

2. The list of issues to be decided by the tribunal was as follows:

2.1. All claimants claim entitlement to a disturbance allowance of £2486.12 on their transfer to a new garage in Cricklewood in September 2015;

2.2. All claimants claim £3.95 per day meal relief in relation to meal relief taken at Hampstead Heath from 26/09/2015;

2.3. All claimants claim that their pay has been calculated incorrectly by the respondent with reference to Time on Duty, Enhanced Time on Duty payments, Spread Over Allowance and various contractual enhancements.

2.4. Mr D'Auvergne claims that he has not been paid his full contractual entitlement for work undertaken on Boxing Day, 26/12/2015.

3. At the commencement of the hearing the respondent's representative told me that although it is not recorded in the case management summary following the hearing of 06/11/2017, it was agreed by the respondent that the claimants' claims, to the extent that they were successful, would be paid up to the date of hearing and the claimants were told that they did not need to resubmit their claims on three monthly intervals.

The Law

4. The relevant statute in this case is the Employment Rights Act 1996 and in particular section 13 prohibiting unauthorised deductions from wages. I note that Mr Coward is the only claimant who no longer works at the respondent and his claim is also pleaded in the alternative as a breach of contract claim.

5. In relation to the applicable statutory limitation period, the claimants' are obliged to bring their claims to the employment tribunal before the end of the period of three months (subject to the relevant extension provided by the compulsory conciliation process) beginning with the date of the deduction complained of or, the date of the final deduction in the case of a series of deductions. Where the claimants have not complied with the

statutory limitation period, the claim will only be allowed to proceed where it was 'not reasonably practicable' for a complaint to be presented within the limitation period. In such cases the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

6. The further sake of completeness I also refer to the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended ('TUPE'). It is common ground that the claimants' employment was transferred from Arriva to the respondent on 26/09/2015 in accordance with the provisions of TUPE. All of Arriva's rights, powers, duties and liabilities under or in connection with the claimants' contracts of employment were transferred to the respondent. Ignorance of any such duties are liabilities that attach to the contracts will not prevent TUPE applying.

The Background

7. The has been considerable case management in relation to this claim. I note the original case management hearing conducted by Regional Employment Judge Byrne on 06/11/2017. The claimants wrote to the employment tribunal on 28/11/2017 clarifying their claims to include meal relief, enhanced time on duty, spread over allowance and unsocial and disturbance allowance payments. The claimant wrote to the employment tribunal on 08/06/2018 again seeking to clarify the issues and confirming that their hourly rates stay the same from Saturday to Friday.
8. This matter was listed for a preliminary hearing on 03/07/2018 where it was explained to the claimants that they must identify the sum claimed and set out how this sum is calculated. A further preliminary hearing was held on 04/01/2019 where the claimants were warned that 'issue creep' would not be permitted by the employment tribunal.

The Hearing

9. The claimants in this case are five bus drivers. Their claims arise from various disputes relating to their pay. During the first day of the hearing, there was considerable confusion between parties and it was difficult for the tribunal to understand the parties respective positions. It became apparent to me, that a complete worked example (including the final payslips provided to the claimant relating to the worked example) was required to allow the parties to coherently set out their arguments in respect of the correct calculation and to allow the employment tribunal to understand those arguments. At the commencement of day two, the respondent produced a worked example as requested and as set out below. I asked the parties to concentrate on this example when explaining their position.
10. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

