IN THE COURT OF APPEAL **Claim No. CA-2024-002733**

CIVIL DIVISION

B E T W E E N:

(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

Appellants

- and -

TUI AIRWAYS LIMITED

Respondent

RESPONDENT'S APPEAL SKELETON ARGUMENT

[Unless otherwise stated all references below refer to the numbered paragraphs of the Judgment of HHJ Wood KC ("the Judgment")]

Page References:
CB - Core Bundle
SB - Supplementary Bundle

A: SUMMARY

1. The principal (if not determinative) Ground of appeal in this matter is **Ground 1**. The issue before the Court can be summarised shortly: on its right construction did paragraph 5.1 of the 2015 Handbook (which the Judge found to be incorporated into the Appellants' contracts of employment): (i) prevent any changes whatsoever from being made to the PHI rights of in-claim pilots, and/or (ii) 'carve out' from collective bargaining the PHI rights of such in-claim pilots? CB 15 CB 18-25 SB 59

2. The answer to this crucial question can also be set out in a matter of a few sentences. The objective meaning of paragraph 5.1 is that it provided the Respondent with the right to exercise a unilateral discretion (to modify, suspend or discontinue the PHI plan) while protecting 'in-claim' pilots from the effect of those (and only those) changes.

3. The Judge was not only right to construe the provision in this manner, but also, he was right to find that by engaging in a process of collective bargaining (to agree changes in the

provision of PHI) the Respondent did not exercise any such unilateral discretion. As a result, paragraph 5.1 of the Handbook was not engaged. It was simply irrelevant to the effect of the collective agreement reached between the Respondent and BALPA (the PIP MOA) and whether the terms of that agreement were incorporated into the Appellants' individual contracts of employment. SB 59 SB 200-207 SB 4-23

4. In short, therefore, the Judge was right to find that paragraph 5.1 did not:

4.1. apply a blanket prohibition of 'any changes' whatsoever being made in respect of in-claim pilots, or

4.2. carve out from collective bargaining the PHI rights of such pilots. Indeed, had it been the intention of the parties to remove such rights from collective bargaining, one would have expected clear words to that effect [**# 215**], such as used in **USDAW v Tesco Stores Ltd [2025] ICR 107, SC**. CB 137

5. Moreover, as paragraph 5.1 was not engaged, the Judge was right to analyse whether the Appellants' individual contracts of employment were amended by the PIP MOA, by focusing on the 'Seminal Provision' within each of their contracts of employment. Although differently drafted, each of the Appellants' contracts of employment stated that its terms were: CB 151

5.1. "*in accordance with…* [the MOA] ***as published from time to time****…"* or SB 4, 6

5.2. "*subject to the provisions of a Memorandum of Agreement between the Company and the British Airline Pilots Association* [the MOA]. *The existing provisions of this Agreement* ***and subsequent revisions thereto are deemed incorporated in your terms and conditions of employment…****"* SB 12, 18

5.3. *"subject to the provisions of…* [the MOA]… ***as amended and supplemented from time to time. The terms of any amendments and/or new agreements in respect of the Memorandum of Agreement will be deemed to be incorporated in your terms and conditions of employment".***

(Emphasis added)

6. Accordingly, pursuant to the terms of their contracts of employment, the Appellants had already consented to the incorporation of amendments agreed between BALPA and the Respondent. As a result, the Appellants' contracts of employment were automatically varied by the new collective agreement (i.e. the PIP MOA). SB 200-207

7. This is a complete answer to **Grounds 1, 2 and 3**.

8. **Ground 4**, is misconceived for two fundamental reasons: CB 16

8.1. the Appellants did not plead or advance any case before the Court that the terms of the new PIP MOA were inapt for incorporation; and

8.2. it is logically incoherent to say that the provisions of the PHI scheme in a handbook were apt for incorporation, but the corresponding provisions in the PIP MOA were not.

9. Finally, the Appellants' suggestion that they would have continued to be paid a "*replacement salary*" as a pilot beyond the period for which they could lawfully be employed as a pilot, was commercially absurd. The Judge was right to find that it was not the objective intention of the parties to incorporate such a matter into their individual contracts of employment. SB 264

10. Alternatively, the point is of no importance. Even if originally incorporated:

10.1. for the reasons set out below, any such right to receive PHI beyond the age of 60 (let alone 65) was removed by the incorporation of the PIP MOA; and SB 202

10.2. the Appellants' eligibility to receive PHI was expressly dependent on them continuing to be employed by the Respondent, in circumstances where the Respondent operated a mandatory retirement age of 65. Therefore, whether, in-claim pilots would otherwise have been entitled to receive PHI beyond the age of 65 is entirely academic.

11. For each of these reasons, as set out more fully below, the Court is invited to dismiss the Appellants' Grounds of Appeal in their entirety.

B: RESPONSES TO GROUNDS OF APPEAL

Ground 1:

The learned Judge wrongly held that clause 5.1 of the PHI Handbook applied only to unilateral changes made to the Appellant's contracts of employment and therefore did not apply to collective bargaining. CB 16 SB 59

12. The principles to be applied in construing a contractual provision are well established (see **Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, HL**) and recently affirmed by the Supreme Court in **Tesco**. The exercise is essentially one of ascertaining the meaning which the provision would convey to a reasonable person having all the background knowledge available to the parties. In the context of construing a lease, Lord Neuberger held in **Arnold v Britton [2015] AC 1619, SC** that such meaning:

> *"…has to be assessed in the light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

13. In the particular context of construing collectively agreed terms which are incorporated into an employee's contract of employment, in **Tesco**, Lord Burrows and Lady Simler held that despite there being a two-stage process for incorporating collectively agreed terms (collective agreement followed by individual contracts of employment), the usual objective and contextual approach to contractual interpretation in **ICS** would apply **[at para 4]**.

