Neutral Citation Number: [2024] EWHC 2589 (KB)

Case No: QB-2002-002483

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17/09/2024

Before : His Honour Judge Graham Wood KC

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; AND
(8) MELVILLE CHARLES BISHOP

Claimants

and

TUI AIRWAYS LIMITED

Defendant

Ms Alice Mayhew KC and Mr Matthew Sellwood (instructed by **Blacks Solicitors LLP**) for the **Claimants**

Mr Edmund Williams KC and Mr Andrew Edge (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing dates: 1st, 2nd, 3rd 4th 5th, 8th, 9th and 12th July 2024

- -

APPROVED JUDGMENT

His Honour Judge Wood KC

Introduction

1. This is a claim brought by a number of airline pilots (the "Claimants") employed by the charter airline TUI Airways Limited (the "Defendant") in which they allege breach of contract in relation to the variation of the ill health benefits to which they were contractually entitled. It concerns, principally, the effect of a collective agreement entered into purportedly on their behalf by the pilots' union, the British Airline Pilots Association ("BALPA"), and their employer on the pre-existing contractual arrangements for permanent health insurance ("PHI") by the introduction of a new benefit scheme, Pilots Income Protection ("PIP").

2. That is a very simple summary of the dispute between the parties. However, the resolution of the dispute has required the court to hear evidence from 16 witnesses over the course of seven days, with the contemporaneous transcription of their evidence, to consider up to 6000 pages of documentation some of which stretches back over 40 years, and ultimately to determine 12 separate agreed issues of fact and law.[1] Inevitably, therefore, despite my intended best efforts to provide as succinct an analysis as possible, this will be a lengthy judgment. To aid navigation, therefore, I provide the table below which identifies the different sections/ paragraph numbers setting out the contents of the judgment.

[1] As set out in paragraph 68

Background

3. Despite the substantial amount of evidence, both written and oral, there is very little factually challenged. Therefore it is possible to provide a background and overview on a relatively uncontroversial basis.

4. The Defendant airline is part of the multinational German-based TUI group. It operates charter flights from the United Kingdom to many destinations throughout Europe and the world and employs over a thousand airline pilots. Various smaller airlines, principally UK-based, and by whom some of the Claimants were originally employed, have been taken over at different points in time by the Defendant or have been "rebranded" as part of any takeover /incorporation. These include Britannia Airways, Thomson Airways, Air 2000, and First Choice. There is no question but that there has been continuity of employment for all the Claimants whatever corporate changes came about, by reason of the Transfer of Undertakings Regulations 2006 (TUPE).

5. Each of the remaining seven Claimants are no longer actively flying by reason of medical incapacity. [2] The Civil Aviation Authority requires pilots to submit to regular medical examinations to receive an appropriate certificate of fitness or licence to fly, and there is a high threshold to be met for obvious safety reasons. There is also a self-reporting requirement

[2] Mr Sherpa, the 2nd Claimant, settled his case before the trial

where any issue arises, and the pilot is immediately taken off active flying duties once a significant medical condition is identified. Invariably there is no other role for the pilot to fulfil, and effectively he or she goes "off sick". For the Claimants in this case there were a variety of conditions which afflicted them, many of which would not have been considered particularly serious for a conventional ground-based job, but which did not pass the high medical threshold required.[3]

6. Every TUI pilot has a written contract of employment, many of which are expressed to be with the Defendant's predecessor in title or previous corporate entity. It is not necessary to delve into the individual terms of those contracts save to note that a common feature is the incorporation of the current (at the time) memorandum of agreement ("MoA") between the airline and BALPA for terms and conditions of service beyond those which were set out in the basic contract. (I shall deal with the role of BALPA in more detail later in this judgment.) By way of example the Britannia contract, which was the original contract for several of the Claimants, contained the following provision:

> "Subject to Clause 5 below, conditions of service will be in accordance with the Pilot's Agreement between the British Airline Pilot's Association and Britannia Airways Limited as published from time to time. Full details of this agreement are available at the Chief Pilot's office."

7. In other contracts it was expressed slightly differently although for the most part saying the same thing:

> "MEMORANDUM OF AGREEMENT: This employment is subject to the provisions of a Memorandum of Agreement between the Company and the British Airline Pilots Association. The existing provisions of this Agreement and subsequent revisions thereto are deemed incorporated in your terms and conditions of employment A copy of the Memorandum of Agreement may be seen on request prior to your date of commencement. Your own personal copy will be provided to you after you have joined the Company."

8. From time to time MoAs would be the subject of collective bargaining, and agreements arrived at between the employer and BALPA would then be incorporated into a new MoA which replaced the previous one. The first MoA which is relevant to this case is dated 2018. Section 10 of this MoA provided for the payment of sick pay for the initial period of absence, as set out in schedule B.[4] Schedule B specified the company sick pay to which the pilot was entitled, essentially 26 weeks within any rolling 52 week period. Although the schedule did not identify the basis of any other benefit that might be paid to a pilot at the end of the 26 week period, nevertheless within the body of the MoA and in particular in the same section 10 at paragraph 10.2 there was this provision:

[3] In paragraphs 60-67 I provide a brief summary in respect of each pilot in respect of the medical reason for incapacity to fly, together with the length of time that such a condition has persisted.

[4] Schedule B as amended at a later stage is a crucial document in the case, and relevant to the PIP changes. The schedule B here referred to is that which existed prior to any amendment.

> "10.2 The Company maintain a Permanent Health Insurance (PHI) policy for pilots, details of which will be provided by the Pilot Management Team."

9. However, there were no other details nor any other mention of the basis or structure of the PHI policy; the pilots were simply directed to the pilot management team. It is common ground that on request a pilot, whether on sick leave or on active duty, would receive from the pilot manager a PHI handbook as well as other documentation which dealt with an ancillary yet important aspect of PHI to which a pilot who was medically unfit was entitled, *a guide to proportionate benefit*. This material could also be downloaded from the company intranet. Before dealing with those key documents, a little explanation is required as to the Defendant's historic involvement in the provision of PHI to all employees, including pilots.

The origins of PHI

10. Although no relevant documentation from 1974 is available, it appears to be common ground that this was when the Defendant's predecessor in title /corporate entity first introduced a benefit scheme by way of PHI to provide a payment to those who were on long-term sickness absence after an initial period of receiving company sick pay. It was a benefit provided by an insurance company which has changed from time to time. The Defendant had a broker who would arrange the appropriate insurance. By 1983 Britannia Airways Ltd were utilising the Imperial Life Assurance Company of Canada.

11. Although potential beneficiaries of the PHI scheme which was operated by Britannia in 1983 did not have access to the principal insurance policy, they were provided with a booklet (obviously then in paper form only)[5] which explained how the benefit worked. In short, this stated that all relevant employees became members of the PHI scheme and were entitled to receive a benefit which amounted to 75% of the pre-incapacity salary after a period of 26 weeks, which would continue up to the normal retirement age, then 60 years, increasing at 3% or 5% per annum whilst the incapacity was total. In the event that partial recovery occurred, but the individual member could not return to the pre-incapacity occupation, the benefit was 37.5 % of the pre-incapacity salary, although there was an opportunity where the member undertook a less well paid occupation to make up that benefit on a proportionate basis to the loss of earnings. This was the concept that became known as "proportionate benefit" ("PB"). Further aspects of the scheme were that pension contributions would be paid on the basis of the pre-incapacity salary, and in the event of a return to work which could not be sustained and the original incapacity returned within a period of 26 weeks, the reinstatement of the benefit occurred. This was described in later years as the "linked claim". Like PB it was to become a highly significant feature in this litigation.

[5] CB (Core Bundle) 39

12. At the end of the 1983 explanatory booklet, there is a paragraph (13) headed *termination and amendment*. It contains important wording, dealing with the entitlement of the company to terminate or amend the scheme and the way in which this might have affected a member's benefits:

> "The company reserves the right to terminate or amend the PHI scheme at any time. Any such amendment will not prejudice the potential payment of any benefits if you are absent from work but have not completed the 26 weeks deferred period.
>
> No matter what the reason for amendment or termination, the insurer will continue to pay any benefit you may already be receiving."

13. Under the 1983 scheme the benefit was paid throughout and entirely by the insurer although pension contributions which were based on the notional pre-incapacity salary fell outside the ambit of the insurance policy and were the responsibility of the company. It appears to be common ground that members, i.e. employees who were entitled to this benefit, were being guaranteed that once "in-claim" their benefit from the insurer was protected.

14. Thus this scheme had six features which were particularly beneficial for pilots (although it extended to certain non-employees). First, although the benefit was reduced where partial recovery occurred, it could be enhanced on a proportionate basis with additional benefit when a paid occupation was pursued (PB). Second, it continued to normal retirement age (paid to retirement). Third, it allowed a return to employment on a trial basis without running the risk that a recurrence of the incapacity inside 26 weeks would prevent the reinstatement of the benefit (linked claim). Fourth, the payment escalated at a fixed rate each year (benefit escalation). Fifth, the pension contributions from the employer were based upon the pre-incapacity salary (pension contributions). Sixth, once a benefit was being paid by the insurer it would continue in the event of a subsequent termination or amendment of the scheme (PB).

15. The explanatory booklet was updated from time to time, although with the advent of the internet and the intranet by 2008 it was being provided in digital form. The introductory words to the **2008** booklet from Thomsonfly Limited purports to set out its legal effect in the introduction:

> "This booklet explains the Permanent Health Insurance (PHI) Scheme that is currently available to Flight Deck Crew and replaces all previous booklets. The Company reserves the right to amend the PHI Scheme from time to time, including the pension benefits which accrue under the Pension Scheme during periods when you are in receipt of PHI Benefits. This document does not create a contractual obligation or entitlement, and PHI benefits described in this booklet are subject to the terms and conditions of the Policy effected with the Insurer from time to time."

16. The booklet, (which also dealt with the special arrangements in respect of pension contributions and superannuation for those in receipt of PHI benefits), proceeded to set out the basis upon which PHI benefits would be paid, which included the same six features identified above. There are several points of note. First, the *normal retirement age* is expressed to be 65 years. Second, the escalation rate is fixed at 5%. Third the partial or proportionate benefit, which at that stage was described as "reduced benefit" was said to be subject to determination by the "company or the insurer". Finally the all-important protected benefit promise was expressed in these terms:

> "AMENDMENT
>
> Benefits provided under the PHI Scheme may be amended from time to time at the discretion of the Company. However, any amendment to the PHI Scheme will not affect the potential payment of any benefit if you are absent from work but have not completed the Deferred Period. Also, PHI Benefits in payment at the date of the amendment will not be affected.[6] The Company also reserves the right to terminate the PHI Scheme at any time."

17. At the time that the **2008** Handbook was accessible, a 2008 MoA contained a similar provision to the current MoA (2018), indicating that details of the policy were available from the "pensions administrator". However, it did not make any reference to the existence of the handbook.

18. Finally in terms of the evolution of PHI, as it was explained in information provided to the pilots, reference should be made to the **2011** Handbook. In fact for one of the Claimants (Mr Booth) this was the operative handbook at the time that he started claiming. There were no significant changes, although by now discrimination legislation meant that *employees* could not be compulsorily retired at 65 years of age. Under paragraph 2 of the handbook which dealt with the eligibility for cover (applying to both pilots and non-pilots) the following detail was now provided at 2.1 in relation to the extent of the cover and the age in which it would cease to be paid.

> "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.
>
> 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 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 your 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."* [7]

[6] My emphasis

[7] The italicised section appears in red in the handbook.

19. This wording, introduced for the first time, has particular relevance to one of the issues in the case, namely whether the Claimants who are receiving PHI benefit, and who are likely to continue to receive it past 60 years of age, are entitled to payment to their state pension age which for many will be 67 or even 68 with the progressive statutory increases that are intended over the next 10 to 20 years, even though regulations prevent pilots from flying after 65 years of age. This will be addressed in more detail below.

20. However, also significantly, it mentions for the first time that the benefit received by a pilot after the age of 60 years is paid directly by the company and not by the insurance company. Thus it is an uninsured benefit, and the Defendant self-insured for those pilots who were still flying after the age of 60 and who were at risk of losing their flying certificates for medical reasons, prior to the introduction of the new scheme. Although the court has heard evidence about the exponential increase in insurance premiums, and was made aware of the fact that the practice of payment over 60 directly by the company had been necessary since at least 2009 because insurance for the 60 to 65 year group of pilots was disproportionately high, there has been no direct evidence explaining how the self-insurance aspect came about.

The relevant PHI handbook (2015)

21. The insurance scheme itself, of course, arises out of a contract entered into between TUI and L&G, and arranged by their broker Aon. Evidence has not been adduced in respect of any significant changes to the policy terms and conditions which were negotiated from time to time when the policy was in existence, and although the policy documents are contained within the main trial bundle, happily they have not been referred to. Requests by individual Claimants to have sight of the policy to aid their own understanding of the insured benefit were rejected by the Defendants on the basis of confidentiality. There will of course have been changes and tweaks with premium adjustment, but it is accepted that the handbooks issued from time to time accurately reflected the policy benefits and gave the pilots all the information which they needed. It was the 2015 handbook which was operative for most of the Claimants at the time that they became medically unfit to fly, and which contained the information available to the pilots about how the scheme operated and the extent of their entitlements; it was not included in any other document. There are several important paragraphs which have featured in the evidence, and therefore they should be highlighted.

22. Paragraph 2.1 was expressed in virtually identical terms to the parallel paragraph in the 2011 Handbook. Whilst there were one or two minor differences, these were immaterial . Paragraph 3 dealt with escalation, and the amount of the benefit:

> "3.1.How much benefit would I receive and for how long?
>
> 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, provided 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……"

23. Again, there is a reference to a *potentially* higher state pension age. Examples are given in the remainder of the section as to how the benefit would be calculated, indicating that the 75% is applied to the pre-incapacity salary, and from the resultant figure there is a deduction for notional state benefit. The payment of benefit is stated to be dependent upon establishing, to the insurer's satisfaction, with periodic reviews, an incapacity to work. There is not a specific paragraph which deals with PB[8] but in a flowchart which is provided to explain how the process works, reference is made to the potential consideration by the employer where there is only partial incapacity and the opportunity to take on a lesser paid job on lighter duties:

> "If you are able to return to your insured occupation for reduced hours or on lighter duties, or you are able to take a lesser paid job as a result of your incapacity, the insurer will usually consider the possibility of paying proportionate benefit. Such cases are assessed on an individual basis"

24. The "linked claim" is dealt with at paragraph 4.6:

> 4.6 What if I return to work and suffer a relapse?
>
> If you suffer a recurrence of the same incapacity, currently within 52 weeks of returning to work after being in receipt of benefit from the Plan, and the medical evidence the insurer obtains supports this, the insurer will usually resume payment of benefit immediately without you having to wait for a further deferred period to expire.'

25. The all-important purported "protected benefit" provision is at paragraph 5.1:

> 5.1 Can the Plan be altered or discontinued?
>
> 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.

[8] But see paragraphs 26ff below and the guide to proportionate benefit

Proportionate benefit

26. As I have indicated, the flowchart in the 2015 PHI handbook ("HB") refers to the possibility of proportionate benefit (PB) where there is partial but not total incapacity but gives little further information. Whilst a separate guide is provided (see below) even this does not explain that the insurer's approach to the way in which regular medical assessment of pilots who are in receipt of PHI might lead to their benefit being reduced. Although seemingly not an exclusive benefit for pilots, the best explanation is contained within the statement of Claire Macan-Lind, the Defendant's senior HR adviser at paragraph 26 of her statement:

> *"26. After the first year, a pilot's entitlement to PHI benefits is assessed differently. The PHI benefit of 75% of the pre-incapacity salary, less ESA, multiplied by the annual escalation is split into two equal halves:*
>
> *a) The first half of their benefit (37.5% of the pre-incapacity salary) is payable on an assessment against their own occupation as a pilot. All pilots on PHI will receive this, as they are on PHI benefits because they are unable to fly commercial aircraft.*
>
> *b) The second half of their benefit (again, 37.5% of the pre-incapacity salary) is assessed against a suited occupation, i.e. based on the pilot's skills and education, can the pilot do a different role? If the pilot is assessed as being incapable of doing an alternative role, they will receive the second half of their benefit (i.e. the full 75% of pre- incapacity salary). However, if the pilot is assessed as capable of doing an alternative role, they are not entitled to the second half."*

27. The rationale for this is obvious. The medical assessment is stringent for pilots, who may have incapacity to fly, but are capable of carrying out many other roles in a "suited" occupation. There was no requirement for an alternative lesser paid job to be taken with TUI, and self-employment was enough to allow the second part of the benefit to be paid on a proportionate basis. The guide accessible by pilots confirmed the availability of PB:

> **"The Guide to the calculation of proportionate benefits**
>
> Introduction
>
> What happens if your illness or injury means that you can work part-time or in a reduced capacity, or in an alternative less well paid role?
>
> *If illness or injury ('incapacity') means that you are deemed medically unfit to return to your substantive role within the company in the foreseeable future but are able to work in an alternative role on the basis of reduced hours or in a reduced capacity, the insurer will pay a 'Proportionate Benefit' (i.e. a proportion of the full PHI benefit) to support you in your return to work.*"

28. The guidance was intended to allow in-claim pilots to work out their entitlement to PB. It provided examples. On the basis of a pilot who was earning £100,000 before becoming medically unfit, and whose salary was thereafter "enhanced" on the basis of an escalation to produce what is known as *enhanced pre-incapacity salary,* ("EPIS") and found himself earning £5,000 in an alternative suited employment, the calculation was expressed as follows:

> "Enhanced Pre-Incapacity Salary minus Reduced Salary divided by Enhanced Pre-Incapacity Salary = % Loss.
>
> £101,712.00 - £5,000 / £101,712.00 = 0.95
>
> The % Loss x Full PHI Benefit (as above but with no ESA deduction)
>
> 0.95 x £78,750.00 = £74,878.78*
>
> * You cannot claim more than the full PHI benefit and therefore the amount of Proportionate Benefit payable is adjusted to the maximum benefit amount which is £73,172.61.
>
> Total Income = Proportionate Benefit plus Alternative Income = £78,172.61 per annum."

