

BETWEEN:

- (1) ADRIAN STUART GREVILLE CRABB
~~(2) ANG JANGBU SHERPA~~
(3) KRISTIAN DANIEL ALFRED GAVIN
(4) SIMON PETER RAWLINSON
~~(5) GREGORY DAVID BOOTH~~
(6) STUART SNEATH
~~(7) HELEN HAY~~
(8) MELVILLE CHARLES BISHOP

Claimants/Appellants

-and-

TUI AIRWAYS LIMITED

Defendant/Respondent

APPELLANTS' APPEAL REPLACEMENT SKELETON
ARGUMENT

All references to paragraph numbers are to the first-instance judgment, set out as [paragraph X]

Page References:
CB - Core Bundle
SB - Supplementary Bundle

INTRODUCTION

1. This is an appeal against the decision of the High Court dated 11 October 2024 in which the Appellants' claims against the Respondent were dismissed. The Appellants invite the Court of Appeal to allow the appeal on each of the grounds set out below. CB 78-168

OVERVIEW

2. The Appellants in this case are pilots, employed by the Respondent. Each of the Appellants is unable to fly commercial aircraft due to illness and is therefore receiving payment from the Respondent pursuant to an income protection scheme. All of the Appellants began their absence when one scheme applied, Permanent Health Insurance ("PHI"), and were then shifted to a less advantageous scheme, Personal Income

Protection (“PIP”), by the Respondent following a collective agreement between the Respondent and the Appellants’ trade union (“BALPA”).

3. The Appellants argued before the High Court that the PHI Handbook (“the Handbook”), which contained the various terms of PHI, was a contractual document and was incorporated into their contracts of employment. This included a provision that they would receive PHI benefits until age 65 or, if higher, their state pension age. They further argued that pursuant to clause 5.1 of the Handbook, they were protected from changes such as the shift from PHI to PIP, as they were ‘in claim’ and so the benefits under the policy had crystallised. The Appellants also argued that the process by which the Respondent had removed PHI and introduced PIP breached the implied term of trust and confidence, although they are not appealing the decision of the High Court in relation to those aspects of its claim. CB 202-204
SB 51-61

4. The Appellants appeal in respect of two aspects of the first-instance judgment handed down by HHJ Graeme Wood KC (sitting as a judge of the High Court) on 11 October 2024: CB 204
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(1) The decision that clause 5.1, having been incorporated into the Claimants’ contracts of employment, nevertheless did not prevent the variation of their PHI benefits (Grounds One to Four).

(2) The decision that the Claimants’ entitlement to PHI benefits ceased at the age of 65 (Grounds Five to Seven).

GROUND ONE

5. The High Court held, as submitted by the Appellants, that clause 5.1 of the Handbook was a contractual term and that it was incorporated into each Appellant’s contract of employment [paragraph 309].

6. Having properly made those findings, the learned judge incorrectly interpreted the contractual effect of clause 5.1 and, in particular, the last sentence of clause 5.1.

7. The learned judge wrongly held that clause 5.1 of the PHI Handbook applied only to ‘unilateral’ changes made to the Appellants’ contracts of employment and therefore did not apply to collective bargaining [paragraphs 251-252 and 261-262].

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CB 150-151

8. The wording of clause 5.1 reads as follows (emphasis added):

5.1 Can the Plan be altered or discontinued?

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*Your Company and the Plan Manager hope to continue the Plan indefinitely, but must necessarily reserve the right to modify, suspend or discontinue the Plan if future conditions, in their opinion, warrant such action, subject to employee consultation as appropriate. **Benefit already being paid at the date of any change will continue and will therefore not be affected by any such change.***

9 The leading modern case on the proper approach to the interpretation of written contracts is contained in Lord Hoffmann’s speech in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] All ER 98 at 114-5. In particular, in reference to the construction of individual words in a contractual document as follows:

“The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.....The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”’ (at paragraph 19).

- 10 In Chartbrook Limited & Anor v Persimmon Homes Limited & Anor [2009] AC 1101 at 1112, Lord Hoffman reiterated that whilst it is open to the court to find that ‘something must have gone wrong with the language’, such a proposition is not easily accepted:

“The House emphasised that “we do not easily accept that people have made linguistic mistakes, particularly in formal documents”...but said that in some cases the context and background drove a court to the conclusion that “something must have gone wrong with the language”. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.

It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out...”

- 11 The Supreme Court has also held in Rainy Sky SA & Ors v Kookmin Bank [2012] 1 All ER 1137, at paragraph 23 of Lord Clarke’s judgment, that “*where the parties have used unambiguous language, the court must apply it*”.