14. Not all evidence is admissible in construing the objective meaning of a contractual clause. As highlighted above in **Arnold**, subjective evidence as to a party's intentions is inadmissible. So too is evidence of the conduct of the parties following the execution of the agreement - see **Union Insurance Society of Canton v George Wills & Co. [1916] 1 AC 281, HL**, per Lord Parmoor at **288**; **James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583, HL**, per Lord Reid, at **603 D-E**; **Rembrandt Group Ltd v Philip Morris International Inc (unreported, 25 February 1999), CA**, per Morrit L[1], and **Hyundai Merchant Marine Co Ltd v Daelim Corp The Gaz Energy [2011] EWHC 3108 (Comm)** Flaux J at para 13.

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[1] *"Each of the events amounts to the description by one party in the presence or to the knowledge of the other of the legal effect of the contract or contracts already concluded. Such views cannot be relevant to or of assistance in the determination by the court of the point of law on which the party is expressing its opinion. Nor, without more, can it be of any assistance in the determination, for the purposes of the Novation Agreement, what obligations had been previously undertaken by PMI. I can understand that the views and opinions so expressed*

The correct construction of paragraph 5.1

15. Paragraph 5.1 of the Handbook provided as follows:

> "*Can the Plan be altered or discontinued?*
>
> *Your Company and the Plan Manager[2] 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."* SB 59

16. Applying the principles set out above, the objective meaning of paragraph 5.1 is clear:

16.1. the first sentence of paragraph 5.1 reserves to the Respondent "*the right*" to modify, suspend or discontinue PHI;

16.2. plainly, that right is unilateral. Indeed, if its exercise required consent from BALPA (or individual employees) it would not be a "*right*" at all;

16.3. the right can be exercised by the Respondent in circumstances where in its opinion, the modification, suspension or discontinuance of PHI is "*warranted*" due to "*future conditions*";

16.4. accordingly, should the Respondent choose to exercise the right, it would be applying a contractual discretion;

16.5. the second sentence of the provision needs to be read in the context of the first sentence. In other words, the second sentence sets out the agreed (limited) effect of the exercise of that discretion, which is that such "*changes*" would not apply to in-claim pilots, who are already receiving the benefit of PHI; and

16.6. the second sentence, therefore, does not purport to "*qualify*" anything other than the effect of the exercise, by the Respondent, of its unilateral discretion.

17. On the natural and ordinary meaning of the words used, the provision does not address agreed variations *at all*, let alone purport to:

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might give rise to some estoppel by convention for the future or to some further or collateral contract to the effect represented in the statement; cf Amalgamated Investment & Property Company Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84, [1981] 3 All ER 577. But in the absence of such an estoppel or contract, and none was suggested, I do not see how the statements relied on can have any effect on the issues we have to determine."

[2] The Plan Manager is defined as TUI Travel Healthcare Limited, which is name of the group entity responsible for managing the Plan on behalf of the Respondent.

17.1. prevent consensual amendments to the PHI benefit, or

17.2. remove from collective bargaining the rights of in-claim pilots.

18. At paragraphs 12 and 13 of their Skeleton Argument, the Appellants appear to argue that that the right of in-claim pilots to continue to receive the PHI benefit is "*unqualified*" – and applies to "*any change*" to the plan. Thus, they seek to argue that in-claim pilots are provided with "*a clear and absolute assurance*" and a "*guarantee*" of continued benefits. CB 20-21 Given that the assurance is unqualified and applies to any change whatsoever, they argue that had it been the intention to qualify that assurance (by the right to change the plan by collective bargaining) express words to that effect would have been expected, and the Judge erred by failing to find as much.

19. With respect to the Appellants, this argument is clearly wrong. First, such a construction ignores the first sentence of paragraph 5.1. The words "*any change*" is not a reference to SB 59 any change whatsoever, but to any change brought about by the exercise of the unilateral discretion identified.

20. Equally, that the "*change*" in question is a reference to any change brought about by the exercise of the above contractual discretion is also emphasised by the use of the words "*any <u>such</u> change*", at the very end of the paragraph.

21. Secondly, the argument ignores a concession made by the Appellants at first instance, that paragraph 5.1 did *not* purport to prevent a consensual variation of / changes to the PHI plan in respect of in-claim pilots, <u>provided that they individually consented</u> **[#149 and para 38 of their Opening Skeleton]**. Thus, on their own case, the provision was not said to apply to "*any change*" whatsoever in respect of in-claim pilots. Instead, the Appellants were in the uncomfortable position of arguing that paragraph 5.1 permitted some types of "*changes*" (variations brought about by individual consent) but not others (changes brought about by way of collective bargaining). CB 122 SB 269

22. Indeed, they maintained this position despite the fact that their pleaded case (at paragraph 21 of the Particulars of Claim) was that:

"As required by the PHI Scheme[3], any changes to the PHI Scheme were required to be brought in by way of collective bargaining between the Defendant and BALPA". CB 182

23. Accordingly, contrary to their pleaded position, the Appellants' argument before the Judge was that the effect of the clause was to remove from collective bargaining the rights of in-claim pilots, in circumstances where paragraph 5.1 contained no words at all addressing collective bargaining, or even addressed the possibility of future consensual variation of rights by either individual (in-claim) pilots, or BALPA. SB 59