29. It is fair to say that the calculation is somewhat complicated and it was doubtless for this reason that the Defendant through its HR department, and I understand also on the company intranet, made available a PB calculator. It is common ground that the calculation allowed a pilot to have almost the full PB entitlement made up (i.e. close to the 75%) even though he or she was earning a relatively modest sum, for instance between £5,000 and £10,000. It was considered a very valuable benefit for those pilots who were not fully incapacitated, i.e. who could follow a suited occupation.

The 2018 Handbook

30. Brief mention should be made of the most up-to-date handbook prior to the introduction of the new scheme in August 2021. It was in virtually identical terms to the 2015 handbook, but there was one notable difference to which the court has been referred. The paragraph which dealt with eligibility, and the cover which was available for pilots from the age of 60, i.e. provided by the company and not the insurer, stated that eligibility ceased at the age of 65, with the removal of the words "*or if higher your state pension age*".

Pension contributions for those on PHI

31. I have referred to the 2018 MoA at paragraph 8 above as central to the contractual arrangements between the Defendant airline and the pilots. It was paragraph 10.2 of the MoA which enshrined the entitlement to permanent health insurance. The payment of ill health benefit, of course, whether derived from the operation of the insurance policy, or for the over 60s with the application of the self-insured element does not cover pension contributions. These were the subject of a separate contractual arrangement within the same MoA (2018) and referenced in clause 13.3.

> "13.3 PHI Pensions
>
> When a pilot, who is a pension scheme member, moves onto PHI, they should refer to Schedule N - BALPA & TUI Airways Agreement – Changes to pension arrangements for pilots in BAL & TAPS (Flight Crew), Appendix D, Section 4 (Pension contributions for pilots in receipt of PHI benefits). This describes how pension contributions will be handled whilst the pilot is in receipt of PHI benefit. "

32. The appendix D that is referred to describes the entitlement in these terms at paragraph 4:

> 4. Pension contributions for pilots in receipt of PHI benefits
>
> The following provides an outline of how DC pension contributions are calculated for those in receipt of PHI benefits. This information is provided for reference only.
>
> - When moving to PHI benefits, a notional pensionable pay value is created for the individual member, including all current aspects of pensionable pay as laid out in Schedule A of the MOA. This value continues to increase as if the individual member remained in active service, including increments and annual pay awards. Management and Training emoluments are increased in line with that applied to the Active role. If however the roles have been discontinued, the increase would be in line with the annual pay award.
> - Employee and employer contributions into the DC plan are based on this notional pensionable pay and remain unaffected by the actual PHI benefit received by the member
> - If the member leaves the employment of TUI and is no longer in receipt of PHI benefits, contributions to the pension plan will cease

33. Thus unlike either the PHI handbook, which deals with the basic benefit entitlement, and the guide to proportionate benefit, which is an explanation of how benefit can be maximised, the pension contributions arguably have a clearer contractual status as they are specifically dealt with as part of the MoA, which the parties accept comes about as a result of collective bargaining. I shall address this again later in this judgment, when dealing with the parties' submissions.

BALPA

34. BALPA is the trade union and professional association to which the vast majority of airline pilots based in the UK belong. It promotes the interests of its pilot members, seeking to improve working conditions, including lobbying government if necessary. In order to focus on the specific needs and issues of pilots of a particular airline, BALPA has set up company councils, ("CCs") which are entrusted with the negotiation of collective agreements with that airline in respect of the pilots' contractual terms, and which act as a liaison with the company management. Accordingly, there was a specific BALPA CC for TUI airline pilots, and it is this body which became involved in the negotiation and implementation of a new MoA that purported to incorporate new terms into the individual contracts of employment for pilots in respect of the benefit which was to replace PHI.

35. A notable feature which emerged from the evidence was that several CC members after completing their term of office, whilst remaining a pilot, would move on to a management role within TUI. For example, Mr Winspear, a principal witness for the Defendant spent a long period as a CC member and a pilot, before moving on to his present role within the TUI management structure. He had been involved in negotiations on behalf of

the union previously, and was now negotiating, as will be seen, on behalf of the company. Thus he had experience on "both sides of the fence". Close relationships existed between pilots who are representing the union interests and pilots who had now become managers. Some of the key communications which took place were on WhatsApp, as will be seen, and there did not exist the usual demarcation often seen in industrial relations between blue-collar and white-collar.

The Need for change

36. TUI senior management received a presentation from their brokers, AoN in April 2018 which provided a comprehensive review[9] of the PHI benefit and which set out the exponential increase in premium cost over a five year period, the claims history in so far as pilots were concerned, the potential cost of pending claims, the health insurance market including other possible providers, and the risk which the airline faced in respect of the self-insured pilots between the ages of 60 and 65. It was noted that there was a lack of market competition, with other providers for the most part declining to quote when approached because of the TUI claims experience. Over five years the premium paid to the insurer had increased from £1,774,381 in October 2012, to £5,680,494 in October 2017, an increase of 188% since 2013. The presentation, whilst recommending payment of the premium for the following year, in its conclusion suggested that substantial cost could be saved by revising the PHI model to introduce a limited payment period, changing the definition of incapacity, reducing the percentage of salary insured, having a fixed period during which the benefit would be paid (five years) and removing pilot PB which was a unique feature of the TUI PHI policy. On the basis of redesigned cover it was anticipated that premiums could become more manageable and affordable.

37. The cost of the PHI insurance, and decisions that were made at a senior management or executive level were not the subject of evidence before the court. Save in respect of a discrete issue which is touched upon later in this judgment which the head of finance, Mr Craig Murphy addressed, no witness was called from a senior TUI level on the issue of affordability, and it was accepted without any real challenge that the premiums had become unaffordable and that change was necessary. The evidence of Julie Tindale was that various alternative bases were contemplated, and discussed with the brokers with a view to finding insurers willing to give quotes, and the results were communicated to the CC in July 2018. In fact there had been a significant level of communication with BALPA representatives in the course of 2018 and 2019 following a management decision that an alternative scheme should be agreed with the pilots through their union. It is clear that there was no intention that any changes should be imposed unilaterally and as the evidence of Mr Godesar from BALPA makes clear, BALPA were fully on board with the need for change.

[9] MB (Main Bundle) 2761

GIP

38. Negotiations between BALPA and TUI for the introduction of a new scheme of permanent health insurance known as GIP (Group Income Protection) began in September 2019. Conducting the negotiations on behalf of the Defendant was Mr Winspear, whilst Mr Godesar led the team on behalf of the union. The intention was that if agreement could be reached, the terms of the new scheme would be incorporated into a revised MoA and become part of the terms and conditions of the pilots' employment. Significantly it was not intended that those pilots who were already "in-claim", that is in receipt of PHI, whether under or over 60 years of age would be included in the proposal. Thus their benefit position was being protected.

39. The main features of this proposed new scheme were that the benefit would still amount to 75% of the pre-incapacity salary, reducing after a year to 37.5%. although there would be no deduction for employment support allowance. Escalation would be linked to the RPI, but capped at 2.5%, and PB which was renamed "partial" benefit would be paid, albeit on a different basis. The major difference was that the benefit would only continue for a period of five years from the time that it was first paid. If a pilot was under 60 when first claiming, the benefit would be paid by the insurance company, and if over 60, it was self-funded by TUI. The rationale behind this scheme was to promote the health and well-being of pilots and to pursue what was described as "preventative care" with accessible private medical insurance and free lifestyle health assessments. Rehabilitation would enable pilots to achieve an early return to work, and thus not become dependent on benefit and ultimately in receipt of a significant reduction in salary.

40. BALPA was supportive of GIP and indicated that it would be recommended to their members. Although BALPA did not always seek the endorsement of members through a ballot, on this occasion, to the knowledge of TUI management, it was considered prudent. In the light of the endorsement of the scheme by the BALPA CC, it was expected that members would vote yes. The ballot ran for two weeks until 14th February 2020 and the result was a resounding rejection of the GIP proposal with 92.9% of pilots voting against it.

The GIP Gap

41. So confident was Mr Winspear and others in the TUI management that GIP would be accepted by the membership on the recommendation of BALPA, that they did two things. First, Mr Winspear issued a notice to all pilots in advance of the ballot describing the agreement that had been reached in principle with BALPA and indicating that FAQs would be provided to assist with the implementation.[10] Second, a business decision was taken in late 2019 to change the nature of the insurance, to bring it in line with the GIP proposal and thus significantly lower the annual premium (by almost £5 million). The effect of this change, which I understand was from the beginning of 2020 and thus before the vote had taken place,

[10] MB 3171

was that the earlier PHI was replaced with a new health insurance limited to 5 years and on the terms that had been intended by the GIP proposal.

42. Following the rejection by the membership of the proposal, and pending the putting into place of any new scheme, the Defendant was faced with potential new pilots pursuing claims for ill-health benefits. Clearly absent any agreement, the rejected GIP terms could not be foisted upon these pilots, a decision already having been made that there would not be unilateral changes, and therefore their benefits began to be paid as if they were PHI entitled, in anticipation that the insurance which was now in place (the GIP insurance at a substantially reduced premium) would pay the benefit for the first five years, and thereafter, the payment responsibility would be undertaken by the Defendant including beyond the age of 60 years. Those who started in-claim before 60, and continued after the age of 60 (this does not include any of the present Claimants in this litigation) would therefore have their benefit paid under the terms of the new policy until 60, and thereafter the benefit was self-funded by TUI. An issue arose as to who bore the burden of the funding of these pilots who fell within the gap between the rejection of the GIP proposal and the implementation of the subsequent scheme (PIP). I will address this below. In the course of the trial and in a more light-hearted moment it was suggested that these pilots could be referred to as the "GIP gappers", those whose benefit began to be paid in the gap between the two schemes.

Covid-19 Mitigation Agreements

43. Although the Covid 19 mitigation agreements were touched on only very briefly in the evidence and do not directly impact on the issues which I have to determine, I should refer to them because they followed on very shortly after the GIP ballot and may have some marginal relevance as to the position of the in-claim pilots.

44. From March 2020 when the country went into different stages of lockdown, and measures were taken by the government in relation to the pandemic, the aviation and travel industry were very badly affected, and many smaller airlines were facing significant financial difficulties. Financial assistance was provided by the government, but it was necessary for individual employers to make their own arrangements in respect of pay reduction. BALPA became involved in negotiation with TUI and over the period of approximately 18 months there were three Covid-19 mitigation agreements entered into by collective bargaining which were introduced into the individual contracts of employment of pilots in respect of pay reduction and the furlough scheme. There was very limited international flying, and most active pilots were not working. Most of these agreements were not the subject of a union ballot, and they enabled the Defendant to pass through the financial hardships of the pandemic relatively unscathed, through a combination of salary reduction and voluntary redundancy/retirement.

45. However, the Covid-19 mitigation agreements did not affect the in-claim pilots who were in receipt of PHI and/or the GIP gappers. They continued to receive benefit on the basis of their escalated original salaries. In other words, their benefits remained protected.

PIP (Pilots' Income Protection)

46. The resumption of negotiation and discussion between management and BALPA in relation to the introduction of a revised PHI scheme following the ballot rejection in January 2020 was delayed because of the pandemic, but resumed again towards the end of 2020.

47. It was clear that the GIP scheme, with its limited benefit payment period of five years was unacceptable to the majority of pilots. In its newsletter announcing the ballot result in February 2020 the CC stated:

> "We do not underestimate the strength of feeling demonstrated by the ballot result and the message that it conveys. We will now take time to consult with members, reflect, consider your views and build a consensus before we engage with the company."

48. However, a balance had to be achieved between the spiralling cost of premiums and the provision of a benefit (which was a contractual entitlement) in a scheme which was workable, and which provided not only financial advantages but also a rehabilitative incentive to those pilots who had been certified as unfit to fly.

49. In December 2020, Ben Coker, a BALPA CC member and an active pilot, compiled a working document for discussion called *Project Pontoon* in relation to alternative funding schemes for the ill health benefit to replace PHI. It is important to note that this task was undertaken on behalf of the union, and the intention was to kickstart discussions, which as in the case of the GIP negotiation, were largely led by Chris Godesar on behalf of BALPA, and James Winspear for the management team.

50. The concept of a self-funded scheme became central to the discussions. Unlike the payments which were made to the over-60 in-claim pilots once they ceased to be receiving their PHI under the insurance arrangements with L&G, that is paid directly by the airline, the self-funded concept meant that a fixed sum was paid by the company (4.52% of the applicable pilot payroll costs) to offset the payment of the benefit in any given year, anticipating the risk of those who might seek to claim. In the event that there was an excess, active pilots (who stood to benefit in the event that they lost their medical certification) would receive a payment, but if there was a shortfall the cost would be spread amongst those active pilots. A shortfall might arise in circumstances where a greater number of claims were received in any given year than anticipated. In the course of the negotiation between BALPA representatives and TUI management it was considered that this would be welcomed by the

pilots who then had a vested interest in the scheme. The fewer pilots who went off sick the greater would be the excess and thus the bonus payment to the active pilot community.[11]

51. In the update provided by BALPA on 20th July 2021 to its pilot members, as the negotiations were underway with TUI, a summary was provided in these terms:

> "PHI is a topic that has been under scrutiny for several years now. The current PHI system is an outdated legacy scheme for which no insurer is willing to provide cover anymore. Even short term insurance is difficult and expensive to get now. Furthermore, these come with what we would consider to be poor terms and conditions, all of which sit outside of our control too. This means any insured mechanism is no longer a stable option to preserve this very important benefit. On the other hand, this same predicament has given rise to a ground-breaking opportunity to develop an industry-first and innovative solution."

52. The scheme under negotiation was to be called Pilot Income Protection or PIP. It was to be a pilot specific scheme, unlike the PHI benefit which had applied to some non-pilot employees and which would continue to apply to those. The update indicated that there were two possible versions of the new PIP scheme. Option A included a 10 year deal paid at 80/40% with no ESA deduction and Option B was a 7 year deal paid at 90/45% with no ESA deduction. In other words, like the PHI benefit, the first year of payment, to which the in-claim pilot was entitled after the first six months of receiving company sick pay, would be the larger proportion of the relevant salary, whereas after the first year, if he or she was capable of suitable employment although still unfit to fly, the benefit would be reduced to the lower figure. It was intended that whatever option was followed, the terms would be included in the collective agreement by an additional schedule (schedule B) and thus contractual.

53. The other features of the new benefit that was being proposed were these. First the 5% escalation rate would be removed, and escalation was linked to the rate of increase for an active pilot's pay. Second, there was no PB built in. However, a benefit recipient was entitled to work in alternative employment without declaring any salary, and thus, potentially, with the addition of the benefit could earn more than under the previous PHI scheme, where the alternative salary was accounted for and could extinguish the benefit if substantial. Third, pension contributions from the company were to be based upon the benefit received, and not on the notional pilot earnings as escalated. Fourth, there would be a linked claim clause, similar to PHI, known as a "connected claim" where the pilot would not be prejudiced by returning to work after a period of ill health if there was a recurrence of the same condition within 52 weeks. Fifth, unlike PHI, private medical insurance for the pilot and his family was extended throughout the period of the benefit claim. Finally, the benefit continued until 65 years of age.

[11] The court heard evidence that for the first two years of operation there was an excess, but in the present financial year there was likely to be a deficit which would have to be borne by the active pilots.

54. Although the pilot members of BALPA had been given an option to accept or reject the GIP scheme 18 months earlier, i.e. through a yes/no ballot, with the new PIP scheme the only choice on the ballot was between option A and option B. Explanations were provided during the course of the evidence which were not the subject of challenge that the imposition of a revised PHI benefit scheme by the company was inevitable because of the enormous cost that was involved in its present form. The BALPA CC was keen to have a hand in the development of the revised benefit, believing that collaboration would be far more beneficial for the pilots, and that rejection (as a result of a yes/no ballot) was not on the cards.[12]

55. It was proposed that PIP should apply to all new claims by pilots from the period of its inception, which was stated to be 16th August 2021, but it would not apply to pilots who were in receipt of PHI and under the age of 60, because these individuals were in receipt of insured benefits (under both the original L&G policy and the new policy that was negotiated in anticipation of GIP changes (the GIP gappers)). However, from the age of 60 all in-claim pilots were transferred to the new scheme. This led to the crafting of transitional arrangements which were the subject of some scrutiny during the course of the evidence, and rightly so because they were almost impenetrable as a result of the complexity of the calculations. I do not intend to analyse them within this judgment, but will refer to the process when considering the evidence, and issues which arise in respect of information which the in-claim pilots were receiving about the changes.

56. Schedule B to the amended MoA became an important document during the course of the negotiations, because it formed the basis of the new contractual entitlement to PIP. It had always been the understanding of both TUI management and the BALPA CC that the principle of ill health benefit was contractual and was enshrined in the MoA (paragraph 10.3) but that its terms and working out were non-contractual, and although PHI was explained in the handbook, TUI retained a discretion as to the nature of the benefit that was to be provided. The Claimants, of course, have never accepted this.

57. There were several iterations of schedule B, a document which passed to and fro between Mr Godesar and his team and Mr Winspear. In anticipation of the ballot, a revised schedule B version was provided to its members by BALPA, together with three sets of FAQs (frequently asked questions) which were intended to provide information for those voting. In addition to the provision of FAQs, a webinar was held on 22nd July 2021which was open to all pilots in which several members of the CC, including Chris Godesar, made themselves available to answer questions. I will consider these aspects in more detail in the course of summarising the evidence, because information provision is relevant to the significant issue of breach of the implied term of trust and confidence.