- 12 In this case, the learned judge held that had a ‘carve out’ from collective bargaining been intended through clause 5.1, “*specific wording to this effect might reasonably have been expected*” [paragraph 262]. The opposite is true. The second sentence of clause 5.1 is entirely clear that benefit already being paid at the date of any change will continue. If the contracting parties wished to qualify that contractual provision, express wording to the effect that collective bargaining could vary PHI benefit for those in-claim should be expected. Its absence is a point which tells in favour of the Appellants but was considered by the learned judge to tell against them.

- 13 The question that introduces clause 5.1 provides further reinforcement to the Appellants’ interpretation. The clause asks, ‘*Can the Plan be altered or discontinued?*’, clearly contemplating the most extreme form of termination. The response first addresses the position in general, confirming that the employer reserves the right to ‘*discontinue*’ the Plan. It then sets out a distinct and express protection for those already in claim: ‘*Benefit already being paid at the date of any change will continue and will therefore not be affected*

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by any such change.’ The phrase ‘*will continue*’ is the direct antithesis of ‘*discontinued*’, and its unqualified use provides a clear and absolute assurance. The clause is structured so as to permit discontinuation of the Plan generally, whilst guaranteeing continued benefits for those already receiving them, thereby ring-fencing ‘in-payment’ benefits from all subsequent changes, up to and including discontinuation.

14 Such an approach also aligns with the now well-established line of authority concerning PHI entitlements, setting out that once an employee’s right to receive PHI benefits has crystallised, those benefits cannot be altered, reduced or withdrawn unless the employer has explicitly, clearly and unequivocally reserved such a power within the contract.

15 Further, the interpretation favoured by the learned judge defeated the purpose for which the scheme was designed, namely to function as a permanent scheme of insurance for the Appellants. As set out within section 1.1 of the PHI Handbook itself, the scheme was available due to the fact that support benefits from the state are “*not guaranteed*” and was provided to employees “*to increase your own security*” and “*provide financial protection*”, which is consistent with the very name of the policy – i.e. that it was to act as ‘insurance’. If the learned judge’s interpretation is correct, the overall result would be that the Respondent and BALPA would be free to agree to change the Appellants’ income to whatever level they saw fit despite the fact that the insured event had already occurred. Such an interpretation strips all meaning from the terms permanent and insurance and removes all security and financial protection from the Appellants.

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16 Such an outcome flies in the face of the reasoning recently set out by the Supreme Court in Tesco Stores Ltd v USDAW & Ors [2025] 2 All ER 565, in which the jointly authored judgment of Lord Burrows and Lady Simler set out at paragraph 40 the ‘underlying’ problem with the appellant’s submissions in that case, namely that the interpretation argued for “*gives no substance to the express promise...that retained pay 'will remain a permanent feature of an individual's contractual eligibility' (where it is accepted that eligibility means entitlement). First, an employee's contractual benefits only ever last as long as the contract providing them lasts. If this is all the word 'permanent' means, it adds nothing and could simply be deleted from the clause*”.

17 Yet further, the first sentence of clause 5.1 provided a restriction on the right of the employer to “*reserve the right to modify, suspend or discontinue*” the Plan as that right was subject to employee consultation. Three points follow:

- (1) The right in the first sentence included an express qualification relating to consultation. It follows that, similarly, if a qualification in the second sentence of clause 5.1 was part of the contractual term (as was found by the learned judge), it would have been expressly set out. The absence of express wording reflects the true position – that clause 5.1 was intended to apply to protect benefits regardless of how any change to them was proposed to be introduced.
- (2) The reference to ‘employee consultation’ in the first sentence of clause 5.1 must be a reference to collective bargaining as the employer is precluded from negotiating contractual terms directly with the employee given the effect of TULRCA 1992 (Kostal UK Limited v Dunkley & Ors [2022] 2 All ER 607). In those circumstances, the parties had plainly considered collective bargaining in relation to clause 5.1. It follows that, given the absence of express words, no such restriction was included in relation to the second sentence of clause 5.1 and the express carve out to prevent variation of the benefits of in claim pilots does not allow for variation by way of collective bargaining.
- (3) The Respondent’s position in this regard is internally inconsistent. In resisting the Appellants’ claim for breach of the implied term of trust and confidence, the Respondent placed considerable reliance on the assertion that it was under no obligation to consult directly with individual pilots and that consultation via BALPA sufficed. As recorded at paragraphs 193 and 201 of the judgment, the Respondent expressly submitted that collective bargaining constituted a consensual process in which BALPA acted on behalf of the pilots, thereby displacing any expectation of individual consultation. Yet, the Respondent now, it is assumed, must contend that the reference to “employee consultation” in clause 5.1 should not be interpreted as encompassing collectively bargained changes. The Respondent cannot simultaneously affirm the sufficiency of collective consultation to defeat one head of the claim while denying its applicability when it would engage a contractual protection. This contradictory

stance, endorsing collective consultation when convenient and rejecting it when adverse, amounts to a desire by the Respondent to have their cake and eat it too.