24. In these circumstances, the Judge was right to find that:

24.1. the objective meaning of the provision was to provide a measure of protection to in-claim pilots should the Respondent exercise its contractual / unilateral discretion **[#251]**; CB 148

24.2. the clause did not address negotiated / agreed variations (whether collectively or individually) **[#260** and **#262]**; and that CB 150-151

24.3. had it been the intention for paragraph 5.1 to provide a 'carve-out' from collective bargaining, "*specific wording to this effect might reasonably have been expected"* **[#262]**. CB 151

25. Those findings disclose no error of law.

26. Between paragraphs 14 and 23 of their Skeleton Argument, the Appellants set out a series of arguments which seek to undermine the clear objective meaning of paragraph 5.1. Each is addressed in turn below. CB 21-25

(i) Alteration of rights after "crystallisation"

27. At paragraph 14 of their Skeleton Argument, the Appellants seek to rely upon an unidentified line of authority which (unsurprisingly) states 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".* (Emphasis added). CB 21

[3] Defined as being the Appellant's contractual right to receive PHI, as set out in their contracts of employment, the MOA and the Handbook (see paragraph 10 of the Particulars of Claim)

28. Again, this argument misses the point. On the face of the Appellants' description, the authorities relied on address the ability of an employer unilaterally to alter a contractual right once crystallised (see the reference to reserving "*a power*"). Unsurprisingly, an employer cannot do so, unless the ability to do so has been agreed in the contract. CB 21

29. The apparent proposition advanced by such authorities is entirely consistent with the Judge's construction of paragraph 5.1. If the Respondent acts unilaterally, any change will not affect the crystallised rights of those already receiving benefit. However, neither those authorities, nor paragraph 5.1 itself addresses whether the provision of a benefit can be amended by agreement after it has commenced / crystallised, – whether: SB 59

29.1. by individual agreement; and/or

29.2. by using the agreed (collective) process within the contract to negotiate such a change.

30. That was the key issue before the Judge - and the Appellants conceded that such amendments could be made to "*crystallised*" rights, at least where there had been individual consent[4]. In the context of that concession, the Judge was right to conclude that: CB 122-123

"*The real question is whether or not a collective agreement to such a variation was permissible when none of the in-claim pilots had themselves agreed or consented to changes*". (Emphasis in original) **[#261]** CB 150-151

31. For the reasons given by the Judge, paragraph 5.1 is silent on that issue. Or to put that another way, there is nothing within paragraph 5.1 to suggest that it was the objective intention of the parties to remove this collectively agreed benefit out of collective bargaining.

(ii) The purpose of scheme

32. At paragraphs 15 and 16 of their Skeleton Argument, the Appellants seek to argue that the Judge's construction of paragraph 5.1 would defeat the "*permanent*" nature of PHI, as it would provide the Respondent and BALPA with the freedom to agree alterations to the benefit amount. Again, this argument is misconceived, given: (i) the concession that nothing in paragraph 5.1 prevents amendments to PHI individually agreed by in claim CB 21

[4] See the concession identified above at paragraph 21, and paragraph 149 of the Judgment.

pilots; (ii) the fact that paragraph 5.1 says nothing about carving any rights out of collective bargaining; (iii) the fact that BALPA were the agreed representatives of the workforce (including the Appellants)[5]; and (iv) the existence of the Seminal Provision in their employment contracts which expressly provides the agreement of each individual pilot to have incorporated into their contracts of employment the amended terms of the MOA (which was the source of their rights to receive PHI) [**# 6-7**]. SB 74 SB 4,6,12,18 CB 81-82

33. Moreover, contrary to the Appellants' position, it is entirely unsurprising that parties to a contract retain the ability consensually to vary rights and obligations. That is the usual, if not invariable, position. It is also the usual position that collectively agreed rights and obligations are capable of change through agreed variations of a collective agreement. The ability to effect such changes does not defeat the purpose of collectively agreed rights - it is the point of them.

34. Such variations may be to the benefit or detriment to individual employees. Again, that is the nature of collective agreements, as expressly recognised by Elias J(P), as he then was, in **Framptons Ltd v Badger and others (UK EAT/0138/06)**, **EAT**, at para 42.

35. The Appellants' reliance on the Supreme Court's decision in **Tesco** takes their argument no further forward: CB 21

35.1. in **Tesco**, it had been expressly agreed between the employer and USDAW that the particular benefit in question (retained pay) had been removed from collective bargaining – such that it could only be removed by individual consent; and

35.2. the issue before the Court was whether there was an implied term in affected employees' contracts of employment, preventing the employer from dismissing the employee in order to remove that right. That question was answered in the particular context of the promises made by the employer.

36. Accordingly, the decision in **Tesco** tells this Court nothing about the correct construction of paragraph 5.1. The Supreme Court's decision does not lend any weight to suggesting that otherwise 'permanent' rights could not be amended by consent. The key issue before SB 59

[5] See the Recognition Agreement (clause 21 of the relevant MOA) as per s178(3) TULR(C)A 1992.

the Court in the present matter was whether – on its correct construction - paragraph 5.1 removes the PHI rights of in-claim pilots from collective bargaining.

37. **Tesco** provides no useful guidance on that point, other than to illustrate the importance of clear language to carve out a statutorily protected right such as collective bargaining.