[12] As will become apparent when the evidence is considered, several of the Claimants who were most affected by potential changes were very unhappy that they were not being given an opportunity to reject the scheme.

58. It was acknowledged by the BALPA CC that the negotiated agreement, which was to be put in place subject to the choice of option, would not be beneficial to the entirety of the membership and there would remain a small percentage who would be at a financial disadvantage. This included those who ended up on long-term ill-health benefit. The significant difference, however, between the GIP scheme and the proposed PIP scheme was that in-claim pilots would transition at the age of 60 and receive their benefit under the terms set out in schedule B.

59. The ballot, which represented a choice between the two options, had opened on 30th July and closed on 13th August 2021. A request for a delay in the ballot was refused.[13] The result of the ballot was that a majority (58.9%) voted for the seven year option (B) and the appropriate figures were incorporated into the final version of schedule B to the amended MoA. With effect from 16th August 2021 PIP became operative and all new pilots who claimed received their benefits under the scheme. It is important to note that those who were already in receipt of PHI, unless they were over 60 continued to receive their benefit on exactly the same basis as before, i.e. they were unaffected by the changes, although on reaching the age of 60 they would move from the insurance backed scheme (whether that be the PHI negotiated insurance or the GIP negotiated insurance) and onto the new scheme. Although it was limited to 7 years as its maximum duration, even in the case of those who had been on PHI for many years, if there was no recovery or return to active flying, the clock would be reset and the pilot would receive benefits for the entirety of the five years up until his/her compulsory retirement at 65 years. Of course in respect of the Claimants in this litigation the 65 years of age cut-off for the payment of benefits is not accepted regardless of the scheme which might have operated.

The position of the individual Claimants

60. It would be helpful to provide a brief summary of the position of each claimant, and how they have been or might be affected in the future by the introduction of the new PIP scheme. I am grateful that the parties have been able to agree (substantially) any potential financial loss subject to the findings of the court and this does not have to be identified at the present stage. For some the loss is immediate, for others it is prospective. For all, declarations are sought.

Adrian (Buster) Crabb (First Claimant)

61. Mr Crabb was 61 years of age as at 16th August 2021. He commenced his career as a pilot in April 1999, working for Air 2000, which became First Choice Airways, then Thomsonfly, Thomson Airways and finally TUI Airways. He became a captain and had a variety of roles throughout his career, involving fleet management and training as well as

[13] Explored in more detail below

being an active pilot. His medical certificate was suspended in November 2017 when he was diagnosed with RVOT tachycardia which could not be managed by medical intervention or medication. After a period on sick pay, he transferred to the PHI scheme in May 2018. He received the full benefit, and although there was an issue in relation to a retrospective clawback he was able to claim PB with effect from November 2019 because he was working as a delivery driver for John Lewis. Because of his age he transferred onto the PIP scheme as soon as it was introduced, and he has losses represented by the difference between the benefits that he would have received if he had remained on PHI which he claimed was his contractual entitlement, and the new PIP benefit as well as the reduced pension contributions based on the difference between the PHI scheme (which was a percentage of the national salary) and the PIP contributions (a percentage of the benefits).

Kristian Gavin (Third Claimant)

62. Mr Gavin is 43 years of age. He joined Britannia Airways in November 2003 when he was 24 years old as a second officer pilot, remaining with the rebranded companies (Thomson Airways, and then the present Defendant TUI Airways) before becoming a captain in 2016. He lost his medical certification on 27 June 2018 after notifying the aeromedical adviser (AME) of the dizzy spells which he was suffering, some of which caused a loss of consciousness, and he has been unable to return to active flying. The diagnosis of this dizziness was later confirmed as vaso-vagal syncope. He received company sick pay, before being accepted onto the PHI scheme. Mr Gavin was aware of his entitlement to claim PB having researched this carefully. He had tried to work full-time in a suited occupation other than as a pilot in simulator training, but his condition would not allow this, and therefore he set up a business providing support for the development of training documents for pilots. He earned less than £10,000 in this role, but it was sufficient to reinstate his PHI benefit through PB to close to the full amount. This he continues to receive as an in-claim pilot who is under 60 years of age, and thus he has incurred no current loss with the introduction of the PIP scheme. His loss is prospective, and he seeks a declaration.

Simon Rawlinson (Fourth Claimant)

63. Mr Rawlinson is 63 years of age. He started working for Britannia Airways in August 1988 as a pilot and became a captain in 2003. He has stayed with the company through the rebranding. In April 2017 he developed a visual migraine, and this was reported to the AME. Although further tests were carried out, the diagnosis was confirmed and his visual migraines have continued to date preventing him from returning to work as a pilot. On 15th November 2017 he was accepted onto the PHI scheme. His benefit was halved because it was considered that he was capable of a suited occupation, but he did not at the time claim any PB, and does not appear to have had an alternative income until recently. However, his position is slightly unusual compared to the other Claimants. He was 61 years old when PIP was introduced in August 2021, technically was no longer entitled to PHI, and should have transitioned onto the

new benefits. Because of the level of his PHI payments, and the way in which the transitional arrangements worked, it was not expected that he would reach the level where there would be any reduction in those benefits. However, he has suffered a loss in two respects; first, he incurred an immediate pension loss, having received the employers' pension contribution as a cash sum; second, from 1st April this year, had he remained on the PHI scheme he would have been entitled to PB, and thus the reinstatement of the original PHI. In fact, in his evidence to the court he indicated that he had made a PB claim, even though he knew that it was not accessible to him as a technical PIP recipient. Both these aspects form the basis of his pecuniary loss claim.

Gregory Booth (Fifth Claimant)

64. Mr Booth is presently 59 years of age. He started working for the Defendant airline, through its predecessor in title Britannia Airways in February 1988, and became a captain in July 2001. In December 2003 he became a training captain. In May 2013 he developed disabling back pain and following notification to his AME his licence was suspended and he was no longer able to work as a pilot/training pilot. He began the process of accessing company sick pay and later PHI benefit, being accepted onto the scheme in September 2013. He achieved some minimal recovery, and attempted to return to work in February 2014, thus having the benefit of the linked claim provision in the original scheme, but unfortunately this was unsuccessful and following medical suspension he was able to resume his PHI benefit with effect from October 2014. He had some difficulty in relation to his PB claim, and was supported by a BALPA CC representative, eventually achieving this in November 2016. Mr Booth turns 60 in September and thus will be the subject of the transitional arrangements. However, because he has yet to incur a loss, or had not at the time of the trial, his claim proceeds on the basis of seeking a declaration only.

Stuart Sneath (Sixth Claimant)

65. Mr Sneath is the second youngest of the Claimants. He turns 60 in 2035 and is currently 49 years of age. He started working for Britannia Airways in April 2004 as a pilot second office and was eventually promoted to captain in 2017 with the now rebranded airline, TUI Airways. He had intermittent health issues, but did not need to access the PHI scheme until 2019. In March of that year he started suffering from vision loss, which was diagnosed as chronic central serous retinopathy. His medical certificate was suspended, and after the appropriate period, and applying for PHI, he was accepted onto the scheme in November 2019. He was aware that he could claim PB although this had not been made clear in his acceptance letter which was somewhat confusing. Mr Sneath set up his own business selling convex mirrors, although he would have preferred ground-based duties with the airline, and made a claim for PB from May 2021 when faced with a 50% cut in his benefit. He was unaffected by the introduction of PIP and will remain so until his 60th birthday. Thus, he seeks a declaration. It is noted, and this was clarified in Mr Sneath's evidence, that he had a

particular concern about the effect of returning to work. His medical condition was such that if this was possible, he would have liked to, although the risk of losing his PHI and reverting to PIP in the event that the return lasted longer than 12 months was significant for him.[14]

Helen Hay (Seventh Claimant)

66. Ms Hay is 55 years of age. She started working for the Defendant's predecessor in title, Britannia Airways as a pilot second officer in November 1997, and worked her way up through the ranks, eventually achieving captain status in 2005. In November 2013 Ms Hay moved onto a salaried part-time role (permanent part year working contract [PPY] whereby she received a reduced salary of 90.6% of the full-time equivalent [FTE]. However, the pension contributions continued on the basis of the FTE salary. In May 2015 she developed disabling migraines which led to photophobia, speech difficulty and severe headaches. These were declared, and after a discussion with her AME her certification was suspended. Ms Hay moved onto PHI with effect from 1st April 2016, whereby she received 75% of her PPY salary. When the benefit was reduced on the first anniversary, she was able to claim PB on the basis of her alternative earnings as an administrator for a cats' charity, a role which has continued to date. As she continues to receive her PHI and will do so for the next five years, there is no immediate financial loss, and therefore she seeks a declaration.

Melville Bishop (Eighth Claimant)

67. Mr Bishop is 61 years of age. He started working for Britannia Airways as a pilot second officer in February 1988, becoming a captain in 2002. He has continued in this role. In January 2017, he developed migraines, and he informed his AME, whereby his medical certificate was suspended in February 2017. Whilst in receipt of company sick pay, he began the process of applying for PHI and was accepted onto the scheme in July 2017. He received the full benefit for 12 months, with the reduction thereafter, but chose not to undertake a suited occupation, and never claimed any PB. However, he did not rule out the option of making a claim at some stage in the future. When PIP was introduced, Mr Bishop was still under 60, although faced the prospect of a change in his benefit after a further 18 months or so. After February 2023, although transitioning onto the PIP scheme, he suffered no loss in benefit because of the salary differentials, although his pension contributions were reduced, and his claim is based upon this pecuniary loss; as with the other Claimants he seeks a declaration.

[14] Mr Sneath accepted on questioning from counsel Mr Williams KC that Julie Tindale's evidence made it clear that the company would honour the linked claim in the event of the insurer declining to continue the more beneficial payments under PHI if he were to return to work and suffer a relapse.

The pleaded cases and the issues

68. In a case of this nature it is usually helpful to address the respective pleaded cases to identify the issues which fall to be decided. However, such an analysis is unnecessary because the parties have agreed a comprehensive list of issues which have been distilled from the pleadings and the extensive documentation that has been made available, and these are set out as follows:

> *List of issues*
>
> *(1) Were paragraphs 2.1 and/or 3.1 and/or 4.6 and/or 5.1 of the 2015 PHI Handbook [and/or the content of the Guide to the Calculation of Proportionate Benefits,] expressly **i**ncorporated into the Claimants' individual employment contracts by clause 10.2 of Schedule M to the 2018 Memorandum of Agreement ("MOA") and if so, were such paragraphs apt for incorporation? [The section highlighted above in square brackets/bold remains in dispute between the parties and the court will be asked to consider the same]*
>
> *(2) If paragraphs 2.1 and 3.1 of the PHI Handbook were so expressly incorporated into the Claimants' contracts of employment, did they provide the Claimants with a contractual entitlement to PHI Benefits (as defined within the Particulars of Claim) assessed against their pilot salary:*
>
> *(a) until their state pension age; or*
>
> *(b) The employer justified retirement age for pilots (currently at 65)?*
>
> *(3) If paragraph 4.6 of the PHI Handbook was so expressly incorporated into the Claimants' individual employment contracts, was it an express contractual term that, once in claim, if the Claimants' returned to work but subsequently became incapacitated as a result of the same or related reason within a 52 week period, their PHI Benefits would be reinstated?*
>
> *(4) If paragraph 5.1 of the PHI Handbook was so expressly incorporated into the Claimants' individual employment contracts, was it an express contractual term that, once in claim, the Claimants' PHI Benefits could not be amended and/or changed?*
>
> *(5) If so, was the contractual effect of paragraph 5.1 of the PHI Handbook to prevent any changes to the Claimants' PHI Benefits, including as a result of variation through collective bargaining with BALPA?*
>
> *(6) If each or any of paragraphs 2.1, 3.1, 4.6 or 5.1 of the PHI Handbook were incorporated into the Claimant's individual contracts of employment, were such terms varied by the incorporation of Schedule B to the Memorandum of Agreement between BALPA and TUI?*

(7) By applying PIP to each of the Claimants did the Defendant breach the Claimants' contracts of employment as particularised at paragraphs 34.1 to 34.7 of the Particulars of Claim?

(8) (Withdrawn)

(9) If the Claimant's alleged contractual rights to PHI were able to be varied through collective agreement, nevertheless:

(a) did paragraph 5.1 impart a contractual discretion upon the Defendant to modify, suspend or discontinue PHI Benefits?

(b) did the Defendant exercise such a contractual discretion as alleged by the Claimants?

(c) If so, was it an incident of the implied term of trust and confidence that such a discretion could only be exercised reasonably and/or fairly and/or rationally and/or after a fair and/or rational and/or reasonable process?

(10) Was it an incident of the implied term of trust and confidence contained within each Claimants' contracts of employment that the Defendant would carry out the process of collective bargaining reasonably, rationally and fairly?

(11) If any of the terms at (9) or (10) were implied into the Claimants' contracts of employment, did the Defendant breach such terms:

(a) By allegedly 'changing' the PHI Scheme for those in-claim?

(b) By allegedly failing to consult adequately or at all (whether directly or collectively) on the impact of the proposed changes to the PHI Scheme?

(c) By allegedly introducing PIP without providing any or any sufficient information about the true impact of those changes?

(d) By allegedly introducing PIP through a flawed and/or unfair process?

(e) By negotiating with BALPA and effecting the change to the PHI Scheme in light of its alleged previous policy statements and/or written assurances that the PHI Benefits of in-claim pilots would not be so affected?

(f) By allegedly failing to notify the Claimants of changes to the pension contributions made by the Defendant?

(g) By allegedly informing the Claimants of changes to their PHI entitlement weeks after PIP was introduced?

(h) By allegedly misrepresenting the changes to the PHI Scheme made by PIP and thereby procure and/or engineer PIP to be accepted to the detriment of the Claimants and/or all in-claim pilots?

(i) By allegedly failing to ensure that the Linked Claim Clause was retained and/or enforceable against the third-party insurer?

(12) Should any breaches of contract be established, what (if any amount) is the appropriate quantum of damages for the First, Second, Fourth and Eighth Claimant? (No longer necessary)

(13) Have the First, Second, Fourth and Eighth Claimants adequately mitigated their alleged losses? (No longer pursued)

(14) Should a declaration be made that the Claimants' alleged contractual entitlement to PHI Benefits are protected from any and all change, including pursuant to the purported changes introduced by PIP in August 2021?

Evidence

69. The court has heard a substantial amount of oral evidence from the witnesses who provided statements, and it would be a disproportionate exercise and of no great benefit in determining all the issues to summarise that evidence in detail. I have the advantage of transcripts of the entire content amounting to over 1400 pages and it has been helpful to be able to cross refer and remind myself of some important passages.

70. On the basis of the list of issues as set out above, it seems to me that those numbered 1 to 7 are largely matters of interpretation and legal principle, and it is unsurprising that most of the cross examination of the witnesses was focused on issues numbered 9 to 12 which represents the secondary or alternative case advanced by the Claimants relating to a breach of the implied term of trust and confidence in the context of the exercise of any discretion. In this respect there were some key communications, including emails and WhatsApp messages which are potentially relevant and touch upon matters such as consultation, the provision of information to the pilots through the agency of BALPA and the Claimants' understanding of the proposed changes; these aspects require some elucidation. I will also address the evidence in respect of paragraph 5.1 of the Handbook, and the status which was attributed to it by various witnesses, as well as the reassurances which were allegedly given as to protected benefits.

Synopsis of Witness evidence

71. First, however, I provide a brief synopsis of the witnesses who provided oral evidence. Each of the pilots (whose positions I have summarised at paragraphs 60-67 above) were called and gave evidence about how they had been affected by the proposed changes, and the involvement which they had had in the consultative process. The principal and perhaps most significant of these witnesses was the Third Claimant, Kristian Gavin, who had acted as a coordinator and at times spokesman when representations were made, and he was cross-examined over one and a half days by Mr Williams KC for the Defendant. All the Claimants were asked about their own understanding of their benefit entitlements, and the

way in which they were affected by the changes that were being introduced. They were taken to key documents which included their own contracts, correspondence and participation in the WhatsApp chats.

72. For the Defendants, the significant witnesses were Mr James Winspear on behalf of the company, and Mr Christophe Godesar, the BALPA chair at the relevant time. Their evidence addressed the negotiations that took place in relation to GIP and PIP, the balloting process, and their interaction with the various Claimants as concerns were expressed about changes which were going to be made to their benefit positions. The court heard from Julie Tindale who had knowledge about the arrangements which have been put in place with the insurance company through the broker from time to time, and who dealt with individual Claimants who had issues which needed resolving, including Mr Sneath. She answered questions about the insurance market and the way in which of the GIP gap insurance came about. Mr Nicholas Dunk, the Defendant's pensions manager also had a working knowledge of the other benefits as well as PHI, although he was not involved in any of the GIP or PIP negotiations. He was questioned about the pilots' retirement age in the context of the state pension age ("SPA") and his own understanding of the alleged contractual status of the PHI handbook. His evidence addressed the joint role which he played with Julie Tindale in instructing the broker in June 2018 when exploring alternative bases for the provision of health insurance for pilots.