- 18 Similarly, the fact of earlier collective negotiations around a scheme known as GIP, in which the Appellants and other ‘in-claim’ pilots had been expressly excluded from any changes [paragraph 38], was held not to assist the Appellants when, with respect, it clearly did. The learned judge ruled [paragraph 264] that the earlier collective negotiations were in line with his view that the Appellants would be excluded from any unilateral changes but not from ones with which BALPA agreed. It is not disputed, however, that the exclusion of the Appellants from any changes resulting from the earlier collective negotiations was not contingent upon BALPA agreeing the changes. They were ‘carved out’ from any proposed changes from the beginning. The same was true in respect of other collective negotiations which might have affected their benefits, such as those relating to the Covid Mitigation Agreements [paragraph 45]. It is the Appellants’ case that the interpretation of clause 5.1 by the Respondent was identical to their own, until the Respondent placed itself in a difficult financial position by cancelling its comprehensive insurance policy due to a premature assumption that pilots would vote for the GIP scheme [paragraph 41].
- 19 In fact, the learned judge correctly recognised the applicable principle at paragraph 238, namely that “*contractual intention can be derived from the practice of the parties in the application of the provision*”. However, he then erred in law by failing to apply that principle to the undisputed and consistent course of conduct adopted by the Respondent over several years. The Respondent’s longstanding practice of excluding in-claim pilots from changes negotiated through collective agreements provides compelling evidence of the parties’ shared understanding of the clause.
- 20 Further, the learned judge simply did not take into account a submission put squarely before him by the Appellants [paragraph 167], to the effect that the collective agreement entered into by BALPA and the Respondent expressly recognised the force of clause 5.1 of the PHI Handbook. Specifically, paragraph 3.27 of Schedule B to the Memorandum of Agreement between BALPA and the Respondent stated that “*in accordance with section 5.1 of the PHI Handbook, a legacy claimant’s achieved PHI EPIS will continue and will therefore not be reduced. A legacy claimant will continue to receive escalated benefits*”. It is difficult to see

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how an express mention of clause 5.1 within the collective agreement itself squares with a decision that clause 5.1 has no impact upon collective bargaining. At the very least, the failure to deal with this point was an error of law. Indeed, the BALPA representatives themselves acknowledged that Clause 5.1 extended protections to the collective bargaining process but wrongly sought to argue that this protection was only limited to specific parts of the entitlement [paragraphs 95, 96].

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21 The learned judge also erred in law in holding that whilst those ‘in-claim’ pilots whose benefits were being funded by the insurer (i.e. those under 60) were additionally protected by the crystallisation of their benefits, those whose benefits were being funded by TUI (i.e. those over 60) were not protected by such a crystallisation [paragraph 250]. As set out by HHJ Tayler in Pelter v Buro Four Project Services Limited [2022] EAT 105: “*It is in the nature of a permanent health insurance contract that the situation crystallises upon the employee becoming incapacitated for work so as to trigger the payment of benefits. Thereafter, payment of benefits is a matter for the insurer. An employer cannot provide renewed insurance cover in respect of an event that has already occurred. The fact that benefits crystallise at the date of incapacity may have upsides or downsides for employees. Future payments are based on salary at the date of incapacity, subject to any provision in the insurance contract for uplift in relation to the rate of inflation or otherwise. After the employee becomes incapacitated better or poorer insurance provision may be available to other employees, but those changes will not affect an employee who is in receipt of benefits having become incapacitated.*”

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22 From the Appellants’ perspective, the Respondent was always the entity actually paying benefit to them – the only difference was that when under 60 that payment was funded by the insurer, and when over 60 it was directly funded by the Respondent. The mere change of the entity funding the contractual benefits should not alter the protection already granted by the crystallisation of the event. The effect of clause 5.1 is simply to encapsulate this foundational and common-sense concept of insurance, that being that it is not open to the insurer to change the insured terms after the insured event has occurred.