(iii) Employee consultation

38. At paragraph 17 of their Skeleton Argument, the Appellants seek to rely upon the fact that paragraph 5.1 states that the ability to alter PHI is "*subject to employee consultation*". In summary, the Appellants suggest that: CB 22

38.1. the provision expressly sets out qualifications to its effect, such that if the provision was intended to be subject to a further qualification (the right to amend benefits by collective consultation) words to that effect would have been necessary. Thus, they argue that the protections provided by paragraph 5.1 must apply "*regardless of how any change… was proposed to be introduced"*;

38.2. the words "*employee consultation*" must be a reference to "*collective bargaining*"; and

38.3. the Respondent's position before the Court must be inconsistent.

39. Again, each of these arguments is without merit.

40. First, a requirement to engage in consultation before exercising a unilateral discretion logically has nothing to do with the separate question of whether the provision on its proper construction excludes any rights from collective bargaining. Again, for the reasons set out above, even on the Appellants' own case (given their concession) the second sentence of paragraph 5.1 did not apply to any "change" of benefit regardless of how the change was proposed to be introduced. SB 59

41. Secondly, it is misconceived to suggest that the reference to "*employee consultation*" in paragraph 5.1 must be a reference to collective bargaining. As to this: SB 59

41.1. On its natural and ordinary meaning, "*consultation*" does not require the agreement or consent of those consulted - see for example, paragraph 17 of **Airlie v City of Edinburgh District Council [1996] IRLR 516**. By analogy also see the definition of "*consultation*" within s**. 188 TULR(c)A 1992**.

41.2. Construing the phrase "*employee consultation*" to mean "*collective bargaining*" defeats the entire purpose of paragraph 5.1. It would replace a unilateral "*right*" to impose change with a mere negotiation. On the Appellants' construction, in the absence of agreement, there would be no amendment of the PHI scheme at all. Such a construction would, therefore, remove the ability of the Respondent to exercise its discretion unilaterally. SB 59

41.3. The Appellants' reliance on **Kostal UK Ltd v Dunkley & Ors [2022] ICR 434, SC**, misunderstands both the ratio of the Supreme Court's decision and the objective meaning of paragraph 5.1. The Supreme Court's decision in **Kostal** explains the correct interpretation of section **145B TULR(C)A**. Engaging in employee consultation before exercising a unilateral discretion has nothing to do with making any "*offer*" to anybody – let alone making an offer to remove rights from any collective agreement. CB 22

41.4. More widely, it is to be noted that the Appellants' basic argument is premised on the foundation that by inserting paragraph 5.1 into the Handbook, the Respondent simply announced that the rights of in-claim pilots would be removed from collective bargaining. Not only is that the wrong interpretation of the provision (for all the reasons set out above) but also, if anything, the principles underpinning **Kostal** (including the statutory purpose of recognising Trade Unions for collective bargaining and ensuring Article 11 rights are properly safeguarded) point squarely away from construing the provision in such a manner.

41.5. There is nothing inconsistent with the Respondent's position, or the Judgment. To effect a change in respect of PHI, the Respondent could either:

(i) apply its unilateral discretion set out in paragraph 5.1, or

(ii) enter into a process of collective bargaining. SB 59

41.6. The Respondent elected to bargain. Accordingly, it was required to comply with the statutory requirements set out between **s. 178-185 TULR(C)A**. Within that process, it was incumbent on the Respondent to negotiate with BALPA, and not individual employees. That process has nothing to do with "*consulting*" with anyone. It was a collective bargain. Had the Respondent chosen to simply apply its unilateral discretion, it would not have been "*bargaining*" with anyone. However, it would have been required (pursuant to the terms of paragraph 5.1) to "*consult*" with employees. SB 59

42. That distinction between the two options is not inconsistent. Instead, it shows a fundamental confusion within the Appellants' analysis as to the difference between consulting and bargaining. In any event, there is nothing within paragraph 5.1 to suggest that the exercise of its unilateral discretion would have required it to consult, or bargain with BALPA, and **Kostal** certainly does not suggest otherwise.

(iv) Attempted reliance on subsequent conduct

43. Between paragraphs 18 and 20 of their Skeleton Argument, the Appellants seek to run a series of arguments that the Judge erred in his construction of paragraph 5.1, by failing to rely upon the subsequent conduct of the parties – i.e. the conduct of the parties following the incorporation of paragraph 5.1 into their contracts of employment. CB 23-24

44. In particular, the Appellants seek to rely upon (as an aid to construction) the Respondent's conduct in respect of:

44.1. the terms of the proposed GIP amendments (negotiated in 2019 and rejected by the workforce in early 2020); and SB 117-118

44.2. the terms of the later PIP MOA. SB 200-207

45. As set out above at paragraph 14, such arguments are misconceived. It would have been an error of law for the Judge to have relied upon the subsequent conduct of the Respondent when construing the terms of the Appellant's existing contracts of employment (including paragraph 5.1) which had been executed years before.

46. In any event, the Appellants never sought to rely upon paragraph 3.27 of the PIP MOA as an aid to interpretation of paragraph 5.1. That provision was only relied upon by the Appellants to argue that paragraph 5.1: (i) was apt for incorporation into individual contracts of employment; and (ii) had not been "*overridden*" by any later incorporation of the PIP MOA. SB 204 SB 274 SB 299

(v) Pelter v Buro

47. At paragraphs 21 and 22, the Appellants argue that the Judge erred in failing to recognise that pilots over the age of 60 were protected as a result of the 'crystallisation' of their CB 24

benefit. Not only does this argument not advance their appeal, but also, it misunderstands the point being made by the Judge.