73. Claire Macan Lind was the Defendant's HR advisor who dealt with the process which applied when individual pilots went on to PHI and thus dealt with the day-to-day implementation of the benefit. She was questioned about her understanding of the handbook, and the individual enquiries which she dealt with. She had an understanding about the operation of PB and was questioned about this. Claire Hood was the head of pilot relations, and had worked as a national officer for BALPA until July 2022 thus had some knowledge of the collective bargaining at the time that PIP was negotiated, being present for many of the negotiations. She was able to give evidence about the BALPA structure, including the CC, and how the collective bargaining process worked. The Defendant's head of financial planning, Kartik Hari gave evidence in relation to the financial aspects of the new funding scheme, and how it was monitored. He was responsible for providing some financial forecasting and costing for the purposes of senior management. His evidence also became important in relation to an issue which arose during the course of the hearing, and which was addressed by a supplemental statement, namely whether or not the PIP provision in the payroll covered any aspect of the GIP gappers' benefit, i.e. those who became in-claim pilots before the implementation of PIP but after the GIP insurance commenced. I will address this issue later in the judgment. It was also covered by an additional witness called by the Defendant, namely Mr Craig Murphy, head of operational finance.

74. The Defendant also called another BALPA representative, Mr Benedict Coker who was a pilot CC member who had played a role in the collective bargaining process, but who also acted as a go-between in the resolution of a number of problems which pilots have had in

relation to their claims for benefit. He professed a very detailed understanding of the workings of the new PIP scheme and was questioned about this by counsel for the Claimants. He was also able to deal with several of the communications at the time of the negotiation over PIP, and the ballot as to option A or option B.

Protected benefits, / "carve out" and reassurances

75. Mr Gavin was very familiar with the PHI handbook, even before he had a need to apply for any benefit. He had accessed and researched every aspect of the scheme that was available to pilots from the intranet and the handbook, and had found clause 5.1 to be particularly reassuring. In his statement he explained how this had enabled him to move forward and make plans. He had also contacted Jennifer Davey from the Defendant's HR department to clarify his position in respect of pension, acknowledging that schedule B to the 2008 MoA provided contractual confirmation that employer contributions to the pension scheme would be based upon the pre-illness salary. This was confirmed to him. In his statement he made it clear that as far as he was concerned the benefits to which he was entitled where he was no longer able to actively fly as a pilot, were not the subject of any discretion or goodwill on the part of the Defendant. In July 2018 he had noted a response from Mr Winspear, then the BALPA CC chairman on the online forum, (which enabled pilots to exchange ideas and seek information), to the effect that PHI and the pension payments were contractual entitlements and would remain secure. He had become somewhat more cynical towards the Defendant because of pension changes which were effected, and felt that there was a gradual erosion of pilots' terms and conditions taking place. Thus he placed great store by any assurance that could be given.

76. At the time that the GIP negotiations were taking place, on 18th January 2020 Mr Gavin communicated by WhatsApp message with Mr Winspear (who was now part of the TUI management, but who remained a close friend) when he was concerned about possible changes to the benefit. He received a reply in these terms:

> "*Hi Kris, definitely no changes for you……"*

77. A few days later, Mr Gavin had a telephone conversation with Mr Winspear (29th January 2020) following a WhatsApp message, as he still remained concerned about the proposal, although by now it was known that the ballot was likely to reject the introduction of the new scheme. He obtained reassurances that the wording of the PHI handbook provided protection to those in-claim. This was followed up by a further WhatsApp message in which Mr Winspear was thanked for his reassurance. Under cross-examination by counsel for the Claimants, Mr Winspear stated that he could not recall this conversation.

78. On the publication of the proposals for PIP in July 2021, Mr Gavin was shocked to read the impact which this was going to have for in-claim pilots after the age of 60 and he immediately became engaged with his colleagues, other in-claim pilots on a specific WhatsApp group that had been set up. He also sent a message to Mr Winspear separately. The exchange was as follows:

> [20/07/2021, 15:58:35] Kristian: Hey mate. Just seen the phi scheme. Is my initial reading correct. Are you suggesting that those on phi experience Retrospective changes? Seriously disappointed if that is the case mate.
>
> [20/07/2021, 16:02:18] James Winspear: Only when your 60 and then only on the rate of increase
>
> [20/07/2021, 16:02:36] James Winspear: So your benefits are unchanged until then
>
> [20/07/2021, 16:03:02] James Winspear: L&G have you covered until then

79. In the period leading up to the PIP ballot, Mr Gavin communicated with his colleagues on the WhatsApp group where they expressed strong feelings about what was perceived to be a betrayal by the airline in relation to the proposed changes, and the collective belief that they had a contractual entitlement to the protection of in-claim benefits by virtue of "clause" 5.1.

80. Mr Gavin was cross-examined about his understanding of the contractual entitlement to PHI derived from the MoA and the circumstances in which collectively bargained changes to the benefit might be incorporated. He insisted that this could not happen because of the protection of paragraph 5.1 which made it clear that as soon as the pilot was transferred onto the PHI scheme, the terms could not be changed. Thus the terms of the collective agreement were not appropriate for inclusion in his individual contract of employment. However, he accepted that any pilot could on a personal level negotiate to change the effect of paragraph 5.1.

81. Mr Crabb was also reassured by paragraph 5.1 of the handbook in relation to his own claim, and found the approach taken by BALPA in the FAQs that were provided at the time of the GIP ballot to be in line with his own understanding and he believed this to be because the Defendant was morally and contractually committed to retain the benefits of in-claim pilots. Specifically, following the merger with Thomson Airways he had investigated the PHI provision and noted what he considered to be a promise in paragraph 5.1 of the handbook; if there had not been such an assurance he would have taken out his own permanent health insurance.

82. Mr Crabb agreed with Mr Edge of counsel that on the pilots' case, paragraph 5.1 effectively "carved" out any collective bargaining despite the words of the balance of that paragraph that reserved the right to the company to modify, suspend or discontinue the plan if future conditions warranted it. As far as he was concerned the words "any" and "change"

were decisive and excluded the company's right to *impose* changes on them. He acknowledged, however, that a personal variation of in-claim benefits could be agreed with the company, although he was not accepting of the proposition that his BALPA representatives could do that on his behalf, unless they had his specific authority. He had never given such authority and as far as he was concerned the last sentence of paragraph 5.1 was to prevent any change in the future to those who were receiving benefits.

83. Mr Sneath gave similar evidence about the reassurance he had received from paragraph 5.1, which was reinforced by the approach taken to the benefits of in-claim pilots in the Covid-19 mitigation agreements when their benefits remained unaffected, although active pilots were on reduced salaries. Mr Sneath had had issues in relation to the linked claim clause, because he had been hoping to return to active duties, but had remained fearful that under the new scheme to be introduced this protection might be lost. On 1st June 2021 he emailed the BALPA CC chairman, Mr Godesar, to seek clarification and in the expectation that in the negotiations this would be included. He received a reply from Mr Godesar which whilst lacking in detail made a pertinent observation which was taken by Mr Sneath as a reassurance:

> "You raise a lot of very valid points and these will be catered for in the new agreement. The GIP proposal fell short in a number of critical areas. A bit more patience please.
>
> **I guess you are familiar with the PHI handbook? Check out 5.1!"**

84. Of course Mr Godesar was writing on behalf of BALPA , and it was an understanding which could not be attributed to the Defendant, but it is relied upon by the Claimants as an indication of the position of the union which was representing their interests.

85. In respect of the remaining Claimants, Helen Hay, Melville Bishop, Greg Booth and Simon Rawlinson also gave evidence as to the assurance which they had received from the PHI handbook at paragraph 5.1 that their benefits could not be retrospectively changed.

86. The evidence of the Defendant in relation to the handbook, and its contractual effect is provided principally by Mr Winspear. Prior to becoming head of flight operations in August 2019, he held a role in BALPA as an elected representative. He was questioned about a discussion which had taken place on the BALPA forum in 2018,[15] when the desire was expressed for more robust agreements in relation to PHI and other employment benefits including medical cover, the details of which were not enshrined in the MOA. His response on 15th July 2018 had been:

[15] D11/31

> "PHI and Pension are contractual benefits and covered under collective bargaining. The level of medical cover isn't."

87. It was suggested to him that his reference to "*contractual benefits*" meant more than just the fact of a scheme and included the underlying benefits, but he did not accept that this was the case. He had been asked by the company to negotiate a new scheme with the union and he considered that it was an opportunity to have the process dealt with by collective bargaining, and the terms properly included in the MoA. At the time the handbook was not used as a reference in any of the discussions in the collective bargaining but these were based upon materials supplied by the company.

88. In respect of 18th January 2020 WhatsApp message to Mr Gavin that they would be unaffected by any GIP changes and a similar enquiry from Mr Booth, Mr Winspear confirmed that at that point there had been no intention of including the in-claim pilots in the new scheme. This was not because of the effect of paragraph 5.1. In relation to the telephone call just over a week later, whilst having no recollection of it, he stated that he would not have been able to give any assurance in respect of any future schemes, as there were no alternative proposals, and the ballot had not taken place.

89. Mr Winspear was asked about his understanding of paragraph 5.1 in the context of the PIP collective bargaining. He told the court that he would have sought advice from the experts, namely those within the human resources department, as to its status and effect, and was assured that it could be collectively bargained, and would not restrict the terms that were agreed for a new scheme.

90. Similarly, when he had been a BALPA representative he had always felt that the primary mechanism for dealing with changes to PHI was an "industrial" one, that is by the use of collective bargaining and with a mandate from the pilots, which was not affected by paragraph 5.1.

91. It was put to Mr Winspear by Ms Mayhew KC when he was questioned about the creation of the self-funded pot during the PIP negotiations that it was the idea of the company to bring the over 60s into the scheme, notwithstanding that they may have had protected benefits, but he denied that this was the case. His response was that this had been driven by Mr Godesar who was keen for fairness and equitability in the collective bargaining process, and as far as he was concerned collective bargaining allowed both the union and the company to achieve this.

92. The witnesses who were called on behalf of the Defendant from BALPA, Mr Godesar and Mr Coker provided some evidence on the issue of protected benefits and assurances. In

his statement, Mr Godesar acknowledged that there was a contractual obligation on TUI to provide a PHI policy, as this was included in the MoA, but that the terms and conditions sat outside collective bargaining and were at the discretion of the company. This was recognised as a contractual weakness from an industrial point of view, and BALPA therefore welcomed the willingness of the company to enter into collective bargaining to change the terms of the PHI provision.

93. In his evidence to the court, and under cross examination by Ms Mayhew KC, Mr Godesar did not agree that the over 60s were considered by either the company or BALPA to be "ring-fenced" at the time of the Covid mitigation agreements. It had been BALPA's role to maximise benefit for all its members, and paragraph 5.1 was not taken into consideration; it was considered that the benefit was broadly an insured product and prepaid, and there was no point in depriving the in-claim pilots of that.

94. He was asked about his reply to Mr Sneath (see paragraph 83 above) and it was suggested that he was conveying the union understanding that paragraph 5.1 would provide protection to someone in his position. He sought to explain the reason for his reply. As far as he was concerned the PHI handbook was intended to reflect the underlying insurance policy which would have applied to those under 60 and whose benefit was protected completely. He knew that there was no insurance policy between the ages of 60 and 65, although he accepted that one possible reading of paragraph 5.1, if the company provision of PHI was intended to mimic the policy, was that it applied equally to the over 60s.

95. Mr Godesar and Mr Coker had been the speakers at the webinar on 22nd July 2021 which was provided shortly after BALPA members were told about the negotiations which had led to an agreement with TUI in respect of PHI benefit changes, and the introduction of PIP. A transcript of the webinar is available.[16] It was not specifically aimed at the in-claim PHI group, but for all pilots. In answering one of the questions which sought clarification on the way in which existing PHI recipients might be affected, Mr Godesar made this comment:

> "…..we're being really careful to make sure we don't end up with reduction in your benefit level basically honouring the commitment that the company has made to PHI claimants in their PHI handbook saying that you know their salary will not be affected but terms and conditions can change and these are changes to PHI terms and conditions….."

96. Mr Godesar sought to explain what he meant in answer to questions from Ms Mayhew. As far as he was concerned, the PHI handbook sat outside the remit of the CC and collective bargaining although his reply was referring to the basic entitlement which an in-claim pilot had, being mandatory, rather than the discretionary aspect, which was the PB.

[16] MB 4447

Retirement age of 65 or SPA

97. This is the second issue which the court is required to determine. As I have indicated, it is largely a question of legal interpretation in respect of paragraphs 2.1 and 3.1 of the PHI handbook, assuming that they were contractual terms incorporated into the employment contracts. The evidence is therefore necessarily within a fairly narrow scope, because it is 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. The issue relates to whether or not in-claim pilots are contractually entitled to receive benefit from PHI beyond that age.

98. It was Mr Gavin's understanding that he could. Prior to the conclusion of the PIP ballot, and during the extensive communication and correspondence which he and other in-claim pilots had been undertaking with the Defendant he was directed to an intranet page which in addition to providing a link to the 2019 PHI handbook, contained a brief outline of the scheme, as understood by the company, under a post "Permanent Health Insurance". This included a bullet point summary of the provision of PHI once a claim was accepted with the following:

> "….continued provision of PHI is subject to regular medical assessments and generally continues until you return to work, reach state pension age (SPA) retire or leave the business."

99. However, he noted that the 2019 handbook now contained an alteration which he considered to be a subtle but critical change, with removal of the reference to the entitlement to scheme benefits to a pilot's SPA, in "clause" 2.1, and with an amended "clause" 3.1 where the words "*contractual retirement age*" were now provided. He discovered that his own letter of acceptance onto the scheme also made no reference to SPA, which for him would be 68 years of age, and thus he was being deprived of three further years of benefit payment beyond the compulsory pilot retirement age.

100. Mr Gavin was cross examined by Mr Williams KC about his understanding of the SPA. He accepted that his benefit entitlement would be removed on dismissal. It was put to him that the Defendant could dismiss him if he was not legally entitled to fly commercial airlines because he had reached 65 years, but he did not accept this proposition; if he was medically disqualified from flying there was no reason why he could not continue in receipt of his benefits, and his eligibility did not fall away. Essentially there was no reason to dismiss him if he was not entitled to fly, although he accepted that if he had been able-bodied and flying, on his 65th birthday, despite there being no specified retirement age in the MoA, he would be dismissed by TUI.

101. Further, in the WhatsApp discussions in the period leading up to the PIP ballot when there was discussion as to how the proposed changes might be challenged, Mr Gavin accepted that he had not raised the issue of SPA on 23rd July when he sent a message to the group in these terms:

> "23/07/2021, 09:37:39] Kristian Gavin: "It might be totally clear from their prospective [*sic*] but I am struggling to see how a retrospective change can be legally defended. All the documents I have are quite clear that once in receipt the benefits continue to 65 and any changes will not be applicable to us.."

102. Mr Crabb had noted a discrepancy between his PHI acceptance letter and the handbook (2.1/3.1) where it was said in the former that his benefits would cease at the age of 65, despite the reference to SPA in the handbook. He did not pursue this any further at the time because of other issues relating to his benefits, and the introduction of the PIP scheme. He also noted that in the 2019 handbook, SPA had been replaced with the new term "*contractual retirement age*" which he regarded as a "fundamental and enormous alteration to terms and conditions".

103. Under cross-examination on this issue from Mr Edge, Mr Crabb did not agree that the entitlement which was sought by the in-claim pilots for PHI benefit to be continued until their SPA meant that they were being treated more preferentially than active pilots. He stated that "remaining employed by the company" covered the situation of an active pilot who had a ground-based non-pilot role and who subsequently became sick. In such circumstances the pilot would not be entitled to PHI pilot terms on his interpretation. Mr Crabb accepted that the handbook applied to both pilots and non-pilots.

104. Mr Sneath was questioned by Mr Williams about his understanding of the requirement to leave the company when he reached the age of 65 as he could no longer work as a pilot. He did not accept that his eligibility was affected after the age of 65, because he would be in-claim and therefore there would be no good reason for him to be dismissed. Mr Bishop also regarded himself as having a changed status because of the PHI handbook which entitled him to the payment of benefits up to the SPA, and not the age that a pilot would normally be retired if he was active. However, he accepted that if this contract came to an end at the age of 65, his eligibility for the benefit would also cease.

105. In respect of the Defendant's evidence, the main witness who dealt with the question of SPA v pilot retirement age of 65 was Mr Dunk, the group pensions manager. Whilst he did not regard any of the various PHI handbooks published from time to time as contractual documents so much as provided for explanatory purposes, having been drafted for the most part by the brokers/risk advisers, he noted that although in earlier versions there had been references to the normal retirement age which was defined as 65, in the 2009 handbook the words "*normal retirement age*" were removed, and it was stated that cover was only available

to pilots up to the age of 65. Further, on that occasion there was no reference to SPA. It was following the introduction of anti-discrimination legislation, and in the light of the fact that the handbook explained the benefits that were available to both pilots and non-pilots that later versions from 2011 had amended wording, because the company was prevented from compulsorily retiring employees aged 65 or over. It was relevant, however, that pilots were not allowed to fly after the age of 65 by reason of aviation regulations, and therefore their employment would be lawfully terminated at that age. This would mean that there was no entitlement to any PHI benefits on the termination of their contracts of employment.

106. Mr Dunk had been copied into an exchange of emails in 2011 between Timothy Taylor the head of reward and recognition at TUI and Catherine Stait the broker from AoN when consideration was being given to the wording of the latest version of the handbook. On 28th September Ms Stait wrote to Mr Taylor:

> "Basically, Matt's understanding on the cease age of cover for pilots was the same as mine i.e. that TUI were only covering them to age 65, not to 65/SPA if higher. That said, we understand & note that Pilots can't remain employed as 'pilots' after age 65. Therefore we assume that if any such pilots remain with TUI after age 65, that they would effectively be 're-employed' as such as 'non-pilots'. We therefore assume that they would effectively 're-join' the insured PHI population & would then be covered up to age 65/SPA if higher. (This is of course assuming that the SPA for any such member is higher than 65, otherwise there would be no merit in them re-joining the insurance as 'non-pilots".) Therefore in the immediate future, pilots who reach age 65 will also have a SPA of 65 & so would not be able to re-join the insurance as a non-pilot. However, it could affect the younger pilots who currently have a SPA above 65 (66, 67,68) & who on reaching age 65 (in years to come) could then re-join the insured cover as a non-pilot & be covered to their SPA…."