11. The claimants produced a single short witness statement that was adopted by each claimant individually and accepted as their evidence in chief. Only Mr D'Auvergne and Mr Dyte were cross-examined. I heard evidence from Mr Harris, operations director of the respondent and Mr Topliss of Arriva on behalf of the respondent. Their witness statements were accepted as evidence in chief and both witnesses were cross-examined. All witnesses gave evidence under oath or affirmation. Although this was the claimants' claim, in light of the fact that the claimants were unrepresented and the subject matter of the claim was the calculation of pay, it was agreed that the respondent would present its evidence first.
12. It was common ground between the parties that:
    12.1. The claimants' employment transferred on 26/09/2015 from Arriva London North to the Respondent along with the transfer of the 168 bus route under the provisions of TUPE;
    12.2. The claimants' terms and conditions of employment enjoyed at Arriva were transferred to the respondent and considered 'protected';
    12.3. It was not alleged by the respondent that there had been any change to the claimants' terms and conditions of employment for any reason following the transfer;
    12.4. On transfer of the bus route 168, the claimants base was moved to the respondent's Cricklewood garage;
    12.5. the claimants were subsequently moved to Holloway, before returning to Cricklewood in 2018.
13. There was very little documentation available relating to the transfer. I note the letter from Arriva to the claimants dated 24/06/2015 confirming the transfer. It stated that Arriva have written to Metroline and asked them to confirm any 'measures' that Metroline intended to take. Arriva gave its employees the option to stay with Arriva. It goes on to state that if employees chose to transfer to Metroline the terms and conditions of their employment, except those relating to pension, will remain as stated in the employees' contract with Arriva. The employees were thereafter provided with a form where they could tick whether they wished to stay with Arriva or transferred to Metroline with Route 168. The claimants say that they received no information in relation to any measures taken by either party in relation to the transfer.
14. I refer to the respondent's letter dated 24/08/2017 addressed to the claimants from Harjit Sahota, the respondent's Head of HR. this letter states inter-alia:
    14.1. Metroline are aware that as a result of your TUPE the transfer, the terms and conditions are protected;
    14.2. The transfer does not give rise to an entitlement to disturbance allowance and this was conveyed to Arriva prior to your transfer. However, following on from the route transfer which was effective on 01/04/2017, and this is an internal transfer within Metroline, I am pleased to inform you that disturbance allowance will be paid to you for 52 weeks, effective 01/04/2017……;
    14.3. The weekend rate and unsocial hours that transferred with your employment have been amalgamated into your rate of pay…. You will therefore find that your pay is set out

differently from what would have been the case when you were employed by Arriva. On this basis no further payments owed to you;

14.4. Meal relief payment. As per the terms and conditions, a meal relief payment is paid if the following criteria is met: a supplement of £3.95 per duty for relief away from a recognised facility. Your recognised meal relief facility is at Hampstead Heath. It is my understanding that a meal relief payment is paid only if you are required to take your meal relief at any other destination as specified above. So far, this has not been the case and therefore no payments are due;

14.5. There were various other aspects raised by the claimants that were addressed by the respondent at this point and do not form part of these proceedings.

15. The claimants' terms and conditions of employment relating to pay were not clearly set out in any written document. I note that the correspondence in the bundle showing that the claimants had repeatedly (eg the emails of 10/12/2016 and 03/01/2017) requested such written information. I was told that by the respondent that the claimants were all issued with 'Section 1 statements', but these documents were not included in the bundle as they did not contain any relevant information in relation to calculation of the claimants' pay to the extent it was in dispute within this claim.

16. I was referred to the following documents:

16.1. general information details for Arriva London North full-time drivers: details as at January 2013. This document states, at the end on page 7, that, 'this is a summary of prevailing agreements re conditions and payments and is not contractual'.

16.2. General information details for Arriva London North full-time drivers. Details as at 01/01/2015. The document consists of nine pages and states at the end, 'this is a summary of prevailing agreements re-conditions and payments ….' This document does not have the added wording '.. and is not contractual.'

Disturbance allowance

17. Mr Harris told me that he was not involved in the administration surrounding the transfer of the claimants' employment to the respondent. However he believed that prior to the transfer, the respondent had told Arriva that the respondent would not pay a disturbance allowance on acquiring the route. Mr Harris said that this was declared as a 'measure' to Arriva. The only documentation produced by the respondent was the letter from Ms Sahota dated 24/08/2017 that refers to 'measures'. Mr Harris said that it was his experience that no disturbance allowance would normally be payable in a transfer situation and this is normally dealt with as a 'measure'. There was no information available in respect of any consultation that may or may not have been carried out by Arriva prior to the transfer.

18. Mr Harris told me that it was normal for the general information documents (the Arriva documents referred to above) to be considered contractual by the employees however the respondent did not accept these documents as

contractual. Mr Harris said that he considered the elements of the documents that are related to calculation of pay to be contractual.