48. At paragraph 250 of the Judgment, the learned Judge held that on its correct construction, paragraph 5.1 protected *both* in-claim pilots above and below the age of 60. Having made that key finding, the Judge observed that, in respect of the under 60s, the Respondent was receiving sums of money from an insurer to cover the cost of PHI. As a matter of practicality, that was plainly relevant to: CB 148

48.1. the industrial bargain struck between the Respondent and BALPA; and

48.2. the lawfulness of any exercise by the Respondent of its unilateral discretion, had it decided to rely on paragraph 5.1.

49. The Judge's observation discloses no error of law.

Any error of law made no difference

50. Finally, even if this Court concludes that the Appellants are right, and that (contrary to the concession) on its true construction, paragraph 5.1 purported to prevent "*any change*" whatsoever to the PHI rights of in-claim pilots, their appeal should still fail. Like any other term, paragraph 5.1: SB 59

50.1. was capable of being amended; and

50.2. contained nothing within its wording preventing it from being amended by way of collective bargaining.

51. The only sensible construction of the PIP MOA is that it was the objective intention of BALPA and the Respondent that the PHI rights of in-claim pilots were replaced with the (less generous) PIP benefit upon each reaching the age of 60. To put that another way, to the extent that paragraph 5.1 was inconsistent with the introduction of PIP, it must have been the objective intention of the parties that it be removed from the MOA and replaced with PIP. The inevitable result of that, given the effect of the Seminal Provision, was that paragraph 5.1 would also be removed from the Appellants' individual contracts of employment – see by analogy paragraph 42 of **Framptons.** SB 200-207 SB 4,6,12,18

Ground 2:

The learned judge wrongly held that the Appellants' trade union acted as agent for the Appellants when engaging in collective bargaining

52. At Ground 2, the Appellants contend that the Judge: CB 16

52.1. wrongly held that BALPA acted as an 'agent' for the Appellants; and (importantly) that

52.2. this error "*infects*" the Judge's entire approach to clause 5.1, as the 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*". CB 26

53. It is correct that at paragraphs 264 and 278 of the Judgment, the Judge wrongly referred to BALPA as being the "*agent*" of the pilots it represented (including the Appellants). However, that mischaracterisation takes the Appellants' appeal nowhere. It certainly does not suggest that the Judge wrongly construed paragraph 5.1 or the effect the PIP MOA. CB 151 & 155 SB 59 SB 200-207

54. First, for each of the reasons set out above, the Judge correctly construed paragraph 5.1 by finding that it provided the Respondent with the right to exercise a unilateral discretion, but limited the effect of that exercise in respect of 'in-claim' pilots.

55. Secondly, the Judge correctly held **[**at **#260]** that by collectively bargaining with BALPA, the Respondent did not exercise any such discretion, and therefore, paragraph 5.1 was not engaged. Indeed, this finding was the basis for the Judge's rejection of the Appellants' complaints relating to breach of the implied term of trust and confidence and 'failure' to engage in individual consultation. It is noteworthy that the Appellants have not sought to appeal that part of the Judgment. CB 150

56. Thirdly, at paragraph 261 of the Judgment, the Judge expressly recognised that none of the Appellants had "*themselves agreed or consented to the changes*" proposed by the Respondent in the collective negotiation. There is no suggestion in the Judgment that the Judge considered that the Appellants *had* consented to the agreement by reason of any agency relationship with BALPA. Instead, the Judge correctly identified that the key issue before him was "*whether or not a collective agreement to such a variation was permissible*", given the Appellant's lack of individual consent. CB 150 CB 151

57. Fourthly, at paragraph 262 of the Judgment, the Judge answers this question by analysing the objective effect of the Seminal Provision in each of the Appellants' individual contracts of employment / normative effect. CB 151

58. That analysis has nothing to do with 'agency'. Instead, the learned judge:

58.1. correctly holds that the effect of the Seminal Provision is that each of the Appellants has agreed that the terms of future amendments to the MOA will be incorporated into their contracts of employment; and that SB 4,6,12,18

58.2. paragraph 5.1 does not carve out from collective bargaining the PHI rights of in-claim pilots.

59. Fifthly, no-where in the Judgment does the learned Judge simply find that any collective agreement reached between TUI and BALPA "*must override any previous contract of employment*". It is not understood what the Appellants mean by the words "*override*" or "*any previous contract of employment*". The issue before the Judge was whether paragraph 5.1 prevented amendments brought about by collective bargaining. In any event, and as set out more fully below, it was never contended by the Appellants that the terms of the PIP MOA were not apt for incorporation into their contracts of employment. That issue was neither pleaded, nor included in the Agreed List of Issues to be determined by the Judge. Indeed, pursuant to the Judge's findings, it was not a matter of whether paragraph 5.1 had been "*overridden*". Paragraph 5.1 was simply not engaged. It neither prevented, nor was inconsistent with the amendments introduced by the PIP MOA. CB 26 SB 59 SB 200-207

60. Accordingly, 5.1 did not need to be overridden by anything. The simple answer provided by the Judge was that paragraph 5.1 did not prevent the amendments introduced by the PIP MOA through collective bargaining. That conclusion discloses no error of law. Indeed, it was the inevitable result of the correct construction of paragraph 5.1.

61. For each of the above reasons, Ground 2 is meritless. Any error made by the Judge referring to BALPA as being the agent of the pilot workforce, therefore, had no effect on his correct analysis of the construction of paragraph 5.1 and the effect of the PIP MOA.