23 Accordingly, and for all the above reasons, the learned judge erred in law in his contractual interpretation of clause 5.1. The correct interpretation of the second sentence of clause 5.1

is that it prevented the benefits of those in-claim being varied by way of collective bargaining as well as by unilateral variation.

GROUND TWO

24 The learned judge wrongly held that the Appellants' trade union acted as agent for the Appellants when engaging in collective bargaining [paragraphs 264 and 278].

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25 The well-established position as to the status of a trade union within collective bargaining, as noted by the learned judge [paragraph 169], is as set out in Framptons Ltd v Badger [2006] UKEAT/0138/06, cited with approval by this court in Tyne and Wear Passenger Transport Executive v NURMT [2023] IRLR 235 (emphasis added):

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“...employees do not derive rights directly from the Collective Agreement. The parties to that agreement are the employer and the union, and (save possibly in very exceptional and limited circumstances) it is generally accepted that the union does not act as agent for its members...there is a presumption that the Collective Agreement is not intended to be legally enforceable. That is now contained in statute: see section 179 of the Trade Union and Labour Relations Act 1992. However, the rights (and obligations) found in Collective Agreements can bind employer and employee by being incorporated into the individual's contract of employment...that incorporation can operate either expressly...or by implication. In order to determine whether that has occurred, it is necessary to focus on the relationship between the employer and employee and not on the relationship between the employer and the trade union”.

26 Since the first-instance judgment in this case was handed down, the Supreme Court has provided further clarification within an appeal of the above judgment as to the legal status of trade unions within collective bargaining (NURMT v Tyne and Wear Passenger Transport Executive [2025] 2 All ER 205). As set out within the jointly authored judgment of Lord Leggatt and Lady Simler at paragraph 41: *“The general view of commentators, which we consider to be legally correct, is that a union which negotiates a collective agreement does so as principal and not as an agent of its members, let alone as an agent of any other individual employee”.*

27 Despite this, the learned judge repeatedly referred to BALPA as being the agent of the Appellants. It was not. It had no power to enter into or vary any contract on behalf of the Appellants. Despite this, the learned judge appears to have viewed the role of BALPA as intruding into the contract of employment itself (see paragraph 264: “*whilst that may be the case in respect of any unilateral variation, it cannot apply in circumstances where the pilots’ acknowledged agent, namely BALPA, agrees to that variation, and it is not imposed*” and paragraph 278: “*in so far as I have found that these were consensual variations through the agency of the union*”).

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28 This is an error of law which infects the High Court’s entire approach to clause 5.1. Rather than taking a step-by-step approach as submitted by the Appellants (first construing the effect of clause 5.1, then its aptness for incorporation based upon that construction, and then whether it prevented the variation of PHI to PIP and, if not, why not) the learned judge simply took the incorrect view that since BALPA were the Appellants’ agent, any agreement reached by them must override any previous contract of employment. That is simply wrong in law.

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29 The correct finding by the learned judge would have been that BALPA were at no time the agents of the Appellants in the contractual sense and that, therefore, BALPA had no power through agency to vary the Appellants’ contracts of employment by agreement with the Respondent.

GROUND THREE

30 The learned judge wrongly held that a collective agreement between the Appellants’ trade union and the Respondent amounted to a consensual variation of the Appellants’ contracts of employment [paragraph 262] and as such was ‘allowed’ or not prevented in accordance with his interpretation of clause 5.1.

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31 As set out in Ground Two above, the learned judge appears to have considered that BALPA were the Appellants’ agents and that the PIP variation was therefore ‘consensual’ rather than ‘unilateral’. The correct position was in fact that the Respondent and BALPA were engaged in collective bargaining leading to a collective agreement. The distinction explained in Framptons between the collective agreement (entered into between TUI and

BALPA) and the individual contracts of employment (entered into between TUI and each individual Appellant) is vital for a proper understanding of this case.

32 The learned judge held that the wording of clause 5.1 could be altered by a ‘consensual collective variation’ [paragraph 263]. It is not understood how such a variation would have any legal form. The parties to the contract of employment are the individual Appellants and the Respondent. Absent the union acting as an agent for the Appellants (which, as a matter of law they did not – see Ground Two), the only way in which a collective agreement could vary the contract of employment would be through its normative effect, which has no bearing upon what clause 5.1 actually means as a matter of contractual interpretation.