19. In relation to disturbance allowance, the general information states:
    19.1. Disturbance allowance is payable to staff displaced as a result of garage closure, route transfer or transfer of excess staff. Payable for 52 weeks while employed. If it becomes necessary for a second or subsequent transfer to be made, a new disturbance allowance, based on the distance from the original garage and in place of the existing allowance, will be paid for a period of 26 weeks from the date of the second or subsequent transfer, or for the balance of the original 52 weeks, whichever is the greater.
20. There was considerable dispute between the parties in relation to when the claimants raised their alleged entitlement to the disturbance allowance. The claimant told me that they had continually raised the lack of payment of the disturbance allowance since the transfer. The respondent pointed to the lack of any documentation relating to the claimant's concerns relating to lack of disturbance allowance payment within the bundle.
21. In any event it was agreed between the parties that should the disturbance allowance have been payable it would have been due for a 12 month period between 26/09/2015 and 26/09/2016. The final date in this series of deductions was 26/09/2016. The claimant entered early conciliation on 05/06/2017 and issued their claim in the employment tribunal on 14/08/2017. The claims for unauthorised deduction from wages resulting from the disturbance allowance payment allegedly arising out of the transfer has been lodged at the employment tribunal nearly 24 weeks out of time.
22. I was referred to letter contained in the bundle from Mr D'Auvergne dated 01/11/2016, noting that Mr D'Auvergne had spoken to ACAS and referring to 'unlawful deduction from wages …. If it is not corrected I am within my rights to go to a tribunal'. The Claimants were asked why they have waited so long to bring their claim in respect of the disturbance payment to the Employment Tribunal. I was told that they had raised the issue with the Employer and tried to deal with the matter through ACAS.

<u>Meal relief</u>

23. It is common ground between the parties that the claimants would be entitled to meal relief in certain circumstances. The general information document provides for, 'a supplement of £3.95 per duty for relief away from a recognised relief facility'. On transfer of the route from Arriva to Metroline, the drivers of the took their meal relief breaks at Hampstead Heath.
24. Mr Harris said in his witness statement that Hampstead Heath had hot water, microwave, fridge, seating and toilet facilities and the respondent considered this to be a 'recognised relief facility'. In giving further oral evidence Mr Harris said that they were toilet facilities at Hampstead Heath. There was also locked storage used by Transport for London. There were tables and chairs with running water and boiler. The area was for the exclusive use of bus drivers. He could not recall if it had a fridge and was not aware of any time when the facilities have not been available to use by the bus drivers. Mr Harris said that meal relief payments should possibly be payable to the drivers in the event that Hampstead Heath was closed or not available, depending on the circumstances.

25. The respondent says that the central issue is the ability to get away from the public and take a meal relief in private. I was referred to email correspondence between Mr Topliss and Mr Harris relating to this issue where Mr Topliss said that if the facility described were available, there would generally be in agreement with the union that these were acceptable, and no allowance would be paid. Mr Topliss did not comment on whether the claimants had previously used the Hampstead Heath stop for meal relief when employed by Arriva and if so what their contractual entitlements were at that time or whether there were any agreed changes since that time. Mr Topliss confirmed that prior to the claimants' transfer they took their meal relief at Old Kent Road, where there was no such facilities, hence they were paid the meal relief allowance.
26. Mr Harris told me that Metroline had a union agreement (predating the claimants' transfer) providing that Hampstead Heath was a recognised meal relief facility. Other routes within Metroline that stop for meal relief at Hampstead Heath do not get paid meal relief payments. Mr Harris said that all staff get meal relief payments within Metroline, where the circumstances warrant the payment.
27. Within the claimants' witness statement it is stated that 'while employed by Arriva, 4r of the 5 to the employees took their meal relief at Hampstead Heath and Old Kent Road. Arriva paid the meal relief payment 'regardless of which end.' Mr Dyte gave further evidence during the course of cross-examination in relation to the background to the meal relief payments claim. Mr Dyte's employment with Arriva commenced in 2003. He explained that bus route 168 was extended from Elephant and Castle to Old Kent Road in approximately 2005. In approximately 2010 the drivers started to take their meal relief at Old Kent Road. However prior to this time, Mr Dyte took his meal relief at Hampstead Heath. Mr Dyte told me that he was paid meal relief by Arriva for meal relief stops taken at Hampstead Heath. Mr Dyke says that when meal relief was taken at Old Kent Road he was also paid meal relief payments. Old Kent Road was a garage where the bus drivers had a microwave, coffee machine and a place to sit down. There was no canteen or cooking facilities but it was described as more comfortable than Hampstead Heath yet the contractual meal relief payments were still paid by Arriva. At this time the drivers could also use the garage around the corner in Mandela Way. Mr Dyte told me that there was no fridge or kettle in Hampstead Heath. There was a microwave 'when it was working'. The facilities in Hampstead Heath had been closed on occasion.
28. I was referred to payslips as contained within the tribunal bundle from Mr Dyte dated July 2008 and December 2010, showing payments made under the heading of 'cash adjustments'. I was told that the cash adjustments referred to meal relief payments.