Ground 3

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].

62. At Ground 3, the Appellants variously appear to claim that: CB 16

62.1. the Judge found that the collective agreement itself amounted to a consensual variation of the Appellants' contracts of employment; CB 26

62.2. the collectively agreed amendments to the MOA constituted a "*unilateral*" imposition on the individual Appellants; CB 26

62.3. the Judge found that the "*wording of clause 5.1 could be altered by a 'consensual collective variation'*"; and that CB 27

62.4. the Judge elided the process of interpreting paragraph 5.1 with the collective bargaining process. CB 27

63. Each of the above averments is wrong.

64. As set out above in response to Ground 2, the Judge did not simply find that the collective agreement constituted a consensual variation of the Appellants' contracts of employment. In fact, the Judge's conclusions can be tracked in stages:

64.1. First, he found that the collective agreement (the MOA) was amended by consent – i.e. the consent of the Respondent and BALPA **[#260]**. CB 150

64.2. Secondly, the Judge asked himself the "*real question*": what was the effect of that collective agreement, given that the Appellants themselves had not consented **[#261]**. CB 150-151

64.3. The Judge answered that question (correctly) through an analysis of the contracts of employment of the individual Appellants and, in particular, the effect of each Appellant's Seminal Provision. In short, the Judge found that the Appellants had already expressly agreed that amendments to the MOA would be incorporated into their contracts of employment. Indeed, collectively agreed amendments followed by express incorporation into individual contracts of employment was the agreed mechanism to change collectively agreed rights. SB 4-23 SB 4,6,12,18

65. The Judge's analysis discloses no error of law. He was correct to hold that given the effect of the Seminal Provision, the amendments to the Appellants' individual contracts of employment:

65.1. had not been unilaterally imposed (see **Mawson and another v Exel Logistics EAT/227/96)**; and

65.2. constituted a consensual variation. The Appellants had already agreed that their contracts of employment could be amended in this manner. Accordingly, it did not matter whether they purported to withhold consent in respect of any particular collective agreement. The Appellants' consent to alter their contracts had already been given.

66. In any event, whether amendments brought about by normative effect should correctly be viewed as being "*consensual*" is beside the point. The Judge was plainly right to find that: (i) paragraph 5.1 was only engaged in respect of the exercise of a unilateral discretion (ii) SB 59
entering into a process of collective bargaining did not constitute the exercise of such a discretion; and (iii) that the effect of each Appellants' Seminal Provision was to SB 4,6,12,18
"*automatically*" and/or "*immediately*" incorporate into their individual contracts of employment the relevant terms of the PIP MOA (see **Edinburgh Council v Brown [1991 IRLR 208]** at paragraph 20, and **Mawson** (above).

67. Nothing in the above analysis suggests the Judge elided the process of construing the meaning of paragraph 5.1 with normative effect. Indeed, it appears that the Appellants have misunderstood the Judgment. The Judge does not find (as alleged at paragraph 32 CB 27
of the Appellants' Skeleton Argument) that "*the wording of clause 5.1 could be altered by a consensual collective variation*". The Judge's analysis had nothing to do with amending the words of paragraph 5.1. Instead, what the Judge found was that the collectively agreed variation of the MOA was incorporated into each of the Appellants' contracts of employment.

68. Finally, for the reasons set out above (at paragraph 35-37), the Appellants' reliance on **Tesco** takes their appeal no further forward. The comments made by the Supreme Court relate to the construction of a particular agreement which (it was agreed between the parties) expressly removed from collective bargaining a particular benefit and whether a

term should be implied, given the specific circumstances of that case. The Supreme Court was not commenting on the principle of normative effect generally, but what the word "*consent*" meant in the particular context of the express promises made by the employer.

Ground 4

The learned judge failed to consider the aptness for incorporation of the PIP scheme to the Appellants' existing contracts of employment and, instead, considered it to be automatically incorporated into those contracts CB 16

69. At Ground 4, the Appellants argue that the Judge erred due to his alleged failure to consider whether the terms of the PIP MOA were '*apt*' for incorporation into their individual contracts of employment. In particular, the Appellants argue that the Judge failed to appreciate that amendments to a collective agreement "*may or may not*" affect the terms of individual contracts of employment, and the Judge failed to consider: (i) what effect paragraph 5.1 had upon incorporation of the amended collective terms and/or (ii) whether clause 5.1 itself was "*overridden by implication*". SB 200-207 CB 28 CB 29-30

70. Again, largely for the reasons already identified above, these complaints are meritless.

71. It was not the Appellants' pleaded case that the terms of the PIP MOA were inapt for incorporation into their contracts of employment. The Court is invited to note: SB 200-207

71.1. no-where in the Appellants' Particulars of Claim, Reply, or Further and Better Particulars did they assert that the PIP MOA was inapt for incorporation. Equally, the issue was not included within the Agreed List of Issues, or the Appellants' opening Skeleton Argument; CB 172-190 SB 226-234 SB 258-272

71.2. instead, they simply argued that the effect of paragraph 5.1 was to prevent the incorporation of the terms – which is plainly a separate point;

71.3. that this issue was missing from their case was expressly noted in the Judgment **[#216]**; and CB 137

71.4. it is, of course, unsurprising that the Appellants did not seek to argue that the terms of the PIP MOA were 'inapt'. Such a contention would have been misconceived, SB 200-207

and inconsistent with their claims that the corresponding parts of the Handbook *were* apt for incorporation.