33 The proposition that ‘consent’ to a contract (in the absence of agency) can only come about between the parties to that contract was foundational to the Supreme Court’s decision in Tesco Stores. In that case, the court accepted that a contractual term forbidding change save ‘by mutual consent’ did not allow changes to be made through collective bargaining. As explained at paragraph 40 of the leading judgment, the effect of a ‘by mutual consent’ clause was that “*retained pay can only be changed by mutual consent (of Tesco and the individual concerned): accordingly, the word ‘permanent’ must mean something more than merely that retained pay cannot be removed by collective bargaining*”. Similarly, in his concurring judgment at paragraph 110, Lord Leggatt held that “*the risk that in future pay negotiations the unions might agree to the removal or dilution of the right to retained pay as part of a collective bargain which was in the interests of most of the workforce even though not in the interest of those entitled to retained pay... was addressed by the stipulation that ‘retained pay can only be changed by mutual consent’*”.

34 Simply put, in the instant case the High Court has put the cart before the horse. It has elided the process of interpreting clause 5.1 (which is a process which involves only the intentions of the parties to the employment contract) with its consideration of the collective bargaining process. The collective agreement between BALPA and the Respondent does not represent collective consent, which is not a concept recognised by law. Still less can it be said that if BALPA agree to a change during collective bargaining, it is ‘not imposed’ [paragraph 264] upon Appellants who vociferously disagree with it.

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35 The correct finding for the learned judge to have made would have been that BALPA was not a party to the contract of employment and that, therefore, it was necessary to undertake the process of assessing whether the PIP scheme was apt for incorporation through its normative effect, given the existence of clause 5.1.

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GROUND FOUR

36 The learned judge failed to consider the aptness for incorporation of the PIP scheme into the Appellants' existing contracts of employment and, instead, considered it to be automatically incorporated into those contracts [paragraph 262].

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37 It is well recognised that an incorporated contractual term (such as, for example, Clause 5.1 in the PHI Handbook) is capable of acquiring 'a life of its own' (Keeley v Fosroc International Ltd [2006] IRLR 961, per Auld LJ [35]): "*if put in clear terms of entitlement, it [the term] may have a life of its own, not to be snubbed out by context immediate or distant in the document of which it forms part*".

38 As summarised in Harvey on Industrial Relations and Employment Law at paragraph 3257.01, the effect of this is that "*the contract of employment (as between employer and employee) may or may not be affected by a subsequent variation or termination of the collective agreement (as between employer and union). It is essential in every case to construe the relevant term or terms of the contract of employment*".

39 The High Court did not undertake this exercise. The learned judge appears to have considered that if BALPA had the authority to enter into collective agreements (which is agreed between BALPA and TUI) and if the Appellants' contracts of employment contained a clause incorporating those collective agreements (which is also agreed), then any collective agreement must automatically have been incorporated into those individual contracts of employment through 'consensual variation', despite the existence of clause 5.1 within the existing contract of employment.

40 This is to completely misunderstand the effect of collective bargaining. As set out in the extract above, employees do not derive their rights, nor employers their obligations, directly from the collective agreement. There is no question of BALPA having acted as an agent for

the Appellants when collectively bargaining. They do not ‘stand in the shoes’ of the Appellants and, indeed, the Respondent’s case was that BALPA had to act contrary to the Appellants’ interests during the PIP negotiations as they were in the minority. Instead, BALPA and TUI negotiated a separate collective agreement which **may or may not** have overridden existing terms of the contract of employment.

41 At paragraph 262 of his judgment, the learned judge reached the view that, because the contracts of employment contained a clause which deemed incorporated both the “existing provisions” of the Memorandum of Agreement “and subsequent revisions thereto”, the PIP scheme was thereby automatically incorporated into the Appellants’ contracts of employment. Given his conclusions in respect of Grounds One to Three, he did not consider what the effect of clause 5.1 upon such an incorporation would be.

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42 It was necessary for him to do so. Clause 5.1 was a part of the contract which expressly clashed with the new collective agreement in a number of different ways. That being the case, it was incumbent upon the court to consider whether the new collective agreement was apt for incorporation. It cannot be the case that any new collective agreement would be automatically incorporated without any need to consider aptness – if that were true, then a new collective agreement could contain terms which were plainly inapt for incorporation (for example, terms governing the relationship between BALPA and the Respondent or terms which were nonsensical) which would nevertheless be automatically incorporated into each individual contract of employment. That is not and cannot be the legal position, as set out by this court in Fosroc at paragraph 31: “*On the question of construction... where a contract of employment expressly incorporates an instrument such as a collective agreement or staff handbook, it does not necessarily follow that all the provisions in that instrument or document are apt to be terms of the contract*”. That common sense proposition has been confirmed more recently by the Employment Appeal Tribunal (Lozaique v Tesco Stores [2019] UKEAT/0261/18/LA [57]).