Calculation of pay

29. The claimants' pay is calculated in a complicated manner. The respondent's representative acknowledged that the formula for calculation of the claimants' pay as inherited from Arriva was complex and difficult to follow. The documentation available to the claimants to work out their pay was far from clear. Within the general information I note the following relevant parts:

- meal breaks: 40 minutes unpaid, remainder paid
- spread over: 40 minutes unpaid, remainder paid
- unsocial hours and over time rates:
  - time plus one third [Monday to Friday] between 0600 and 2100
  - time plus one third Saturday and Sunday, including [bank holidays] (nil on Boxing Day)
  - time plus one third of spread over on night duty is part
  - time plus one half of spread over on night duty Friday night/Saturday morning and Saturday night/Sunday morning

30. A document headed 'manual pay calculations' and signed by Mr Dyte on what appears to be 01/02/2016 states:
    - Time and duty (TOD)
      - this is the period from sign-on to the end of the first half of the day + the start of the second half to the sign off time.
      - If a duty has a TOD of less than 7hs 36mins, then drivers are paid 7hrs 6mins [this should read 7hrs36mins] as per agreements
    - Each duty has a minimum meal relief of 40 minutes
  - Spread over Allowance (SOALL).
    - Spread over (SO) is the total time from sign-on to sign off (including meal relief). If a duty has a SO of more than eight hours 16 minutes, they are entitled to a spread over allowance. So take the total SO and deduct 8 hours 16 minutes and the answer is the SOAL.
  - Enhanced time on duty ENTOD
    - If a duty has a scheduled TOD of more than seven hours 36…. This extra time as has an enhancement of ¼
  - Unsocial time – UT
    - TOD before 06:00 and after 21:00 Monday – Friday, and all day Saturday and Sunday. UT is paid at time plus 1/3. So to work out UT you will need to work out how much the duty accrues. E.g. if a duty starts at 05:00, it will have one hour UT. So 1hr/3 =20 mins. So UT will be 20 mins + the hour.

31. On the morning of the final day of the hearing, the claimants produced a document produced by the TGWU. The claimants had referred to this document in the witness statement however had not produced it in the bundle as they were not sure if it was in their favour. I explained to the claimants that they had an obligation of disclosure relating to all documentation that may be relevant to the issues to be determined by the employment tribunal regardless of whether or not they are in the parties' favour. The respondent noted that the document was a very old document from TGWU. It was not from Arriva or the respondent and in any event the worked example on the document appeared to be incorrect to the extent that the respondent would pay more than that noted in the example. There was some confusion between the claimants in relation to whether or not this document was relevant. The claimants deferred to Mr Dyte in relation to evidence surrounding the method of calculation of their pay. During his evidence Mr Dyte asked me to disregard the document and said that the claimants did not wish to rely upon it. In light of the fact that this is a union document rather than an Arriva or respondent document and both parties

have identified errors within it, I have disregarded this document for the purposes of this judgement.