107. Mr Taylor replied the following day:

> "Hi Catherine
>
> Thanks for this and your phone messages. I have not had a chance to call you but I have discussed with Nick. We believe we should keep the Pilots on the same basis as everyone else in terms of retirement date being 65/SPA if higher but rely on their contractual terms to ensure that even if on PHI they will cease to be employed at 65 and so will come off the benefit. In this way we have set ourselves correctly for the future but can still manage the pilots.
>
> I will check this with Sam Sinclair and as you have pointed out does not impact the L&G terms in any case.
>
> Let me know of any questions or thoughts.
>
> Regards
>
> Tim"

108. These exchanges are potentially relevant in providing an insight into the understanding of the Defendant and its broker at the time in respect of the over 60 element.

Breach of the implied term of trust and confidence

109. I turn now to several features of the evidence which touch upon the Claimants' secondary case alleging a breach of the implied term of trust and confidence in respect of the process of consultation and information provision which was followed, as well as the fairness and rationality behind any discretion which might have been exercised.

Requests for information/adequacy of consultation

110. The starting point again is the evidence of Mr Gavin. As indicated above he was the pivot around which the grievances and representations to the union and management took place, and it is clear that he undertook a thorough reading of all the available material to obtain the best understanding that he could.

111. His initial reaction on reading the proposed changes which had been sent by email, was that the Defendant had torn up its promise to protect the in-claim pilots and that retrospective changes to their contractual entitlement were being imposed. The WhatsApp group was used extensively for discussion between the affected PHI recipients as they aired their grievances amongst each other. The in-claim pilots had been provided with an early draft of schedules A and B and the first set of FAQs (frequently asked questions). He found it impossible to understand the transitional arrangements, whereby a pilot on reaching the age of 60 moved from the PHI scheme to the new PIP scheme, and he could find no reference to the availability of PB for those over 60. The second set of FAQs were available from BALPA on 21st July and in the comparison table provided, there were a number of inaccuracies. In particular, apart from not dealing with PB, the table indicated that there would be higher pension savings under PIP, which Mr Gavin could not understand bearing in mind that the employer pension contribution (or cash alternative) under PHI was based upon the notional pilot earnings as escalated, and not on the benefit, as it would be under PIP. He regarded the FAQs as a deliberate attempt to mislead the pilot community, although it is noted that the FAQs were supplied by his own union, even if they had also been shared with management.

112. Mr Gavin attended the first webinar on 22nd July (referred to in paragraph 57 above) and subsequently sought a second webinar specifically aimed at the in-claim pilots (PHI recipients), emailing the entire BALPA CC to this effect. Thereafter, in the light of the concerns which were being expressed in the WhatsApp community, he drafted a letter (signed by six of the seven Claimants in this action and others[17]) which was sent by e mail to the TUI BALPA CC on 27th July. The concerns were expressed in the third paragraph of the letter:

[17] Bishop, Gavin, Booth, Hay, Rawlinson, Sneath and 5 others

> "1) It is extremely difficulty for a PHI recipient to understand the personal financial implications of these changes on their future income and pension provisions. Both schemes are complex and use a variety of reference salaries and terms. As a result, it is near impossible for members to calculate the true financial impact of these proposals.
>
> 2) These changes effectively break the principle of "protected benefits in payment". As such, we have concerns that this will weaken our position in relation to protecting existing under 60 PHI benefits or additional post 60 changes.
>
> 3) By moving to a company funded scheme, we are concerned that we will not be supported by the company and BALPA, in the event that the insurer decides to become more aggressive as a result of the cessation of ongoing insurance premiums.
>
> 4) The proposed changes appear to have a disproportional financial impact on those members in receipt of proportional benefit. Furthermore, the proposal documents appear to ignore that proportional benefit currently exists"

113. The letter also made a request for further information:

> "1) Personal illustrations to each PHI recipient showing the predicted financial impact of these changes, based on their own personal circumstances. These illustrations should show the full financial impact, including proportional benefit and pension contributions (where appropriate).
>
> 2) Independent legal advice be provided in order to assess the potential implications of PHI recipients accepting changes to "benefits in payment".
>
> 3) A commitment from both BALPA and the company to continue to fully support existing PHI recipients during any dealings with the insurer.
>
> 4) A review of the current proposal to explore ways to avoid the over 60 "Income cliff" that will potentially be faced by those PHI recipients on proportional benefit."

114. It is important to note that when a request was made for independent legal advice, the writers were referring to advice which would be obtained by the union on their behalf and which might inform any further discussions going forward.

115. Mr Gavin and his colleagues received a reply to the letter they had written on 29th July 2021 from Benedict Coker via email in which he stated that the issues were being taken seriously, and that BALPA was still in the process of consulting with the Defendant. In the meantime a further set of FAQs (FAQ 3) had been provided on 29th July which Mr Gavin believed provided no additional clarification, but merely contained a comparison between the two alternative PIP schemes. In the same set of FAQs, it was also indicated that there had been a mistake in schedule B, in respect of the definition for a PHI reference salary which was relevant to the process of dealing with the transitional provisions when a pilot on PHI transferred to PIP at the age of 60.

116. On 3rd August, there was a further collective letter written by the same group of pilots in which a request was made to the Defendant for a copy of the PHI contract with L&G. This

was refused by Claire Macan-Lind on 9th August, on the basis that it was a commercially sensitive document.

117. Mr Gavin remained concerned that there had been no meaningful response either from BALPA or from the Defendant (in the expectation that the issues raised would have been discussed in consultation with the company). A follow-up collective letter to BALPA was sent on 8th August 2021 which elicited a response from Mr Coker, again promising a detailed reply when issues were "reconciled" with the company. At this point the in-claim pilots were seeking to have the ballot delayed until their concerns had been addressed.

118. Two days before the ballot was due to take place, on 11th August 2021 Mr Gavin wrote to James Winspear, Claire Macan Lind and Malcolm Sutherland (managing director) on behalf of the same group of in-claim pilots. This letter was couched in similar terms to the earlier letter of 27th July, but there were two additional requests, namely a dedicated webinar provided by BALPA for the existing PHI recipients, and the delay to the ballot to enable those recipients to consider information received. It was stressed by the writers that they did not believe that they had sufficient information to make an informed decision, and therefore could not accept the result of any ballot.[18]

119. Despite six separate requests for a delay to the ballot, it went ahead on 13th August 2021 and the decision of BALPA members favoured option B.

120. Mr Gavin had sought to understand how the transitional mechanism worked, but found that the definitions provided were confusing and contradictory. He had hoped that the second webinar, which was organised for 13th August (after the ballot was closed) would provide some clarification. However this did not happen, and he felt that the BALPA CC members who participated, including Ben Coker, had limited understanding, particularly as to the pension provision under the two schemes and some of the definitions that had been provided. Those attending were told that a calculator would be provided by the Defendant which would enable pilots to work out what their entitlement to another. However, this never materialised.

121. Mr Winspear's reply to the collective letter of 11th August was received on 31st August 2021 (he had been on holiday and had passed it to the personnel department). It is potentially significant, and therefore I set it out substantially in full.

> "Dear All,
>
> …….Thank you for your letter of 11 August 2021, 1 can confirm that we have fully consulted with BALPA regarding your collective communications and queries from other pilots.

[18] MB 4673

> As you are all aware through our various FAQs, letters and consultation with BALPA, the current PHI scheme is a legacy scheme for which no insurer is prepared to provide cover for. This has meant that the Company has had to look at other options and this has led to the rebuilding of a pilot specific scheme now known as Pilot Income Protection (PIP).
>
> The Company has been open and transparent about this change and we have consulted fully with BALPA.
>
> We have provided details of a Scheme A and a Scheme B setting out fully the terms of these options so that all pilots could make an informed choice and choose their preferred option. As you are aware the ballot closed on 13 August 2021 with Scheme B being voted the preferred option. We do not accept that there has been no consultation with current PHI recipients, as you suggest, we have fully consulted with all of those affected by this change through BALPA. The Company will therefore not be entering into a further consultation period with you all to discuss your points 1-6 of your letter.
>
> It should be noted that although the Company has an obligation to maintain PHI cover for pilots it is for the Company to decide what this cover will be. In providing this alternate cover to the legacy scheme, the Company is continuing with its commitment to all pilots, however there is nothing in the MoA or your contracts of employment that states that this is a contractual entitlement nor is there anything that would narrate the terms of this cover or how this cover will be provided - again, this is for the business to decide.
>
> The information we have provided gives each individual the opportunity to work out how this change to the PIP will affect them going forward however, if you feel it necessary you can take your own independent advice whether that be financial or legal in relation to the non-contractual change.
>
> It is important to note that you will still have the benefit of the PIP until the NRA of 65 albeit not on the same terms as previously provided. The Company remains committed to providing the best possible terms for our pilots and we will continue to support you through this transition."

122. Under questioning from Mr Williams KC, Mr Gavin accepted that the documents which the pilots were receiving at the time had been provided by BALPA, principally the FAQs, but said that these were deliberately misleading. Although a request had been made for the L&G insurance documentation, he also accepted that there was only a small chance of it being provided, possibly because the policy was being cancelled. It was suggested to him, based on the numerous WhatsApp exchanges, that the PHI recipients were well aware that PB was not going to be available, and that their benefit might be cut in half under the new scheme after the age of 60. Mr Gavin did not accept this, and insisted that the material he had seen, and in particular the FAQs, did not make this clear.

123. Several witnesses on behalf of the Defendant were asked about the scale of the changes which were being introduced in the context of the requirement on the part of the company to ensure that the information provided by BALPA to the pilots was accurate and detailed. In particular, Claire Hood,[19] who accepted that she had a hand in the documentation when the PIP negotiations were underway, and was involved in looking at the mechanisms, percentages and calculations, had wanted to ensure that the material which the BALPA CC provided to its members was accurate and explained the situation, particularly in the light of the uncapped liability when the new scheme was being funded by members from the payroll.

[19] Then, of course, a BALPA rep

124. Whilst the FAQs were ostensibly documents provided by BALPA, a role in their creation and verification by the Defendant has been suggested. Before the negotiated scheme was rolled out to the members, Mr Godesar and Mr Winspear had been in communication by email. Mr Godesar expressed the need to be confident and comfortable with the resilience of the scheme, and in an email dated 19th July 2021 he sent a number of documents to Mr Winspear, including the schedules (A&B), the comms which were going to be provided on the PIP release to members, and the first version of the FAQs. He invited comments on these. Mr Winspear responded in these terms:

> "Thanks Chris.
>
> Fantastic to have reached this point. FAQ1 is inconsistent with date issue. Otherwise I have no further comments. I think you have done really well to condense a complex subject into clear and concise guidance.
>
> I'm happy, but let's wait for Malc to give us the final sign off."

125. Mr Winspear was asked in cross examination about his role, and he did not accept that it was the TUI prerogative to approve the FAQs, although management did provide input. Ultimately, he said, they were BALPA documents. The TUI management had a greater role in the production of schedules A and B. He was also asked about his comments in the letter dated 31st August (paragraph 121 above) in which he had referred to "*our* FAQs" seemingly accepting ownership. This letter, said Mr Winspear, had been drafted by lawyers, (Dentons) and whilst he may have checked it, he had not picked up on that aspect which would have been a drafting error. In relation to the error in the second FAQs, which Mr Winspear accepted in respect of the statement about pensions, he did not agree that this was something which the company should have altered, as it was clearly BALPA's document.

126. Mr Godesar, on the same issue, went somewhat further in sharing ownership of the FAQs with the Defendant. He agreed that if something inaccurate had emerged in the FAQs, which were shared with TUI as a matter of courtesy for review purposes, he would expect it to be pointed out, agreeing that the documents which were provided to the pilot community had to be clear and accurate. Further, he agreed that FAQ 2 did not reflect that there was no PB in the new scheme, and that the pension element was mis-stated, although there had been no intention to deceive.

127. Although the Claimants' case in respect of the lack of consultation and the provision of information arising from the way in which the negotiations were carried out and agreement was reached is focused on the conduct of the Defendant, the role of BALPA and its communications with its members over individual queries that were raised cannot be ignored. There is potential relevance in an exchange between Mr Godesar and Mr Booth, the fifth Claimant. On 27th July 2021, Mr Booth sent an email at 10.27 in which he sought some assurance of support from the CC in relation to his pre-60 PHI and the PBto which he was entitled, particularly if any issue arose with the insurer. Mr Godesar responded to that email:

> "Hi Greg,
>
> It is a good arrangement and a much better one than the Company would introduce left to their own devices!
>
> PHI continues to apply until you turn 60 and will be supported in the normal way. In the meantime, we have made sure that you can continue to benefit from the gravy train until the insurer drops out (represented by the red triangle in the transition section - view that as more 'free' money)."

128. It is clear that Mr Booth took umbrage at the implied suggestion that he was "sponging". He replied to this effect:

> "Not sure it's a gravy train for me. I loved my job as an airline Captain. Losing my licence and multiple surgeries left me distraught. Phi was a great insured benefit, that I am grateful for. I know many people think that some swing the led, but I can assure you that 49 needles in my spine, yes 49 and having to be helped to shower and go to the toilet for 6 months was bloody miserable. I'm offended by people who take the piss out of phi as easy opt out but also don't like being labelled a 'sponger'. Not offended by your remarks Chris, just stating that I wish I was still flying around the globe in my own inimitable fashion as Captain Greg!"

129. It was put to Mr Godesar in cross-examination by Ms Mayhew KC that the email exchange, and in particular his comment about a gravy train was reflective of a negative attitude by himself towards PHI recipients and derogatory. Mr Godesar denied that this was the case, and had been mortified that Mr Booth had reacted in such a way, but that in fact by referring to "free money" he had intended to identify the prepaid benefit from the insurer which would not come out of the PIP funding scheme.

130. In relation to the provision of documentation, Mr Godesar was also asked about the changes to schedule B in respect of the definitions provided, which were not seen by the pilots before they voted on the two alternatives. There had been a previous amendment in red endorsed on the version which had been seen by the pilots at the time of the ballot. It was suggested to him by Ms Mayhew KC that these changes would have enabled those trying to do the transitional arrangement calculations to have a clearer understanding, and he accepted that the PHI work which was undertaken by BALPA was "done almost on behalf of TUI" and that BALPA were reliant to an extent on the company checking the accuracy of these documents. In this context, it is noted that Mr Godesar had responded to the letters that were written to the BALPA CC by Mr Gavin's group on behalf of the PHI recipients in these terms:

> "Hi Kristian,
>
> You have all the information you need to make an informed decision on the ballot.
>
> If you are a PHI claimant, then you will remain so until reaching the age of 60. At that point you will only need 5 years of cover. Both of the options available will give you that, but only one will provide you with the highest possible benefit in those last 5 years."

131. Immediately after the ballot and during the webinar that was held on 13th August 2021 for the PHI recipients, a number of issues of concern were raised. Members of management did not attend this webinar. There are several features of note. The first is that in the introduction, Ben Coker and Claire Hood go to some lengths to defend their position on the allegation of a lack of consultation of the pilot community, stressing that the CC had been discussing potential changes with management for some considerable time even before the GIP ballot. It was accepted by Claire Hood that there had not been individual discussion with PHI recipients because there had been difficulty in getting information from the company for GDPR reasons as to the identity of all the individuals likely to be affected, but stressed that the union was empowered to negotiate on behalf of all its members. Second, Mr Gavin bemoaned the lack of consultation of the group most likely to be affected, the PHI recipients, who had been requesting a dedicated webinar before the ballot had closed, and who had very specific concerns. Third, when there was discussion about how the post 60 benefits might be calculated, and the impact that the changes were likely to have, Gareth Stephens, who was coordinating the meeting, in addressing the issue that the PHI recipients were not able to understand this aspect, accepted that the CC were not in a position to help with financial calculations which were within the remit of the company, and they were not acting in the role of financial advisers. Fourth, Mr Coker pointed out that there was no option for a no vote, because if they had rejected a further attempt to negotiate a scheme change, it is likely that the company would have imposed this on the pilot community. He believed that it was within company's rights to change the scheme. Fifth, when asked about how the pension contribution changes were worked out, differentiating between the pre-disability salary as escalated, and the benefit received when transferring onto PIP, and whether there would be any changes for those pre-60, Mr Coker was unable to answer any specific questions, and indicated that he and the other CC members would consult management about that.

132. As far as the complexity of the calculations required under the transitional mechanism (PHI to PIP for the over 60s) was concerned Claire Macan Lind, was asked about her exchanges with one of the pilot managers, Linda McNamee, after the ballot had closed and the new scheme had been implemented. Ms McNamee had been struggling with understanding how to work out the EPIS figure (Enhanced Pre-Incapacity Salary) in the spreadsheets with which she had been provided, and Claire Macan Lind accepted that it was complicated; if the pilot manager was struggling to understand the transition, it was likely to be even more difficult for the pilots to understand.

GIP gap liability

133. It is necessary to consider aspects of the evidence in relation to the GIP gap liability, mentioned earlier in this judgment.[20] I refer to the issue arising in the course of the trial. The GIP gap liability was the uninsured element of the replacement scheme which was associated with the policy taken out by the Defendant in the expectation that there would be pilot agreement for the new GIP proposal which was limited to 5 years of benefit. Obviously when

[20] See paras 41-42

the vote rejected the new scheme, those pilots who were in a position to claim, that is after the inception of the new policy, which I understand was effective from the start of 2020, and before the implementation of PIP in August 2021, would receive their benefits under the new policy if they were under 60 as an insured element, but on the basis that they were PHI recipients. It is understood that in this period there have been a handful of pilots who fell into such a category, approximately 21 in all, although four had returned to work and three had retired leaving 17 currently. The court has not been provided with details as to their ages, and in particular when they will move on to the self-funded element. They have been described as the GIP gappers. Those who were either over 60 in this period, or started under 60 and are now over 60, will have received their benefit from TUI funds until they transitioned onto PIP.