72. Despite their failure to plead or advance the issue before the Court, the Appellants now complain that the Judge failed to address the issue. Plainly, that is an unfair criticism – especially in circumstances where such an argument would have been hopeless. Indeed, even now, the Court is invited to note that rather than identifying particular terms of the PIP MOA that are said to be inapt, they seek to advance entirely separate points: whether paragraph 5.1 prevented incorporation and whether 5.1 was "*overruled*" by the amended MOA. Those are not issues of aptness, but issues of construction. SB 59

73. For example, at paragraph 38 of the Skeleton Argument, the Appellants refer to Harvey on Industrial Relations, to point out that the contract of employment "*may or may not*" be affected by a subsequent amendment to a collective agreement. Not only is this not a point on aptness, the Appellants fail to provide the full quotation, which states as follows: CB 28

"That is to say, 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, ***but, other things being equal, it is likely that any bilaterally agreed variation in the collective agreement will feed into and so vary the contract of employment, whereas any purported unilateral denunciation of the collective agreement is unlikely to have any effect on the contract of employment*** *(eg Morris v CH Bailey [1969] 2 Lloyd's Rep 215, CA; Burroughs Machines Ltd v Timmoney [1977] IRLR 404, Ct of Sess; Framptons Ltd v Badger UKEAT/138/06, [2006] All ER (D) 127 (Oct), EAT)."* (Emphasis added).

74. Equally, at paragraph 57, Harvey further addresses the point:

"*Revision of the collective agreement, then, may or may not affect the individual contract, depending on the circumstances****. If the parties to the contract of employment have agreed to incorporate the collective standard as renegotiated from time to time then revision of the collective agreement should lead automatically to revision of the contract of employment.*** *If on the other hand the contract adopts the current collective standard, but no more, then each successive renegotiation of the collective standard has to be incorporated into the individual contract. That may be inferred from the de facto application by the employer and acceptance by the employee of revised terms following the new collective agreement".* (Emphasis added)

75. Of course, the point being made in Harvey is that whether amendments to a collective agreement are incorporated into individual contracts of employment requires one to construe the effect of the Seminal Provision. If that term provides for the incorporation SB 4,6,12,18

for the terms of the collective *as amended from time to time*, that is likely to lead to the automatic incorporation, provided that the amendments have been bilaterally agreed between the employer and trade union.

76. This is precisely the analysis carried out by the Judge at paragraph 262 of the Judgment. There was no need to determine whether the terms of the PIP MOA were incorporated by implication into the Appellants' individual contracts of employment. Given the wording of each Appellant's Seminal Provision, the terms of the PIP MOA were incorporated expressly. CB 151 SB 200-207 SB 4,6,12,18

77. Equally, the Appellants are wrong to assert that the Judge failed to consider whether the effect of paragraph 5.1 prevented the incorporation of the terms of the PIP MOA. As set out above, the Judge expressly considered this at paragraphs 261-263 of the Judgment. The Judge found that paragraph 5.1 did not prevent such incorporation – because it simply was not engaged. He was right to do so for the reasons set out above. CB 150-151

78. Accordingly, it was not incumbent on the Judge to consider whether 5.1 had been impliedly overridden by the terms of the PIP MOA. Paragraph 5.1 was neither engaged nor inconsistent with the terms of the PIP MOA. It was, quite simply irrelevant to the issue of whether a bilaterally agreed amendment to the MOA was incorporated into the Appellants' individual contracts of employment. SB 200-207

No difference in any event

79. Even if there was a failing by the Judge to properly set out his analysis on this question, this would make no difference to his reasoning that PIP was incorporated into the Appellants' contracts of employment, as it is obvious, for the reasons above, that the operative parts of the PIP MOA were apt for incorporation.

80. Indeed, the reason why this was not pleaded (and therefore was not a live issue before the Judge) is obvious. Arguing that the terms of the PIP MOA were inapt, would have been wholly inconsistent with the Appellants' assertions that the corresponding provisions of the Handbook (which they replace) were apt for incorporation. This point is illustrated perfectly by their written opening submissions [at paragraph 14]: SB 51-61 SB 262

"The Handbook and Guide were both crucial elements of the scheme, without which there was no way for an individual employee to understand his entitlement nor for the benefit to be provided. The documents go to the heart of the bargain between employee and employer, and, without their incorporation, the employee would simply be left with a bare contractual right to a PHI Scheme without any assurance whatsoever as to its content".

81. Replace the words "the Handbook and Guide" with "the PIP MOA" the Appellants' reasoning applies with equal force to the PIP MOA: SB 262

81.1. it was a "crucial element of the scheme";

81.2. without it "there was no way for an individual to understand his entitlement nor for the benefit to be provided"; and

81.3. it goes "to the heart of the bargain between employer and employee".

82. Equally, replacing "clauses 2.1 and 3.1" with "the PIP MOA" in paragraph 20 of the Appellants' written opening has the same effect. Namely, the PIP MOA was "ripe for incorporation" because the provisions in them: SB 264

82.1. "go to the heart of the remuneration received" (as in **Keeley v Forsoc International Limited [2006] IRLR 961, CA** per Auld LJ [at para 34]);

82.2. "govern the period for which it will be received, the level of the benefit, and how/when it will increase";

82.3. "are clear and precise"; and

82.4. "provide a practical framework which gives certainty to the employee as to the duration of his benefit".