32. I was also referred to a worked example that was set out in Mr Harris' witness statements. However this was example was based on Arriva documentation and although the method of calculation was expected to be similar it was not a worked example using an example from one of the claimants actual working hours supported by the claimant payslip. I noted that where Arriva documentation and payment were referred to, the parties remained in disagreement as to the correct calculation with Mr Dykes telling me that Arriva have their calculations wrong in any event.
33. The claimants' explained that:
    - 33.1. when the claimants are entitled to be paid 'time and 1/3', the respondent calculates the amount paid as '1/3' only and the respondents failed to pay the 'time' part. The respondent say that this is an error in calculation on the claimants' part and to include 'time and 1/3' where specified by the claimant's would be 'double counting' and result in an overpayment to the claimants.
    - 33.2. Time on duty (TOD) should be calculated as the start time to the finish time -40 minutes. When the respondent uses the alternative method of calculating time on duty, the basic payment for the claimant's meal relief time in excess of the unpaid initial 40 minutes is wrongfully omitted from the calculation.
34. The respondents set out their method of calculating the claimants' pay as set out below. All parties, at my request, doublechecked and agreed the basic arithmetic as witnesses were giving evidence during the course of the hearing to ensure that the basis of calculation could thereafter be properly examined and compared.
35. Mr Harris told me that the claimants' pay was worked out as follows news in an example day Monday 340 (page N of the bundle). 15.29 start time – (21.03 meal relief start - 21.58 meal relief finish) 01 .24 finish time.
    - 35.1. <u>Time on Duty (TOD)</u> was calculated as start time to meal relief start time, added to meal relief finish time to finish time. (15.29 to 21.03) + (21.58 to 01 .24)
      Time on duty was calculated at 9hrs 3min.
    - 35.2. <u>Enhanced TOD</u> (ENTOD) referred to any TOD that was above 7hrs 36 mins. In this case Enhanced TOD was 1hr 27. This is 87 minutes and ¼ of 87 minutes is 22 minutes.
    - 35.3. <u>Spread over allowance</u>
      Spread over allowance enhanced the hours worked over 8 hrs 16 and is said to cover the whole duty from start to finish, less a 40 minute meal relief allowance. In this example spread over allowance
      In this example, sign-on to sign off time is 9 hrs 58mins. 9hrs 58 mins minus 8hrs 16 is 1hr 42. 1hr 42mins represents the spread over allowance
    - 35.4. <u>Unsocial hours</u>
    - 35.5. There is an uplift for unsocial hours worked after 21:00 hours. In this example the unsocial hours uplift applies to 4 hours and 27 minutes (267 minutes). The enhancement for

unsocial hours is 1/3 of time paid, amounting to a further 1 hour 29.

35.6. The respondent calculates the claimants' pay by adding:
9 hrs 3 minutes of TOD
22mins ENTOD
1hr 42 mins SPREADOVER
1hr 29 min Antisocial
TOTAL 12hrs 36mins.

35.7. In decimalisation 12.6hrs x £13.45 (Claimants rate of pay). Total pay due £169.47. in relation to antisocial hours the calculation was 1 hr 29 mins or, in decimalisation,1.48 hours x £13 .45 (rate of pay) equalling £19.95.

35.8. It was noted that there was a slight discrepancy between the total calculated by the worked example and that recorded as paid to the claimant within the payslip. Mr Harris told me that this discrepancy was caused by the rounding up of decimal places within the worked example and the calculation used by the respondent's payroll system was more accurate. All

36. Mr Topliss' evidence corresponded and corroborated that of Mr Harris and he confirmed that the amount paid to the claimants' by reference to hours worked by the respondent was equal to that previously paid by Aviva.

37. The claimants maintained that the above example was worked out incorrectly. I found the claimants' evidence to be confused and contradictory at times in respect of the correct method of calculation. I requested that the claimants, in an effort to assist the tribunal explain their case with reference to the above worked example. The claimants told me that:

37.1. TOD was start time (15.29) to finish time (01.24) minus -40 minutes for meal relief. In this example TOD would be 9 hrs and 18 mins (NOT 9 hrs 3 mins).

37.2. ENTOD was calculated at 1hr 49mins (NOT 22 mins). The claimants calculation was 87mins x 1.25 being the uplift.

37.3. SpreadOver was agreed with the respondent at 1hr 42

37.4. Unsocial was 4 hours 27 minutes by uplift of 1 1/3 (NOT 1/3) = 5hs 58mins. 5hrs 58mins x 13.45 (rate of pay) = £79.80. (I note that the claimants later in the hearing referred to the unsocial hours as being 1hr 29 mins (adopting the calculation used by the respondent.))