134. The specific issue arose after the cross-examination of Julie Tindale, and in particular when she was questioned about paragraph 41 of her statement which stated as follows:

> "…..TUI will self-fund the PHI benefits of anyone on PHI that is insured under the GIP insurance after the five-year fixed term, subject to eligibility (the GIP Claimants), until age 60, at which point they go onto PIP. Any liability relating to topping up the difference between the benefit provided under PHI insurance and that insured for GIP Claimants has no impact on the fund which is used to fund PIP."

135. A number of documents were put to Ms Tindale, the most significant of which was an email from Kartik Hari to several senior managers, and into which Mr Winspear was copied. It enclosed a slide presentation entitled: "NRA crew update – August 2021" in which information was being provided, amongst other topics, on the PIP agreement which was being negotiated with the union.

136. On the slide setting out the scheme, there was a table providing a comparison between the current scheme and the proposed PIP scheme to be delivered. One of the rows included the self-insured element set out as follows:[21]

SELF-INSURED	Since January 2020, TUI has been funding the gap between the 5 Year policy and the whole career provision under PHI (FY20 - £0.8m provision booked for a 36 year old pilot, FY21 - Risk of c.£3.0m for 3 additional pilots in FY21	All 2020 non-insured liabilities passed to BALPA and all risk removed

137. It was suggested to Ms Tindale that this indicated that the liability for the GIP gappers, despite her statement, may have passed into the self-funded PIP pot and thus became

[21] MB 4679

a liability of the pilots under the new scheme. Ms Tindale, whilst thinking that this may well have referred to the 60 to 65-year-olds, accepted that she may have been wrong about this.

138. It was clarified by Ms Mayhew KC in discussions between counsel that the issue potentially touched upon the adequacy of consultation and raised the possibility that information had not been passed to BALPA, and thus the pilots, which might have been central to their interests, namely that the new fund which was being created and for which the pilots bore the risk may have additional expenditure in relation to the GIP gappers. This led to objection taken by Mr Williams KC that this had never been part of the Claimants' pleaded case. He submitted to the court that further evidence would be required were the Claimants allowed to continue with this allegation and in particular the assertion that if further information had been provided through adequate consultation there would have been a rejection of the new scheme. This arose from the evidence of Mr Gavin that with sufficient information the pilots could have been mobilised, despite the position of the union representatives, and created a substantial opposition to what was being proposed.

139. After hearing brief submissions, I encouraged a resolution of what was potentially a pleading issue, after establishing that the Defendant could call additional evidence to address the material fact that was being raised. I required an amended pleading from Ms Mayhew KC which was provided in these terms to sit at the end of paragraph 25 of the Particulars of Claim:

> *"In producing financial information to BALPA for the purposes of BALPA assessing risk to pilots of introducing PIP, TUI failed to inform BALPA of the GIP or the post 20 GIP liability gap which they subsequently passed on to pilots as part of the PIP scheme."*

140. In respect of further evidence, the Defendants called Craig Murphy, and provided a second witness statement from Mr Hari.

141. In his statement, Mr Murphy, who was the head of operational finance, indicated that he had not been closely involved in relation to the review of the PHI scheme, which was handled for the most part by Kartik Hari, although he had a role with the financial oversight of the scheme, which included producing functional reporting and crew budgets and forecasts. In relation to the PowerPoint slide referred to at paragraph 136 above he stated that the passing to BALPA of non-insured liabilities was incorrect. He had asked his team to check this and it was confirmed to him that there were no costs included in the payroll in relation to the non-insured liabilities for this specific group of pilots (the GIP gappers). Thus the pilots' fund had no liability save for the costs which were incurred for those claiming under the new PIP process. He indicated that there was a transparent process with quarterly governance meetings with BALPA representatives since the inception of PIP which showed what the costs were to the PIP fund.

142. In cross-examination, Mr Murphy was referred to a further slide that had been prepared as part of a presentation to senior management in relation to what was described as the "GIP 2020 MANDATE". He had been included in an email which contains this as an attachment. In the fourth line of the executive summary the following was included:

> "….All 2020 non-insured liability to be included within collective scheme and provision released"

143. Mr Murphy did not accept that this was anything more than a postulation of alternatives, but he was not involved in what he described as "the heavy lifting" which was the responsibility of Kartik Hari. He was referred to a further document contained within a slide presentation entitled "Revised UK PIP agreement – August 2021"[22] which repeated a reference to the 2020 non-insured liabilities in these terms:

> • All 2020 non-insured liabilities passed to BALPA and all risk removed

144. It was agreed by Mr Murphy that this was not reflected in the financial modelling provided to BALPA, and accepted that this was an inconsistency, but he insisted that there was never any intention to include these costs. Similarly, where in the section marked "business benefit" there was a reference to a provision of £0.8 million in relation to FY20 being released, he accepted that this referred to the GIP gappers, and suggested that the liability of these pilots was now being taken on by the PIP scheme. However, this and any other document that might have been sent up to senior management suggesting that the GIP liability was to be passed on to the PIP fund was incorrect. It had not been reviewed by Mr Murphy or specifically approved by him, but he denied that the present position was an attempt by TUI to row back from what had been their original intention.

145. Mr Hari also provided an additional statement where he dealt with the naming conventions in the relevant payroll which identified those claiming PHI, and the differentiation between the over 60s and the under 60s, including the GIP gappers and those who were dealt with under the new PIP scheme. From the payroll download, he was able to determine that from the very beginning of the PIP provision there had never been any deduction of the benefit element in relation to those who were receiving that benefit under the GIP insurance.[23] He selected three examples, two of which were PHI recipients and which showed that the salary element was recorded as £0, thus demonstrating that the salary or benefit did not come from the PIP payroll. He was also able to indicate from the accounting documents how the first three years of PIP had operated, whereby in the current year there

[22] MB 4561

[23] The liability of TUI in respect of GIP related to the changed terms on escalation of benefit and PB, or partial benefit (as it was called under the scheme) for those who fell ill in the relevant period after the implementation of the GIP insurance)

would be a deficit of £227 per pilot based upon an overall deficit of £278,899, whilst in the two previous years there had been an excess.

146. Mr Hari was questioned by Ms Mayhew KC in relation to the GIP gappers and their funding. Regardless of the slides that were presented to senior management, which may have suggested otherwise, Mr Hari insisted that the modelling which was provided to BALPA in relation to the pilots' liability did not include the GIP pilots.

Respective Submissions

147. The court received extensive and detailed written submissions from both counsel which were used as a platform for oral arguments on the last day of the hearing. Whilst I am grateful to all counsel for the careful way in which the relevant sections of the detailed evidence were marshalled, and the court was signposted to all the relevant authorities, necessarily, because of the sheer detail in both sets of submissions, a paragraph by paragraph analysis of every point is not possible, and would be disproportionate, making this judgment impenetrable. The parties can be reassured that I have had an opportunity to read all the submissions carefully in conjunction with the transcript of the oral argument, and have been able to cross refer the various points which were being made with the identified documents.

148. I propose to distil the principal points from the respective arguments.

Claimants

Summary of submissions

149. On behalf of the Claimants the overarching submission is that not only was there a contractual entitlement to the payment of PHI, as confirmed in the MoA, but also that the terms of such entitlement were set out in the PHI handbook and the PB guide. These were incorporated into the individual contracts by reason of the respective intentions of the parties and the terms were apt to form part of the contractual relationship between them. Whilst like any contractual terms they could be the subject of variation by negotiation, the effect of paragraph 5.1 prevented any future (non-consensual) variation once a benefit was in-claim. In the alternative, in the event that the Defendant was entitled through a collective bargaining process with BALPA to vary the incorporated terms, on the basis that a discretion was reserved to them by virtue of paragraph 5.1, the exercise of this discretion required the Defendant to act rationally and in accordance with the implied obligation of trust and confidence. As an employer, the Defendant failed to have an understanding of the scheme that was being introduced, provided inadequate and inaccurate information to those most

likely to be affected, misled benefit recipients by false assurances and thus by its conduct had acted irrationally in the sense understood by the Supreme Court in **Braganza v BP Shipping Limited [2015] 4 All ER 639**.

150. I shall now drill down into those submissions in a little more detail to identify the main evidence upon which the Claimants rely on in support, and how the legal arguments are framed on the basis of the significant case law.

Incorporation of HB and PB guide

151. As a starting point, and addressing the issue of incorporation of contractual terms, the court was invited by Ms Mayhew KC to consider the guidance provided by the president of the Employment Appeal Tribunal (Elias J) in the case of **Framptons Ltd v Badger [2006] UKEAT/0138/06** which drew on the wisdom of Hobhouse J in **Alexander v Standard Telephones & Cables Ltd (No 2) [1991] IRLT 286** in a case which examined the relationship between collective agreements and individual contracts. Whilst a collective agreement in the absence of express incorporation was not legally binding between the parties, it was still capable of incorporation; what was key was the intention of the parties to the contract, and even then, if a separate document was to be construed as containing the terms of the contract, it is still necessary to consider whether the relevant part or parts were apt for incorporation. This was exemplified in the summary of Hobhouse J:

> "…..In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. Insofar as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."

Contractual intention

152. Ms Mayhew KC applied the same reasoning to the HB and the PB guide and to support her submission that contractual intention was established, she relied on a number of features in the evidence, both written and oral.

153. First, whilst there was an undisputed entitlement to be paid this benefit, apart from the HB and the guide there was no other source of the terms of the contractual right. Pilots did not have access to the insurance contract (and indeed were denied it on grounds of

commercial sensitivity). Within the MOA which enshrined the entitlement there was a direction to the pilot manager for the details, and on any request for such details a pilot would be provided with these documents. Without the documents there was no way in which the benefit could be understood, and if the right to benefit stood alone without this detail, it would be no more than a bare contractual right without any assurance as to what it contained. Ms Mayhew KC relied on various concessions made in the evidence of the Defendant's witnesses including James Winspear, Julie Tindale and Claire Macan Lind which accepted that there was no other detail available of the benefit.

154. Second, reliance was placed upon the historic nature of the HB and PB guide which stretched back over many years in different iterations but all containing virtually the same clauses, which had informed both the pilots and the management's understanding of the benefit. Insofar as the 2008 "draft" handbook describes itself as a document which *did not create any contractual obligation or entitlement,* such language was not repeated in any later versions, and this could not be taken to suggest a lack of contractual intention. Such changes as there had been over the years, it was submitted, did not alter the core rights, and amounted to no more than tweaks, or adding to the benefits of the pilots.

155. Third, the Defendant's evidence confirmed that although the broker may have been involved in drafting the substance of the HB and the PB guide, they were TUI documents, and the Defendant had the final sign off. This was relevant when considering the intention of the parties.

156. Fourth, paragraph 10.2 of the MOA, which was explicitly incorporated into individual contracts, and which indicated that "the details will be provided" of the PHI benefit, would have been otiose if it had not been the intention of the parties that such detail was contained within the HB and the PB guide. Further, the mandatory nature of "*will be*" could not be ignored, and contradicted the Defendant's position that the HB was intended to be a flexible document which could be easily changed.

157. Fifth, if the details of the benefit as opposed to the basic entitlement had been non-contractual, negotiating the level of benefits with BALPA would have been meaningless.

158. Sixth, the Defendant had regarded itself as bound by the outcome of the GIP ballot, when there had been a negotiation of terms with the union, an approach which was inconsistent with the terms of the PHI scheme being non-contractual.

159. Seventh, insofar as the Defendant sought to rely on the legal documents governing the plan, i.e. the insurance policy, (as specified within the HB) this did not negate its contractual status, because it could never have included the over 60s who were not covered by insurance.

For them the only available details of the PHI scheme, and proportionate benefit, were the HB and the PB guide.

160. It was immaterial, submitted Ms Mayhew KC, that the MoA did not specifically make reference to the HB or the PB guide. She sought to distinguish **Stewart v Graig Shipping Co Ltd [1979] ICR 173 EAT**, an authority relied upon by the Defendant.

Apt for incorporation

161. Ms Mayhew KC addressed each of the respective "clauses"[24] in support of her submission that they were apt for incorporation into the individual contracts, by reference to the guidance or *rule of thumb* provided by the Court of Appeal in **Keeley v Fosroc International [2006] IRLR 961**. In her oral submissions, she highlighted paragraph 31 of the judgment of the Court of Appeal:

> "... 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. For example, some provisions, read in their context, may be declarations of an aspiration or policy falling short of a contractual undertaking ...it is necessary to consider in their respective contexts the incorporating words and the provision in question incorporated by them."

162. Counsel also relied upon the indicia set out by Andrew Smith J in **Hussain v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB)** which included (i) the importance of the term to the contractual working relationship, (ii) the level of detail, (iii) the certainty of the term or provision, (iv) its context and (v) the workability of the provision. On the basis of these indicia she submitted that clauses 2.1 and 3.1 were apt for incorporation. In particular, whilst clause 3.1 did not specifically reference PB, this was clearly considered to be part of the PHI scheme, and had to be read in conjunction with the PB guide.

163. In relation to the incorporation of clause 4.6 (linked claims) it was submitted that this provided clarification on remuneration and was crucial to the ability of pilots to be able to return to work and not face the risk of loss of their PHI benefit if that return was unsuccessful. Whilst it was suggested that the words "*will <u>usually</u> resume*", were relied upon by the Defendant to suggest either uncertainty or insurer discretion, the fact that the new scheme now guarantees in connected claims that benefit will be reinstated is an indication that PIP was intended to reflect the position as understood with PHI.

[24] It is to be noted that within the HB itself the separate paragraphs are not referred to as "clauses". Each paragraph simply contains a number.

Clause 5.1

164. The incorporation of clause 5.1 and the protection which it provides is central to the Claimants' argument. Ms Mayhew KC submits that the concept of protected benefits was not only recognised by both pilots and the Defendant, in the sense that once a pilot was in-claim his or her position could not be affected by the entitlement of the company to alter the terms for subsequent pilots who might claim, and thus supported the intention of the parties that this should be contractual, but was also *apt* for incorporation as a term. It was a term which provided the certainty for pilots that once they were in receipt of such benefit it could not be altered.

165. Any argument that its contractual nature could only be limited to those who were in-claim as a result of the operation of the insurance policy was defeated by the fact that there was no distinction between the under 60s and the over 60s within the clause. It is also highly relevant that in practice, submits Ms Mayhew KC, the Defendant has never sought to distinguish the older and the younger in-claim pilots, and the underlying insurance policy has only been significant as the source of funding for the payment of the benefits. Insofar as the Defendant maintained the distinction based upon the insurance policy, Ms Mayhew KC relied upon the judgment of HHJ Auerbach in the Employment Appeal Tribunal in the case of **Amdocs Systems Ltd v Langdon [2022] EWCA Civ 1027**, a case which dealt with PHI schemes and where it was held that if there was to be such a distinction, the limit of the employer's commitment should be unambiguously and expressly communicated to the employee.

166. She draws support for the practice of protection without distinction, and thus the understanding of the parties, from the protection which was afforded when the GIP changes were being negotiated, and the fact that all the in-claim pilots were treated as protected when the Covid 19 mitigation agreements were being implemented.

167. Ms Mayhew KC invited the court's attention to paragraph 3.27 of the amended schedule B which formed part of the negotiated collective agreement for PIP, in which paragraph 5.1 was specifically referenced in the context of "legacy" Claimants. There was no distinction drawn between the pre-and post 60 in-claim pilots. Further, the fact that clause 5.1 appeared to use language which was aspirational, such as "hope" did not militate against its incorporation as an apt term. This only applied to the first part of the clause, in any event, and not to the "carve-out" aspect which protected in-claim pilots.

168. In the course of her oral submissions, Ms Mayhew KC accepted that both the PIP scheme and the PHI scheme could subsist together running parallel to each other, notwithstanding that the collectively negotiated PIP scheme, providing an amended schedule B, created a transition from PHI to PIP. In effect, clause 5.1 operated to prevent this happening.

Collective bargaining

169. The Defendant's alternative argument that collective bargaining in any event served to vary such rights as may have existed in respect of the HB and the PB guide, was addressed by Ms Mayhew KC. Although PIP terms were expressly incorporated into individual contracts by the amended schedules A and B of the 2018 MoA, it did not follow that these applied to the individual contracts of employment, either wholly or in part, of these Claimants. She relied upon **Keeley** (*supra*) to support the proposition that a contractual term is capable of acquiring a life of its own, and invited the court to consider the legal position in respect of the incorporation of collective agreements into individual contracts in **Framptons** (*supra*), where it was acknowledged that not only did the union not act as agent for its members in collective bargaining, but also that there was a presumption that collective agreements were not intended to be legally enforceable. It was important, she submitted, to focus on the contract between the employer and the employee, and not the contract which was entered into by the union and the employer.

170. Insofar as it was asserted that the union stood in the shoes of the Claimants during the course of negotiation in terms of agreeing how their rights and entitlements might be consensually varied, this was negated by the evidence before the court that BALPA had to act contrary to the Claimants' interests, as the in-claim pilots were in a minority and to serve the interests of the majority of pilots, i.e. those who might claim PIP in the future. There was no agreement on the part of any of the in-claim pilots to consensually vary their own contracts. Further, the reference to "employee consultation" in paragraph 5.1 has both a collective and individual element.