43 Given that there was no express provision within the new collective agreement overruling clause 5.1 (and, as set out above, Schedule B in fact refers to it at paragraph 3.27), the court was required to consider whether the clause was capable of being overridden by implication. Given that the purpose and plain interpretation of clause 5.1 is that it is to

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prevent the variation of the existing terms, it would be entirely purposeless if it could simply be overridden by implication through the incorporation of an agreement to which the employee was not a party. To do so would also, as set out above, undermine the foundational purpose of this permanent scheme of insurance. The proper interpretation of clause 5.1 and Schedule B is that Schedule B does not vary the carve out provided by clause 5.1 and clause 5.1 thereby prevented changes to in-claim pilots benefits provided by PIP.

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GROUND FIVE

44 The learned judge wrongly held that, contrary to the explicit wording of clauses 2.1 and 3.1 of the Appellants' contract of employment, PHI benefits were not payable until state pension age [paragraph 257].

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CB 149-150

45 Clauses 2.1 and 3.1 govern the age at which PHI Benefits will cease to be paid, along with the level at which they are to be paid and the annual escalation rate (when read with the Handbook Glossary). Inasmuch as is relevant, they read as follows (emphasis added):

*“2.1... You will generally cease to be included in the Plan when you reach age 65 **or, if higher your State Pension Age**, or earlier if you cease to satisfy the eligibility conditions. If you leave the Company you will also cease to be eligible for inclusion in the Plan.*

*Please note that **if you are a pilot**, whilst you will be eligible to be covered under the Plan until you reach age 65 (**or, if higher, your State Pension Age**), on reaching age 60, your cover or any benefit in payment or which may become payable, will be provided in accordance with the Plan terms by your Company, rather than the insurer.*

If you leave the Company you will also cease to be eligible for inclusion in the Plan. Please also note that on reaching age 65, if you remain employed by the Company (in a 'non-pilot' capacity) and you are able to satisfy the insurer's 'actively at work' requirement, you would be eligible for continued PHI cover which would then be insured in line with the standard stance for non-pilot members.

3.1...*The Plan aims to provide you with a regular income benefit while you remain in your Company's service. This benefit is designed to act as a replacement salary. It is payable until the earlier of the following:*

- *You return to work*
- *Your incapacity ceasing*
- *Reaching your 65th birthday or, if higher, your State Pension Age;*
- *Or your death...*

...this benefit will increase annually in line with the escalation basis on the anniversary date of the claim commencing, providing you continue to satisfy the definition of incapacity.

The annual amount of benefit is calculated as 75% of your Salary less a standard deduction for the Employment and Support Allowance benefit... ”

46 It is the Appellants' case that the clear and explicit wording of clauses 2.1 and 3.1 should be construed according to their obvious meaning, such that PHI Benefits continued for the Appellants until 65 or, if higher, their SPA. The learned judge himself agreed that both of the clauses at least “**appear** to extend the payment of benefit to the higher SPA which for all of these Claimants will be older than 65” [paragraph 253].

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47 The task before the High Court was to ascertain “*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*” (per Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd at 1112). The court should not easily be swayed towards the proposition that ‘something has gone wrong’ with plain language in a contract.

48 Further, it is well established that considerations of ‘commercial sense’ should not be used by the court to undermine the plain language of a provision. As set out by Lord Neuberger in Arnold v Britton [2015] AC 1619, at 1628:

“the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook paras 16-26) should not be invoked to undervalue the

importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract... ”

49 As explained most recently in Tesco Stores at paragraph 33 of the leading judgment, which cited Lord Neuberger’s judgment in Arnold, the court must also “*be alive to the possibility that one party may have agreed to something which, with hindsight, did not serve that party’s interest*” and be cautious not to ‘fix’ a bad bargain for that party rather than focusing on the words actually used in the contract.

50 Despite the clear wording of clauses 2.1 and 3.1, the learned judge in the instant case held in respect of the continuation of benefit to state pension age that “*this cannot have been within the intention of the parties. Apart from the fact that it makes no commercial sense to provide a benefit to cover a salary shortfall which could not have been earned in the absence of sickness or incapacity, the historical nature of this benefit and the overall application of the handbook to all TUI employees cannot be ignored*” [paragraph 254].