83. The five indicia set out by Smith J in **Hussain v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB)** and relied on by the Appellants in the High Court **[#162 & 235]** apply with equal force to the PIP MOA. CB 125 & 142-143

84. If the material parts of the Handbook were apt for incorporation, so too must the PIP MOA:

84.1. as in **Anderson v London Fire & Emergency Authority [2013] IRLR 459, CA** [per Kay LJ at 13] there were "no doctrinal obstacles to legal enforceability" of the PIP MOA; and

84.2. the terms in the PIP MOA were not "too vague or aspirational", nor was their "purpose solely to regulate the relationship between [TUI and BALPA]" **Framptons** [per Elias P at para 33]. SB 200-207

Grounds 5 & 6

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] CB 16 SB 54-55 CB 202-203 CB 149-150

The learned judge wrongly held that the term setting out entitlement to PHI 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 the term was contained) were apt for incorporation SB 54-55 CB 202-203

85. Before responding to Grounds 5 and 6, it is helpful to note that these Grounds only arise in circumstances where the Appellants are able to establish that the PIP MOA was not incorporated into their contracts of employment. If, for the reasons set out above, the effect of the collective bargain between BALPA and the Respondent was to incorporate into the Appellants' contracts of employment the new PIP scheme, the terms of the old scheme are immaterial. The PIP MOA makes it expressly clear that: (i) all in-claim Pilots transfer to PIP on reaching the age of 60, and (ii) the PIP benefit ends at the age of 65. SB 200-207 SB 200

86. At Ground 5, the Appellants contend that the learned Judge wrongly construed "*clauses 2.1 and 3.1 of the Appellants' contract of employment*" when determining that the PHI benefit would last only until the age of 65. The short answer to this criticism is that it misunderstands the Judge's analysis between paragraphs 253 and 258 of the Judgment. SB 54-55 CB 202-203 CB 148-150

87. The purpose of this section of the Judgment is to determine (by construing the material before him) whether or not it was the objective intention of the parties to incorporate into the Appellants' individual contracts of employment the parts of paragraph 2.1 and 3.1 of the Handbook that refer to the benefit being payable until State Pension age. Accordingly, the Court was not simply construing the terms of the Appellants' contracts of employment – but was determining whether particular words were incorporated in such contracts at all. The Judge analysed the issue applying the principles set out at paragraphs 233-238 of the Judgment. SB 54-55 CB 202-203 SB 4-23 CB 142-144

88. As expressly identified at paragraph 235 of the Judgment (see **Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670** (QB)) one of the factors the Judge was entitled to consider was whether the provision in question was "*workable*". In particular, when determining whether it was objectively intended by the parties to incorporate a particular matter: CB 142-143

> "*…the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, not be workable or make business sense*".

89. That is precisely what the Judge did.

90. The Appellants' argument appears to be that the Judge erred by not incorporating a statement which on its face would provide a non-flying pilot with a "*replacement*" salary beyond the point in time they could lawfully be employed as a pilot (their State Pension age, rather than the employer justified retirement age for pilots currently at 65). The Judge's reasoning was that it could not have been the intention of the parties to incorporate that particular statement. It would have been commercially absurd as the Respondent would be providing a benefit to cover a salary shortfall which could not otherwise have been earned. Indeed, as the Judge found at paragraph 97 of the Judgment: CB 109

> "*…it was not in dispute that a pilot is not allowed to fly after the age of 65, or that the Defendant airline compulsorily retires active pilots at that age.*"

91. There was no error of law in the Judge's analysis.

No difference

92. If (contrary to the above) the Judge erred by finding that entitlement to State Pension age was not incorporated, it had no effect on the correctness of his decision for the following reasons:

92.1. a pilot's eligibility to receive PHI ceases when they are dismissed for cause (in this case retirement) **[#257]**. Paragraph 2.1 starts with this question in bold, "**Am I eligible for cover**?" It then has the following sentence under it "your **eligibility** is determined by your contract of employment". All pilots (whether present or not) are dismissed by the Respondent at the age of 65. Such dismissals are perfectly CB 149 SB 54 CB 202

lawful. The Respondent is not aware of any authority that seeks to fetter an employer's ability to dismiss an employee for good cause (such as any of the statutory fair reasons in **s.98 Employment Rights Act 1996**), even if the consequence of that decision is the ending of a PHI provision. Therefore, the Judge should have found that regardless of any stated reference to State Pension age, it was inevitable that benefit would have ceased for all pilots when lawfully retired at the mandatory age of 65; and

92.2. in any event (as set out above) the introduction of the PIP MOA removed the Appellants' previous rights to receive PHI. The introduction of PIP was lawful and effective for all the reasons set out above. SB 200-207

Ground 7

The learned judge wrongly held 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 16 CB 149-150 SB 54-55 CB 202-203 SB 59

93. This ground is misconceived. On the Judge's findings, the material provisions of the Handbook that dealt with retirement age were never incorporated into the Appellants' contracts of employment (see his conclusions on aptness) paragraph 5.1 could then not be engaged. CB 150

94. Further, similarly to Grounds 5, 6 and 7, this ground does not survive the introduction of PIP through normative effect. Whatever the Appellants' previous rights to PHI, the PIP MOA expressly stated that: (i) in-claim pilots would transfer to PIP at the age of 60, and (ii) all rights to receive PIP would cease at the age of 65. SB 202

CONCLUSION

95. For each of the reasons set out above, the Court is invited to dismiss the Appellants' appeal.

EDMUND WILLIAMS KC

CLOISTERS

ANDREW EDGE

11 KBW

5 SEPTEMBER 2025