37.5. The claimant calculated their pay as:
TOD – 9hrs 18 mins
ENTOD – 1hr 49 mins
SPREADOVER - 1hr 42 mins
Unsocial - 1 hr 29 mins
TOTAL 14hrs 18mins @ £13.45 = £192.34.
I note that if the claimant's alternative calculation in relation to unsocial hours is added (i.e. 5hs 58mins NOT 1hr 29) this gives an ALTERNATIVE TOTAL 18hrs 47min @ £13.45 per hr = £252.59.

38. The final matter considered was a discrete issue relating to Mr D'Auvergne's claimed entitlement to payment for 26/12/2015. It was the respondent's practice to pay 'triple time' for shifts worked on Boxing Day. However, where a full shift was not worked, the respondent paid for 'time worked' only. Mr D'Auvergne told me that on that Boxing Day 2015 he incorrectly noted his start time of his shift and he arrived late for his shift. He was paid for the time he worked only. Mr D'Auvergne told me that the respondent had investigated this matter and confirmed to him that he would be paid triple time as he had requested. There was no documentation available surrounding any investigation. Mr D'Auvergne said that the respondent later told him that as he was late arriving at work, he did not qualify for triple payment and would only be paid for the time worked. Mr D'Auvergne told me that although he was late for signing on, he was on time for his bus departure and there was no time lost to the respondent and should be paid the agreed triple rate. Other than correspondence confirming that the respondent declined to pay the additional amount, there was no documentation available. Mr D'Auvergne accepted that his claim was a one-off payment arising from 26/12/2015 and it was lodged with the employment tribunal approximately 8 months outside the statutory time frame. When I asked Mr D'Auvergne why this claim was not brought to the employment tribunal earlier he told me that he had been in contact with the respondent and everything had been done through ACAS.

Findings and Determinations

Disturbance allowance

39. I deal first with the matter of the disturbance allowance. I consider whether or not the employment tribunal has jurisdiction to hear this claim and whether it has been brought to the attention of the employment tribunal in accordance with the statutory provisions set out above. This claim relates to a series of deductions from the claimants' wages from September 2015 to September 2016. This claim was brought to the attention of the employment tribunal approximately 24 weeks outside the statutory limitation period.
40. It can be seen from the correspondence referred to above that the claimants were aware of the statutory provisions in relation to unauthorised deduction from wages and their ability to bring their complaints before the employment tribunal. The claimants explained their delay by reference to their dealings with the ACAS and the employer directly. I was given no satisfactory reason or explanation for why these claims were delayed to the extent that they were.
41. I note that the respondent's defence to these claims relates to 'measures' alleged to be taken by the respondent in connection with the TUPE transfer in 2015. The individual tasked with dealing with the administration relating to the TUPE transfer on the respondent's part is no longer employed by the respondent and no documentation was available to cast any light upon the respondent's defence. While it is obvious that 'measures' cannot be used as cover for changing terms and conditions of employment on a transfer, it is possible that 'measures' may have been communicated relating to the change of location in circumstances that did not trigger the disturbance allowance. The respondent's ability to defend itself in the circumstances, over three years after the transfer, is hampered by the passage of time.

42. I note that the discretion available to the employment tribunal to extend time in the circumstances is limited to circumstances where it was not reasonably practicable for the claimants to lodge their claim within the statutory time limit. In the circumstances, taking the evidence as a whole, I conclude that it was reasonably practicable for the claimants to launch their claim in accordance with the statutory time limits. These claims have been raised with the employment tribunal outside the statutory time limits and therefore I have no jurisdiction to determine them. If I am wrong and it was not reasonably practicable for the claimant to raise these issues in accordance with the statutory limitation period, the question is whether the claims are brought to the attention of the employment tribunal within a 'reasonable time' thereafter. There is no reasonable explanation as to why the claimants in this case rate waited for the length of time set out above and I conclude that in any event the claims in relation to the disturbance allowance arising from the transfer in 2015 were not brought to the employment tribunal within the statutory limitation period or, if it was not practicable for the claimants to do so, a reasonable time thereafter. The claimants' claims for the disturbance allowance arising from the transfer of employment from Arriva to the respondent are dismissed.

Meal relief.

43. Mr Dyte's evidence in relation to the arrangements for meal relief while he was employed with Arriva is accepted. The respondent's submission that the claimants' assertion that meal relief payments were made for stops at Hampstead Heath by Arriva was '..flatly contradicted by Mr Topliss' is incorrect. Mr Topliss was unable to comment on Mr Dyte's evidence that he received meal relief payments for meal stops at Hampstead Heath while employed by Arriva. I note that Mr Dyte produced his payslips showing an entry for 'cash adjustment' that he said referred to the previous payments for meal relief. 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 relief stops taken 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.
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 say 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 claimants' 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.