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51 The learned judge does not go on to explain what it is about the ‘historical nature’ of the benefit and the ‘overall application of the handbook to all TUI employees’ which led him to the conclusion that the benefit was not intended to continue to state pension age. It is difficult to understand why either factor is relevant, given that the clauses in question specifically set out the situation relating to pilots.

52 Indeed, the unambiguous meaning of clauses 2.1 and 3.1—that PHI benefits continue until the later of age 65 or state pension age—was further reinforced by contemporaneous evidence before the trial judge. Internal correspondence demonstrates advice from the Respondent to a pilot, before the introduction of PIP, that entitlement under PHI extended to state pension age. This evidence was expressly relied upon in the Appellants’ written closing submissions at paragraph 32, yet the learned judge made no reference to it in his judgment. In circumstances where the court’s analysis relied heavily on “commercial

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sense” and “historical practice” to depart from the natural wording, a failure to engage with this material amounted to a further error of law.

53 As for considerations of commercial common sense, that should not be used to override the plain language of the clauses. Any objective reading of clauses 2.1 and 3.1 reveal a very clear intention that pilots should continue to receive payments under PHI until their state pension age. It is simply impossible for any objective reading of those clauses to escape the plain wording that “*if you are a pilot...you will be eligible to be covered under the Plan until you reach age 65 (or, if higher, your state pension age)*”. Such wording clearly defines a future temporal boundary for eligibility that is not open to qualification. There is no ambiguity in its structure, no competing plausible interpretation, and no indication that alternative meanings were intended. The court was not entitled to disregard the plain meaning of the clause merely because it may produce an outcome which the employer now finds inconvenient or commercially disadvantageous.

CB 202-2023
SB 54-55

54 In any event, the learned judge’s conclusion that such a provision makes no commercial sense is neither adequately reasoned nor sound. It is entirely possible (and indeed relatively common) for contractual parties to enter into a trade-off on one hand – for example, the Appellants agreeing as they did to a lower salary than ‘working’ pilots – in exchange for a positive effect on the other hand – for example, an extension of PHI benefits past the age of 65.

55 The learned judge further relied upon the phrase ‘replacement salary’ in clause 3.1 as indicating that the intention of the parties was not to extend PHI benefits past age 65, which he referred to as the pilot’s normal retirement age [paragraph 257]. However, neither the pilots’ contracts of employment nor the relevant collective agreements contained any reference to a mandatory retirement age for ‘working’ pilots. Instead, the Respondent relied on Regulation 1178/2011 to found their argument that pilots retire at 65, which states that a pilot “*who has attained the age of 65 years shall not act as the pilot of an aircraft that is engaged in commercial air transport*”. The Respondent relied simply upon ‘usual practice’ to establish this as the employer justified retirement age for ‘working’ pilots.

CB 149-150

56 In placing weight upon the phrase ‘replacement salary’, the learned judge has seemingly linked the termination point of the Appellants’ contractual rights to receive PHI benefits to

their ability to act as a ‘working’ pilot, whilst also accepting that the Appellants inability to act as a ‘working’ pilot is a gateway to receive such benefits. The Appellants have been stripped of the class 1 medical certificate which is required to fulfil that role. The employer justified retirement age is said to be objectively justified because of the safety risks of a pilot over the age of 65 flying a commercial aircraft. None of the Claimants are capable of flying a commercial aircraft at any age. There is no justifiable reason for their employment age to be fixed at 65 in those circumstances.

57 Furthermore, the learned judge’s interpretation runs contrary to paragraph 10.3 of the Memorandum of Agreement (as incorporated into the contracts of employment), which states that “*a pilot on PHI, who regains the necessary aviation medical certificates enabling a return to operational flying, has the right of return to operational flying if respective medical certificates are reinstated within 5 years of the first day of sickness*”.

SB 71

58 In other words, many of the Appellants already do not possess the right to return to flying if they recover their health, as it has been more than five years since the first day of their sickness. Despite this, the Respondent has not attempted to dismiss them and, correctly, does not assert that it can do so. The Appellants’ continuation on PHI benefits plainly does not and cannot depend on whether they are able to return to their flying role in the future. This submission was made squarely at first instance and was not addressed.

GROUND SIX

59 The learned judge wrongly held that the term setting out PHI entitlement to state pension age was not apt for incorporation [paragraph 257], and/or was inconsistent in so deciding whilst also holding that clauses 2.1 and 3.1 (within which that term is contained) were apt for incorporation [paragraph 309].