171. It was acknowledged that individual contracts contain a deeming provision in relation to memoranda of agreements that were subsequently negotiated by BALPA, and the incorporation of their terms, a feature on which the Defendant relied as an express contractual term for incorporation. However, the authority of **Mawson & Others v Exel Logistics Ltd EAT/227/96** relied upon by the Defendant, she submitted, did not provide support for the proposition that this is the process by which the individual contracts of these Claimants were varied by incorporation. It was still necessary to consider whether individual provisions were apt for incorporation in the context of the overall employment contract.

Retirement Age

172 The separate and discrete issue of the retirement age was addressed by Ms Mayhew KC. This arose because of the reference in clauses 2.1 and 3.1, which if incorporated, appeared to entitle in-claim pilots to receive benefit until his or her state pension age if later than age 65.

173. It was not accepted that regulation 1178/2011 provided a compulsory retirement age of 65 for pilots; this only restricted those over 65 from acting as pilots of commercial aircraft. When considered in conjunction with the absence of any reference to a retirement age within the individual contracts of employment, it was insufficient for the Defendant simply to rely upon usual practice in retiring active pilots. However, the principal argument as to why in-claim pilots i.e. the Claimants, were entitled to continue to receive their PHI benefit beyond the age of 65 and until SRA, which would be consistent with the clauses referred to, was because they were no longer capable of working as pilots by reason of the medical restriction.

174. Ms Mayhew KC submits that the Defendant cannot rely upon any purported right to dismiss the Claimants upon reaching non-flying age (65 years) which would deprive them of their benefits (as happened in the case of the Second Claimant Mr Sherpa) as this would be contrary to the well-established principle which was confirmed in **USDAW & Others v Tesco Stores Ltd [2022] ICR 1573** that a contractual power to dismiss could not be exercised to deny a claimant of the benefits of a long term disability plan.

175. In terms of the parties' understanding of these clauses and the period over which benefit would be paid, counsel made reference to an exchange between an unnamed pilot and the Defendant's human resources department in which Linda McNamee, the pilot manager, in November 2015 appeared to confirm that PHI continued until state retirement age, which in the case of the individual was 66.[25]

176. It was further submitted that if pilots had a ground-based instructor role or other non-pilot role, which would be suited work, there would be no justification for their dismissal at age 65 because they could no longer fly commercial aircraft.

Pension contributions

177. The primary submission on this issue is that appendix D of schedule N of the MoA (see paragraph 32 above) which provides the entitlement of in-claim pilots in receipt of PHI to pension contributions based upon a notional pensionable pay (the salary of a pilot with enhancements) and not by reference to the PHI benefit amount, was not altered by the collective agreement. It remained the mechanism by which those in receipt of PHI were able to access what was considered to be a very valuable portion of their remuneration package. Accordingly, in the event that this court accepts that those over 60 were contractually entitled to remain on PHI and not transition to PIP, this should automatically preserve the pension benefits as prescribed in the schedule.

178 Alternatively, if there was a purported alteration to the pension benefit of the PHI in-claim pilots, this required individual consultation which was inadequately discharged by

[25] MB 4929

merely sending to all pilots the amended schedules A and B, which in any event were barely understood by the TUI management. This argument dovetails with the Claimants' secondary case in respect of a breach of the implied term of trust and confidence.

Implied Term of Trust and Confidence

179. As indicated above, on the Claimants' case this arises from the discretion which was exercised, and which is identified in the opening sentence of paragraph 5.1. The implied term of trust and confidence, it is submitted, was recognised by the House of Lords in **Malik v BBCI SA [1998] AC 20** and is undisputed. Further, the way in which the discretion should be exercised under the implied term accords with public law principles involving rationality, as confirmed by the Supreme Court in **Braganza** (*supra*).

180. Ms Mayhew KC expanded on the legal approach to rationality by relying on the decision of the Court of Appeal in **IBM UK Holdings v Dalgleish [2018] ICR 1681 CA**. This confirmed that whilst there was a legal burden on Claimants challenging the decision-making process that affected their employment rights, if the decision was *prima facie* questionable, an evidential burden potentially shifted to the employer to justify its reasoning on a rationality basis. It was acknowledged that there was no direct responsibility on the employer to give financial advice or safeguard the well-being of employees (**Crossley v Faithful [2004]ICR 1615 CA**), but nevertheless if they were being given incorrect information about a collective agreement which required a vote, this was pertinent to a situation in which the employer had assumed a responsibility for accuracy at least and not outside the scope of a breach on the basis of that authority. She identified paragraph 43 of the judgment of Dyson LJ:

> "…..It is one thing to say that, if an employer assumes the responsibility for giving financial advice to his employee, he is under a duty to take reasonable care in the giving of that advice. That is no more than an application of the *Hedley Byrne* principle [1964] AC 465. An example of such a case in the context of a contract of employment is *Lennon v Comr of Police of the Metropolis [2004] ICR 1114* . It is quite a different matter to impose on an employer the duty to give his employee financial advice in relation to benefits accruing from his employment, or generally to safeguard the employee's economic well-being."

181. The new PIP scheme potentially introduced drastic changes which would affect new claimants, and all in-claim pilots over the age of 60, leading to a very significant reduction in the level of their benefit. Further, it was submitted, all pilots were being asked to take on board an uncapped liability with no means of reviewing the percentage of the payroll which would be allocated to the new benefit in the absence of new collective bargaining.

182. There was evidence, which Ms Mayhew KC invited the court to accept, that the TUI management intended to shift the GIP gap risk onto the new pilot funded scheme. Although the potential liability was one which would not have crystallised for a period of five years (the limit of the GIP policy) this was something which was never communicated to any of the

pilots, nor even to BALPA who were purportedly negotiating on their behalf. It is immaterial that the passing of the liability may no longer be the Defendant's intention, because the financial risk at the time should have been communicated in the course of negotiation. In any event, with a pilot funded scheme, submitted Ms Mayhew KC, the financial projection provided was grossly inaccurate suggesting no deficit until the 18th year.

183. Ms Mayhew KC invited the court to consider various exchanges between Mr Godesar on behalf of BALPA, and Mr Winspear for the company in relation to the FAQs and the input which was provided by the latter. She identified the numerous inaccuracies in both FAQ 1 and FAQ 2 and the confusion which was generated by the material provided, including the spreadsheets created by Mr Hari which dealt with the viability of the PIP scheme and pilot risk. The confusion of the pilots was demonstrated by the webinar on 22nd July 2021 which confirmed a lack of understanding on the part of the BALPA representatives.

184. There had also been company input into FAQ 3, although the correction contained the wrong calculation, meaning pilots in-claim, and who wanted to work out how the transition mechanism affected them, could not calculate their benefits. When schedule B was eventually corrected, the pilots were not informed, and this took place after the vote for the alternative options.

185. Reliance was also placed on the company's attitude to those who were struggling to understand the information, with reference to a "robust" response drafted by lawyers on behalf of Mr Winspear to the letter which had been sent by Mr Gavin and his pilot colleagues. In the aftermath of the imposition of PIP, the evidence suggested that both managers and BALPA representatives continued to have difficulty in understanding and implementing the changes, and projections which were promised were never provided. The court was reminded that Mr Godesar, on behalf of BALPA, had confirmed that the whole process was rushed because of the pressure under which they were working.

186. Against the evidential background, Ms Mayhew KC submitted that a relevant consideration not taken into account by the Defendant was the impact which the PIP changes would have on the in-claim pilots over the age of 60. Insofar as a decision may have been made that the in-claim pilots who had been protected historically should no longer be ring-fenced, it was pointed out that no evidence had been adduced by the Defendant as to how and in what circumstances that had taken place. Mr Winspear simply referred to a more senior group of decision-makers, and the closest he came to explaining the rationale behind the policy change was to state that he had sought expert advice on the effect of paragraph 5.1. However, no such expert advice have been adduced, nor was it evident in the documentation.

187. Ms Mayhew KC relied upon the assurances that had been given to the in-claim pilots not only during the GIP process but also to individuals who at different times had requested clarification when PIP was being negotiated.

188. In terms of the Defendant's decision not to honour previous commitments to protect in-claim pilots, it was submitted that an obvious reason, and one which would have amounted to an irrelevant consideration, was the risk that was being taken on following the cancellation of the previous comprehensive insurance for PHI in anticipation of acceptance by BALPA pilots of the GIP scheme. On its rejection, the company was faced with a very significant liability if they had to cover on a self-funded basis all the new pilots who became medically unfit to fly with an insurance policy that provided only five years of cover. It is this same liability that senior managers were trying to pass onto the pilots, even if this never actually happened.

189. It was submitted that imposition of a scheme which was going to lead to fundamental contractual rights being changed for the in-claim pilots as well as the remuneration of all active pilots gives rise to an onerous requirement for a full and fair consultation which simply did not occur, as evidenced by the provision of wrong or insufficient information, leading to employees being misled, and an understanding of the proposed changes which did not exist. The fact that schedule B had to be amended on two occasions suggested a flawed process. As an indication of a scheme which was misunderstood and poorly thought out, reference was made to the Defendant's recent agreement (and after the litigation was commenced) to honour the linked / connected claim clause in the event that an in-claim PHI recipient pilot returned to work.

190. Fairness should have required that those who were going to be substantially affected after 16th August 2021 because they were over 60 and receiving PB, which would now be removed, to have been provided with figures or calculations to enable them to know the effect of the changes. Ms Mayhew KC submitted that the attitude of the Defendant, which reflected the unfairness of the consultation process and the manner in which the changes were introduced, was exemplified by the way in which discussions took place when enquiries were made by in-claim pilots following the start date of the new scheme. One such instance was an email from Linda McNamee to Kathryn Cleaver on 16th August 2021 which referred to Greg Booth having had "*too much of a good thing and had suddenly realised*".

191. In relation to the Defendant's argument that the introduction of PIP did not involve the exercise of a discretion, because it was brought about as part of a collective bargaining process, it was submitted by Ms Mayhew KC that this ignored the fact that changes were being made to individual contracts of employment which required rationality when a discretion was exercised. In any event, the general implied duty of trust and confidence could not be excluded in the conduct of collective bargaining.

Defendant

192. The Defendant's overarching submissions can be summarised in this way. The HB and the PB guide were not incorporated into the individual contracts of employment but contained information and were advisory. PIP was introduced by a statutorily compliant collective bargaining process in which the Claimants, as with all other pilots employed by TUI, were represented by the union BALPA. It was immaterial that there was an absence of consent on the part of the Claimants to the agreement which was reached and thereby incorporated into the individual contracts of employment by way of an amendment to the MoA. The argument that paragraph 5.1 of the HB somehow carved out collective bargaining is misconceived. Even if that paragraph amounted to a contractual term, which is challenged, it did not preclude consensual variation by collective agreement. There could be no basis for any challenge related to a breach of the implied term of trust and confidence or irrationality; the Claimants clearly understood the effect which the negotiated changes were going to have on their benefits after the age of 60 and had all the information which they needed to choose one of the two ballot options. In any event, no loss has been suffered because PIP was considered by their union to be in the best interests of the pilot community without the provision of a yes/no ballot.

193. It was emphasised at the outset of their oral submissions that collective bargaining does not involve an imposition on employees but a consensual agreement whereby their representatives, namely BALPA, are acting on their behalf and it was a fundamental error on the part of the Claimants to assert that somehow they were entitled to an individual consultative process.

194. Mr Williams KC and Mr Edge provided comprehensive and extensive written closing submissions (82 pages) which were developed by both of them in the course of oral submissions. As in the case of the Claimants, I propose to address the main and headline points, and summarise the evidence and legal authority relied upon to support those points.

195. In the first part of their written submissions, counsel identified the relevant documents which comprise the employment contracts of the pilots, and the basis of their entitlement to PHI benefit and the associated pension contributions. The generous nature of the PHI scheme and PB was emphasised; it was a scheme which could potentially dis-incentivise a pilot who was in-claim from pursuing all but the most modest of suited alternative occupations. PB was described as a perverse incentive, whereby the less that an in-claim pilot earned, the closer to a full benefit entitlement he or she received. This demonstrated, it was submitted, flaws in the benefit, and the fact that it was plainly rational for there to be a negotiated new benefit put in place which was fairer and more affordable, particularly as

there was an exponential increase over a five year period in the cost of the premium for the PHI policy, and the self-funding cost for the over 60s.

196. Although GIP was rejected by the pilot workforce, the rationale behind the new agreement was clearly to provide a sustainable level of income protection for all pilots, and to introduce a scheme which would support pilots in their return to work, which the previous scheme did not. It was relevant, it was submitted, that BALPA was operating on the understanding that unless an agreement could be reached which was viable and affordable, a new benefit would be imposed on the pilots by TUI which would be less advantageous, and outside the collective bargaining which could be enshrined in an MoA.

Assurances allegedly provided by the Defendant's employees

197. Counsel addressed the comments and assurances relied upon by the Claimants attributed principally to Mr Winspear over the relevant time to support a breach of the implied term. (As I have indicated, the greater portion of the oral evidence dealt with the Claimants' alternative case that there had been a breach of the implied term of trust and confidence between employer and employee.)

198. In relation to the identified email from Mr Winspear on 9th January 2020 to Mr Booth stating that all existing Claimants would be unaffected by the new changes, and a subsequent text message from him to Mr Gavin on 18th January 2020 informing him that there would be no changes to his PHI benefits, it was pointed out that both were clearly in the context of the GIP negotiations.

199. Whilst it was alleged that in a telephone conversation with Mr Winspear, on 29th January 2020 that in-claim pilots would not be affected by any future changes, it was submitted that this was never supported in writing, nor confirmed in any later text message; it was not recalled by Mr Winspear, and the evidence suggests that such a statement was never made. If it had been, there would have been a contemporaneous record, including a reference to such a reassurance when Mr Gavin texted Mr Winspear on the publication of the paper proposals.

200. In respect of Mr Winspear's text message of 20th July 2021 suggesting that the only impact for Mr Gavin would be the rate of increase after the age of 60 (which Mr Winspear accepted in his evidence to be inaccurate), not only were these informal exchanges between friends, but at the time that it was received by Mr Gavin he would have been well aware what the effect of the PIP introduction was going to be, because he already had the draft schedule B in his possession.

Extent of understanding of in-claim pilots

201. Mr Williams KC submitted on behalf of the Defendant that there was no contractual obligation on the company to consult with individual pilots, and the extent of any obligation was to provide information to their union, BALPA, to negotiate if they so chose (as set out in his submissions on the law). Whilst the allegation that BALPA was acting as an agent for the company was no longer pursued, which in effect should have put an end to any challenge as to the inadequacy of information which was available to the pilots to give them an understanding of the proposed changes, nevertheless counsel reviewed all the material that was in fact provided by BALPA, and the evidence which dealt with the knowledge of the in-claim pilots at the time. It is unnecessary for me to rehearse or repeat any of those submissions, which I have carefully noted, and the substance of which is already covered for the most part in the summary of the background and evidence set out above. The court is reminded that the process essentially afforded pilots a choice between two options, and the absence of a yes/no vote was the context in which the pilots understanding was to be considered. It was important to note that changes to the PHI benefit were going to be introduced come what may. It was submitted that the Claimants' position at the end of the trial was basically one whereby there was confusion as to how the transitional provisions would apply with an unclear definition of "PHI escalated salary" and the effect of the receipts of sums by way of PB.

202. Mr Williams KC and Mr Edge provided a helpful analysis of the law relating to the express incorporation of contractual terms, including those collectively bargained. In the context of the agreed test of the ascertainment of contractual intention and consideration as to whether or not a particular document or part of a document was apt to be incorporated as a term of the contract, the court was directed to the case of **Hussain v Surrey** (*supra*), and the indicia provided by Andrew Smith J, a case also referred to by Ms Mayhew KC.

203. Counsel also set out the statutory framework for collective agreements and collective bargaining under the Trade Union and Labour Relations (Consolidation) Act 1992. ("The Act"). The court was reminded of the employer's statutory duty to disclose information upon request to the trade union under section 181 of the Act and the sanctions available under section 183 if the obligation was not complied with. To emphasise that these were not provisions which required an employer to consult with either the union or individual employees, which was said to be integral to the Claimant's case on a breach of the implied term of trust and confidence, the scheme was contrasted with the duty imposed under section 188 in relation to consultation for redundancies. It was submitted that what lies behind the collective bargaining and collective agreement statutory scheme is the requirement for the provision of information to allow negotiation, and it made little sense to impose consultation on a party with whom the employer was already negotiating.

204. Whilst acknowledging that collective agreements were rarely binding between the union and the employer, but a matter of industrial relations, reference was made by Mr

Williams KC to the normative effect of such agreements, whereby they became incorporated either wholly or partially into individual contracts of employment, which was the situation that had applied in the present case. The seminal principle could be derived from the case of **Robertson & Jackson v British Gas [1983] ICR 351** and had been elucidated more recently when guidance was given by the EAT (Elias J) in **Framptons Ltd v Badger** (*supra*). Included in the guidance was the need to focus on the relationship between the employer and the employee which would set out the objective intention of the parties when carrying out a contractual construction of the employment contract. It was submitted that an employment contract could incorporate the terms of future collective agreements, regardless as to whether the employee rejects or disagrees with the incorporation of the new agreement. The immediate and binding effect of such collective agreements being concluded on the individual contract of employment was emphasised in **Edinburgh Council v Brown [1999] IRLR 208.**

205. Specifically dealt with by the case of **Mawson v Exel Logisitcs Limited** (*supra*) was the situation where an individual contractual term in the employee's contract provided for the incorporation not only of an existing collective agreement but also a future collective agreement replacing it. In that case an employee had complained about new terms being imposed upon him which were less favourable, and he alleged constructive dismissal. However, it was submitted, the position was not dissimilar to that which prevailed in the present case where the new collective agreement replaced the old one. Further, it was relevant that in that case the EAT had determined that the authority of the union official to enter into the collective agreement did not depend upon the agreement or authority of the individual employee. A similar situation arose in the case of **Higgins v Cable Montague Contracts Ltd [1993] EAT/564/93** where there had been negotiations in relation to wages between the union and the employer which affected the individual employee, although he had never agreed to changes. Nevertheless, his contract allowed for the incorporation of collective agreements including those which might affect remuneration, and his claim to a tribunal failed at first instance and on appeal.