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 to the respondent, they 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 pre-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.

Calculation of pay

46. The way in which the claimants' pay is calculated is convoluted. This is the method of calculation that was inherited from Arriva and the issues were created by neither party. However, on the claimants' transfer to the respondent, the respondent changed how the claimants pay was set out, although it claimed that there were no changes to the actual amounts paid. The claimants say they had no issues with their pay while working for Arriva. I suspect that has there been some consultation with staff relating to these changes much of this current misunderstanding may have been avoided.
47. The method of calculating remuneration is a major part of the claimants' claim. It appears to me that there is an obligation upon the employer under section 1 (and section 4 in respect of changes) of the ERA to provide a statement of employment particulars to the claimants that shows the method of calculating their remuneration. I also note that while the claimants do not have any written document setting out the method of calculating their remuneration, the documentation they possess as referred to above was not accepted as contractual, prior to the concession made by Mr Harris under cross examination. Taking all of the above issues into account, while it is for the claimants to show their claim under the statutory provisions, I consider that responsibility for the confusion in relation to the claimants' pay lies predominantly with the respondent.
48. I'm grateful to the parties and Ms Norris for their help in assisting the employment tribunal to understand the details of the complaints. The evidence provided by Mr Topliss of Arriva alongside the respondent's evidence, added considerable weight to the respondent's defence.
49. I have carefully considered the claimants submissions in respect of the correct calculation of the pay. I asked the claimants repeatedly during the tribunal hearing to explain their claims to me with reference to the worked example produced by the respondent as set out above, and I have concentrated on this example within my deliberations.
50. The claimants, within their cross examination of the respondent's witnesses repeatedly claimed that they were entitled to be paid for the entirety of their working day, less 40 minutes as their TOD. They claimed that the respondent's calculation of TOD was therefore short. In the worked

example, the claimants said a 15 minute portion of their meal relief, where it was common ground that they were entitled to be paid, was not being paid as it did not fall within the respondent's calculation of TOD. Using the worked example, I note that it includes within its basic hours payment calculation for TOD, the time between 15.29 start time to 21.03 (meal relief start) and from 21.58 (meal relief finish) to 01 .27 finish time. TOD amounts to 9 hrs 3 mins. Therefore the claimants' entire working day (less the 55 minutes meal relief between 21.03 and 21.58) is included within the TOD initial calculation.

51. It is common ground between the parties that the first 40 minutes only of the claimants' meal relief is unpaid. Therefore, within the TOD initial calculation there is 15 minutes of time (55 minutes meal relief duration less 40 minutes unpaid meal relief) that is not included within the TOD calculation.
52. Spread over allowance enhances the hours worked over 8 hrs 16 (being the basic duty shift of 7hrs 36 mins and the unpaid 40 mins meal relief) and is said to cover the whole duty from start to finish, less a 40 minute meal relief allowance. In the worked example, spread over (calculated by reference to, sign-on to sign off time) is 9hrs 58mins. 9hrs 58 mins minus 8hrs 16 is 1hr 42mins represents the spread over allowance. The spread over allowance is paid on a flat rate and in this worked example catches the meal relief time in excess of 40 minutes (in this case 15 minutes) and time spent driving in excess of the basic shift of 7hrs 36 mins.
53. Looking at the above calculation, I conclude that this 'missing' 15 mins of the paid meal relief is accounted for within spread over allowance. I conclude that the respondent includes, within its calculation of pay, the claimants' entitlement to basic hourly rate for the entirety of their shift from start time to finish time minus 40 minutes of unpaid meal relief.
54. I examined the claimants' claim that the respondent had incorrectly calculated the Unsocial hours entitlement by applying an uplift of 1/3 when it should have applied an uplift of 'time and 1/3'. In the worked example, the unsocial hours (those worked after 21:00 hrs i.e.21:00 – 01:27) amount to 4 hours and 27 minutes or 267 minutes. These hours, to the extent that they attract pay (as the first 40 minutes of meal relief i.e. 21:03 to 21:43 is unpaid) are already included within the TOD and spread over allowance set out above. Spread over allowance and TOD together covers all of the hours worked by the claimant (and an additional amount in excess of the basic shift of 7hrs 36 mins) before adding the specified additional enhancements. In the worked example the correct enhancement to be added in respect of unsocial hours is 267min/3 = 1hr 29min not 267min x 1 and 1/3 =5hrs 58mins as claimed by the claimants. I conclude that when adding the unsocial hours enhancement, the correct calculation is the fractional increase of 1/3 of the relevant time. The basic 'time' allowance has already been provided for in the calculation by reference to the TOD and spread over allowance set out above. I conclude that the claimants' assertion that unsocial hours enhancement should be worked out at an additional time and 1/3 would be 'double counting' of the 'time' element as identified by the respondent.
55. The other area of contention between the parties was the correct calculation of ENTOD. The parties were in agreement that ENTOD referred to any TOD that was above 7hrs 36 mins. and such time was said to be paid at time and ¼. In the worked example the ENTOD was agreed at 1hr 27. The