CB 149-150
CB 202-203
SB 54-55
CB 164

60 The relevant legal framework in respect of contractual incorporation is set out within the first-instance judgment at paragraphs 233 to 238 and is not disputed by the Appellants. In essence, the task before the court is to discern the contractual meaning of a particular clause, then consider whether it is apt for incorporation.

CB 142-144

61 It is unsurprising that clauses 2.1 and 3.1 were apt for incorporation into the Appellants' contracts of employment, given that they go to the heart of the remuneration received under the contract. They variously govern the period over which it will be received, the level of benefit, and how/when it will increase. They are clear and precise and provide a practical framework which gives certainty to both employer and employee.

CB 202-203
SB 54-55

62 The provision of PHI benefits to state pension age for pilots is a key portion of clauses 2.1 and 3.1, which the learned judge held to have been incorporated into the contract. However, at paragraph 257 it was held that this 'potential contractual term' (the payment of benefits to state pension age) "would fail to pass the test of being a term apt for incorporation". The reasoning given for this conclusion appears to be a similar recourse to commercial common sense as covered within Ground Five, in that the provision was held to be a "windfall" which made "no contractual sense".

CB 149-150

63 The judgment is entirely unclear as to what, precisely, has been held actually to have been incorporated into the Appellants' contracts of employment in respect of clauses 2.1 and 3.1, and appears to elide into one process the two separate stages of contractual interpretation followed by consideration of aptness for incorporation. This lack of clarity means that the Appellants are now left without any certainty as to when their contractual entitlement actually ends. The learned judge appears to have held that the words 'or, if higher, state pension age' should not be incorporated, which would leave the Appellants with a right to benefits only to the age of 65. This, however, appears to have been based upon the reasoning that 65 is the current employer justified retirement age for commercial pilots.

64 There is no guarantee (and, indeed, it is unlikely) that such a retirement age will remain fixed at 65. In fact, given that the Appellants have already seen this age increase from 55 to 65 years over the course of their employment and considering that the youngest Appellant is only 45 years old, it would seem highly likely that future increases in the employer justified retirement age will need to be considered. If it moves upwards, then the Appellants' benefits will cease at age 65 despite working pilots continuing to be employed past that age. Such an outcome would be perverse and plainly does not reflect the intention of either party to the contract. Put simply, in attempting to rewrite the bargain of the parties so as to avoid the obvious meaning of the words used, the learned judge has inadvertently introduced additional uncertainty into the contract.

65 If the Appellants are successful in respect of Ground Five, it is difficult to see why clauses 2.1 and/or 3.1 (or any part of them) would be inapt for incorporation into their contracts of employment. A provision that PHI benefits continue to state pension age rather than just to age 65 is clear, precise and goes to the heart of the bargain. It fixes, one way or another, the duration of the benefit which is plainly a key term. The correct process for the learned judge to have followed would have been to first interpret the meaning of clauses 2.1 and 3.1, and then to consider their aptness for incorporation – which, on either view, would have led to a decision that they were apt.

CB 202-203
SB 54-55

GROUND SEVEN

66 The learned judge erred and/or was inconsistent in his judgment by suggesting that the explicit wording of clauses 2.1 and 3.1 had been ‘corrected’ in 2019 [paragraph 257], whilst also having found that clause 5.1 prevented such unilateral corrections of the contracts of employment.

CB 149-150

CB204
SB59

67 As set out in the above grounds, the learned judge’s finding in respect of clause 5.1 was that it prevented unilateral corrections of the Appellants’ contracts of employment by the Respondent. Whatever the controversy over the meaning of ‘unilateral’ in this context, it plainly must apply to a correction made to the Handbook by the Respondent without the knowledge of the Appellants.

68 Despite this, having held that the provision of benefit to state pension age was ‘anomalous’, the learned judge held that said provision had been corrected by the Respondent in 2019. If Ground Six of this appeal succeeds, that simply cannot be correct. It was not open to the Respondent to amend any incorporated portion of the Handbook unilaterally and, therefore, the original wording must stand. The effect of that upon the duration of entitlement to PHI benefit will depend upon the court’s finding in respect of Ground Five.

69 In respect of Grounds Five to Seven, the correct findings would have been that clauses 2.1 and 3.1 provide for PHI Benefits to be paid until state pension age, that those clauses were apt for incorporation, and that they were not capable of being unilaterally varied by the Respondent.

CONCLUSION

70 The court is asked to uphold Grounds One to Seven of the grounds of appeal, and consequently to substitute findings in favour of the Appellants.

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12 AUGUST 2025