respondent calculated the enhancement as 87min/4= 21.75mins. the claimant argued that the amounts to be added for ENTOD was 1 hr 49mins, reflecting time and ¼ . For the same reasons as set out above in relation to my findings of unsocial hours enhancement, I conclude that the claimants are incorrect in this calculation, to include ENTOD at 1hr49 mins would amount to double counting the original time being one hour 27 minutes that was included in TOD.

56. For the sake of completeness, I note that the respondent's final calculations in the worked example do not exactly match the payslip. I accept Mr Harris' evidence that the reason for the discrepancy is the rounding up/down used within the worked example when compared to the more accurate decimalisation used by the respondent to calculate pay. In any event any discrepancy between the payslip and the final amount due to the claimant to the extent that it is not caused by the disputed calculation, falls outside the remit of the claimants' claims.
57. I conclude that I agree with the respondent's method of calculation are set out above. For the reasons set out above the claimants' claim in relation to the method of calculation of their pay fails and is dismissed.

Boxing Day pay

58. The final issue that I have considered is the discrete issue relating to Mr D'Auvergne's entitlement to Enhanced pay on Boxing Day 2015. The first aspect that I consider is whether or not the employment tribunal has jurisdiction to hear this claim and in particular whether this claim has been brought to the employment tribunal in accordance with the statutory time limits are set out above. This is a one-off payment arising from December 2015 and the deduction was made, at the latest in January 26. Mr D'Auvergne tells me that this matter was the subject of an investigation that was decided in his favour at an early stage. The respondent has no information in relation to any such investigation. Mr D'Auvergne was aware of the provisions in respect of unauthorised deduction from wages and his ability to bring his claims before an employment tribunal as referenced in the above correspondence. Mr D'Auvergne referred to this claim as being 'out of the time limit' in August 2016. I received no satisfactory explanation as to why these claims were not brought before the employment tribunal within the statutory limitation period or why Mr D'Auvergne waited until June 2017 to commence early conciliation in respect of his potential claim.
59. I note that the discretion available to the employment tribunal to extend time in the circumstances is limited to circumstances where it was not reasonably practicable for Mr D'Auvergne to lodge his claim within the statutory time limit. In the circumstances, taking the evidence as a whole, I conclude that it was reasonably practicable for Mr D'Auvergne to launch his claim in accordance with the statutory time limits. This claims has been raised with the employment tribunal outside the statutory time limits and therefore I have no jurisdiction to determine it. If I am wrong and it was not reasonably practicable for the claimant to raise this issue in accordance with the statutory limitation period, the question is whether the claim is brought to the attention of the employment tribunal within a 'reasonable time' thereafter. There is no reasonable explanation as to why Mr D'Auvergne waited for the length of time set out above and I

conclude that in any event the claim in relation to payment for Boxing Day 2015 was not brought to the employment tribunal within the statutory limitation period or, if it was not practicable for the claimant to do so, a reasonable time thereafter. Mr D'Auvergne's claim for payment relating to Boxing Day 2015 is dismissed.

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Employment Judge Skehan

15 March 2019
Date: ……..

Sent to the parties on: 18 March 2019

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For the Tribunal Office