206. In respect of the law relating to the implied term of trust and confidence, counsel for the Defendants reviewed several authorities which dealt with the correct approach where an employer was exercising a discretion and which confirmed the test of rationality. In particular, the Wednesbury test usually applicable in the context of judicial review was confirmed by Lady Hale in **Braganza** (*supra*) as being a two-stage one, by first considering whether all relevant matters had been taken into account, and second whether the decision was one which no reasonable decision-maker could have arrived at. It was not open to the court to substitute itself for the decision-maker. In so far as it may be the Claimants' case that the incorrect information, or lack of it, caused financial detriment to the Claimants, it was submitted that there was no implied term for an employer to take reasonable care for the economic well-being of its employee (**Crossley v Faithful** (*supra*)).

207. Mr Williams KC and Mr Edge dealt with each of the issues which were identified and agreed between the parties, with Mr Edge supplementing issues 1 to 5 with further oral submissions, and Mr Williams KC the balance.

Issue 1 (Incorporation of HB and PB guide)

208. The starting point was paragraph 10.2 of the MoA. This did no more than require the company to maintain a private health insurance policy; it did not stipulate the terms of such a policy, nor did it prevent the Defendant from varying the terms in the future. Insofar as the Claimants sought to say that both the HB and the PB guide were expressly incorporated by the balance of the wording in paragraph 10.2 this was on the basis that the paragraph made no reference to either. Counsel maintained the Defendant's objection that the incorporation of the PB guide had never been pleaded, and made reference to the further information that was provided in response to paragraph 10.3 of the particulars of claim, where again it was not identified.

209. The wording of the MoA paragraph 10.2, it was submitted, is consistent with an objective intention to allow the company freedom to choose the type of benefit depending upon an appropriate insurance policy which was efficacious. The handbooks which were provided simply reflected the nature, duration and terms of the policy which the company had at any particular time. If it had been intended that the particular benefit as described in the HB should be the entitlement, that would suggest that the discretion to vary or discontinue a particular plan in the first part of paragraph 5.1 had the effect of removing the right to PHI benefit, and this would subvert the express words of paragraph 10.2. This, said Mr Edge in the course of oral submissions, made the incorporation of the entire HB inapt.

210. It was also submitted that the language of the HB made the provisions relied upon inapt for incorporation. In several instances the language was of a general and non-specific nature, with reference made to eligibility rather than entitlement. Examples were given such as: "*you will generally cease to be included in the Plan when you reach the age of 65*"(2.1) "*you may be subject to the insurer's maximum overriding benefit level*" (3.1) and "*the insurer will usually resume payment of benefit*" (4.6).

211. In the circumstances, it was submitted that the wording was aspirational, and not consistent with contractual entitlement.

Issue 2 (age 65 or SPA)

212. It was relevant that the HB was applicable to both pilots and non-pilots, where the mandatory retirement age for the former was 65. Because of the CAA requirements, this was an age written on both the pension statements and the flying rosters. Whilst pilots could continue to receive PHI benefit after the age of 65, this could only be on the basis of alternative employment provided by TUI and with a subsisting contract of employment which would determine the level of benefit (i.e. a non-pilot's salary).

213. Further, the receipt of PHI benefit was dependent upon eligibility, which was determined by a contract of employment; this ceased on the operation of the mandatory retirement age. Accordingly, the Claimants' contention was unsustainable.

Issue 3 (linked claim)

214. It was submitted that the entitlement to a linked claim within 52 weeks was not a mandatory right, but could only be discretionary, by reference to the words "*will usually*" in relation to the insurer's approach, and thus this could not be incorporated as an express term.

Issue 4 and Issue 5 (Construction of paragraph 5.1 /collective bargaining carve-out)

215. These issues were taken together. The Defendant's primary case, of course, was that paragraph 5.1, as with the balance of the HB, was not incorporated into the individual contracts of employment. Accordingly the submissions of counsel were predicated on the basis that they were so incorporated. It was submitted by Mr Williams KC and Mr Edge that the wording of paragraph 5.1 was incapable on its correct construction of providing a carve-out from collective bargaining for those pilots who were in-claim. The wording of the first and second sentences of the paragraph had to be read as a whole. There was no reference to collective bargaining, or consensual variation, and if this had been intended, clear words might have been expected. On the other hand, the natural and ordinary meaning of the paragraph was to provide a unilateral right to the Defendant through the plan manager to modify, suspend or discontinue the plan if future conditions warranted this, protecting only those who are already in receipt of benefit from the exercise of that unilateral right. If there was a consensual change to the basis upon which PHI benefit was to be paid, such as via a collective agreement, then this paragraph had no relevance. In simple terms, it did not provide any legal impediment to the introduction of PIP through a process of collective bargaining.

Issue 6 (Variation of any incorporated terms from HB/PB by collective agreement)

216. It was pointed out that there was no challenge to BALPA's authority to enter into collective agreements or that the individual contracts of employment incorporated such collective agreements. There had been no allegation pursued by the Claimants that the collective agreement terms in the revised MoA that dealt with PIP were inapt for incorporation. It was submitted that whilst the in-claim pilots (i.e. the Claimants) may have

objected to any change in their PHI benefit, the obvious objective intention of the parties, that is the union which had the authority to negotiate on their behalf, and the company was to vary the contracts of employment, so as to introduce PIP, and to transfer in-claim pilots over the age of 60 from PHI to PIP. The variation applied to any inconsistent historic terms. Therefore, insofar as this was a bilateral consensual agreement from a compliant collective bargaining process, it could not be said that the Defendant had acted in breach of contract.

217. Mr Williams KC challenged the assertion of Claimants' counsel that individual acceptances by the Claimants of any variations were necessary. It was submitted that whilst terms which are incorporated can obtain a life of their own after the demise of a collective agreement, such terms could not survive a consensual variation which is what happened here. In the alternative, it was suggested that if paragraph 5.1 was incorporated into the Claimants' contracts of employment, it did not have to be the subject of individual consensual variation by the incorporation of the new schedules A and B to the MoA. It was capable of subsisting, providing protection to the in-claim pilots who were under 60 years of age.

Issue 7 (Breach by introduction of PIP)

218. This issue sought to address the allegations of breach of contract, and counsel relied upon the Defendant's position already established that any variation was consensually introduced, through the agency of BALPA. Specifically, however, it was submitted that the pension contributions which were not associated with the PHI benefit, or the HB, but derived from appendix D, whereby PHI recipients continued to receive employer contributions based upon notional pensionable pay rather than benefit, could be the subject of contractual variation. Contractual terms already existed for the pension contributions, and it was open to the union to negotiate with the employer a variation to the basis upon which these were paid.

219. In respect of the loss of the linked clause, it was submitted that TUI could have no liability for the exercise of a discretion by an insurer third party; in any event the evidence indicated that any gap in funding for a PHI pilot returning to work would now be covered by the Defendant.

Issue 9 (Contractual discretion under paragraph 5.1)

220. The existence of a discretion under paragraph 5.1 was not challenged by counsel for the Defendant. However, it was not accepted that entering into a collective agreement involved the exercise of a contractual discretion. This was a bilateral agreement, and the principles which it was accepted would apply in the context of a discretion (not to act in a capricious or irrational manner) were irrelevant in this context. Reference was made to paragraphs 18 to 20 of the judgment of Lady Hale in the Supreme Court in **Braganza**, where it was made clear that qualified judicial review principles applied where an employer was exercising a relevant power arising from a discretion and the essential question was whether that power had been abused. If and insofar as the Defendant was ever subjected to a

contractual discretion, it was agreed that the appropriate test was one of rationality, applying the two-stage Wednesbury reasonableness test.

Issue 10 (effect of implied term of trust and confidence on collective bargaining)

221. It was submitted that in the context of a collective negotiation, it was not appropriate to ask whether the employers had acted reasonably, rationally and fairly, but whether they had conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with employees. This was derived from the case of **Malik** (*supra*) and was a higher threshold. The Claimants' challenge, it was said, was misconceived, because there was no statutory or contractual duty requiring the Defendant to consult the pilots during any negotiation. Such consultation as occurred was between BALPA and its members, which included the manner in which they would be balloted, and communications about the details of the changes.

Issue 11 (Allegations of various breaches)

222. Counsel addressed the thrust of the Claimants' challenge by way of allegations of irrationality/breach of the implied term of trust and confidence in the manner in which the negotiation was conducted, pilots were consulted and information was supplied, by dealing with each of the nine separate aspects within this issue. The general points were made that the Claimants had failed to identify any obligation on the part of the company to "consult" either with BALPA or the individual pilots during a collective bargaining process, with the only statutory obligation on the Defendant to provide information under section 181. The Defendant's role was to negotiate with BALPA and the overarching complaint of the pilots appeared to relate to the union's own failings in terms of communication and understanding.

223. Mr Williams KC distilled from the Claimants' pleading six separate matters which touched upon the involvement of the employer in the PIP negotiation in the context of perceived failures of consultation. These were (a) providing misleading and insufficient information in schedules A and B, (b) off the record WhatsApp conversations between Mr Winspear and Mr Gavin, (c) failure to provide further information after the collective letter to Mr Winspear and before the date of the ballot (d) only providing information on the effect of the reductions in benefit after the date of the ballot (e) failing to correct misleading information in the comparative table - specifically the absence of PB in the new scheme and (f) producing misleading financial information about the GIP gap funding. Each of these were addressed, and it was submitted that on the evidence, even if taken at its highest, it was unsustainable that any passed the threshold of destroying or significantly damaging the trust and confidence which the Claimants had in their employer.

224. Specifically in respect of the GIP gap information, from the amended pleading during the course of the trial, the court was reminded of the circumstances in which this arose and was invited to find that there had been no passing on of GIP gap liabilities to the pilots under the PIP scheme, nor had it been the intention of TUI to do so. Alternatively if that had been the intention, this would not have affected the negotiation process or at best would have led to the union seeking a greater contribution from the Defendant to cover the liability.

Issue 12 (Causation of loss)

225. Counsel also addressed the issue of causation of loss, in the event that the Claimants were able to establish that there had been any identifiable breach in the way in which the employer had acted during the course of the negotiation and information provision process. It was submitted that the absence of a yes/no ballot was germane. This was a matter entirely for BALPA who had chosen not to proceed with such a ballot, and who had considered that it was in the interests of all the pilots to accept the introduction of the new scheme. The suggestion that the pilot workforce, if aware of any shortcomings in the detail might have been motivated to demand a different ballot was fanciful, it was submitted.

Issues 14 (Declaration)

226. The consensual introduction of PIP by way of a statutory compliant collective bargaining process meant that there should be no declaration for the reasons given.

Relevant Law

227. Counsel have already covered extensively the applicable legal principles, and the authorities which support them. It is unnecessary to repeat those principles within this section in any detail. However, it would be helpful to identify the relevant statutory provisions from the Trade Union and Labour Relations (Consolidation) Act 1992 which have been relied upon in the context of collective bargaining.

228. Section 181 deals with the provision of information.

> **181.— General duty of employers to disclose information**.
>
> (1) An employer who recognises an independent trade union shall, for the purposes of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which the union is recognised by him, disclose to representatives of the union, on request, the information required by this section.
>
> (2) The information to be disclosed is all information relating to the employer's undertaking [……..] which is in his possession, or that of an associated employer, and is information—

(a) without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining with him, and

(b) which it would be in accordance with good industrial relations practice that he should disclose to them for the purposes of collective bargaining.

(3) A request by trade union representatives for information under this section shall, if the employer so requests, be in writing or be confirmed in writing.

(4) […….]

(5) […….]

229. Section 182 contains restrictions on the general duty and has limited relevance in the present case. Section 183 entitles a union to complain to the Central Arbitration Committee where there has been a failure to disclose information.

183.— Complaint of failure to disclose information.

(1) A trade union may present a complaint to the Central Arbitration Committee that an employer has failed—

(a) to disclose to representatives of the union information which he was required to disclose to them by section 181, or

(b) to confirm such information in writing in accordance with that section.

The complaint must be in writing and in such form as the Committee may require.

230. Sections 184-185 set out the further procedural aspects of any failure. Reference was made to section 188 where a duty was imposed on an employer to consult appropriate representatives in redundancy situations, to emphasise the lack of any consultative duty in the context of collective bargaining.

188.— Duty of employer to consult ….representatives.

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be [affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

Discussion

Overview

231. I propose to deal with my determination in this manner. Before answering the specific twelve issues which have been agreed between counsel, it seems appropriate that I make general findings in respect of the contractual relationship between the parties over the provision of PHI and the extent to which the terms of the contractual entitlement may have been contained within either the HB or the PB guide. In this respect, despite the elaborate and

detailed arguments of counsel, the dispute is a stark one and boils down to this: the Claimants say that payment of the benefit was prescribed by the "clauses" in the documents which have become contractual terms; the Defendant says that although the contract of employment provided for such a benefit, the amount, duration and manner of payment of such a benefit was entirely a matter for the *discretion* of TUI.

232. If I determine that the scope of the contract on PHI benefit did indeed incorporate the HB and PB provisions as terms, including the all-important paragraph 5.1, it is then necessary to address whether that term prevented any change to benefit payment for the in-claim pilots by collective bargaining in respect of both their pre-60 and post 60 entitlement, i.e. the "carve-out". If it did not, I will consider whether the effect of the collective agreement incorporated into schedule B and the MoA of 2021 brought the PHI in-claim pilots into the scope of PIP once they turned 60. If it did, this will require an assessment of the Claimants' alternative case that in the collective bargaining process the Defendant breached the implied term of trust and confidence in their individual contracts of employment.

Incorporation of terms- general

233. It has become abundantly clear to me, as both counsel have acknowledged, that none of the jurisprudence in relation to the incorporation of collective agreements or associated documents into individual contracts of employment provides a clear answer to the novel situation that arises in respect of paragraph/clause 5.1 which has been the predominant focus of this case. Undoubtedly this court is entering into virgin territory, even though there are some general principles which are applicable and not capable of challenge.

234. The formula for determining the incorporation of terms, particularly of collective agreements, or indeed any document that is external to the main contract of employment may be derived from the bedrock of the judgment of Hobhouse J in **Alexander** (*supra)*. It bears repetition, and I set out the relevant extract below from paragraph 31:

> "The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. Insofar as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. Insofar as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."

235. Both Ms Mayhew KC and Mr Williams KC also referred to **Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB)** and the observations of Andrew Smith J which it seems to me are particularly useful. That was a case in which a hospital consultant brought proceedings against the hospital trust which had employed her in relation to their pursuit of disciplinary procedures, including exclusion, which were said to be in breach of her contract of employment. She sought to argue that the contents of guidance in the Practitioners Disciplinary Procedure had contractual effect between her and the Trust. Reliance was placed not only on the contract itself, but also upon the mutual intentions of the parties, custom and practice, as well as the implied term of mutual trust and confidence. It was accepted by the Trust that some of the provisions of the procedure may have had contractual effect, including those touching on misconduct and dismissal, but the learned judge, having acknowledged that there was no single test as to whether an employer and employee intended that such guidance should be contractual in nature between them, as opposed to being advisory or an expression of aspiration, then provided the following indicia:

i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them [….] the more important the provision to the structure of the procedures, the more likely it is that the parties intended it to be contractual
ii) The level of detail prescribed by the provision
iii) The certainty of what the provision requires
iv) The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual
v) Whether the provision is workable, or would be if it were taken to have contractual status; 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.

236. These *indicia* were said not to be exhaustive. Andrew Smith J also made reference to an authority which has been central to the submissions of counsel in the present case, addressing the requirement for aptness, namely **Keeley v Fosroc International Ltd,** (*supra*). The facts of this case are arguably more pertinent, involving a staff handbook which included not only rules and procedures, but also employee benefits. An issue arose in relation to its provision for enhanced redundancy payments for those with two or more years' service which was referred to in the handbook but without any specificity indicating that it would be discussed during collective and individual consultation. The judge at first instance, whilst holding that the terms of the handbook were largely incorporated into the contract of employment as apt, decided that the term in relation to enhanced redundancy was not so apt. The Court of Appeal disagreed. Words such as *entitlement* suggested aptness for incorporation, even if the context was one of policies. This was a provision which was part of the remuneration package. It was a term which was capable of having a life of its own, and not "snubbed" out by the context. Auld LJ provided the judgment of the court. At paragraph 30 he clarified that the issue for the court had been the construction of the contract and an allegedly express term, in respect of which the views of the parties may have been of only limited relevance.

> "30 In my view, the issue or issues for the judge were essentially ones of construction of an acknowledged contract, the written terms of which were not in issue, only in the instance of this provision its effect. The variously expressed views on both sides from time to time in the formulation and application of the provision are not, in my view, admissible on that issue. They are potentially relevant and admissible only in the event of the failure of Mr Keeley's case on construction of the express term, driving him to rely on his alternative case based on an implied term – or if Fosroc had pleaded some form of estoppel, which it has not."

237. Auld J identified several reasons why the provision was contractual and not merely advisory or aspirational:

> "33. Equally, here, the fact that the staff handbook was presented as a collection of 'policies' does not preclude their having contractual effect if, by their nature and language they are apt to be contractual terms, as clearly many were in the 'Employee benefits and rights' part of the handbook, incorporating in that way by reference what was not expressly referred to or detailed in the statement of employment terms.
>
> 34 Highly relevant, in any consideration, contextual or otherwise, of an 'incorporated' provision in an employment contract, is the importance of the provision to the overall bargain, here, the employee's remuneration package - what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may be still be apt for construction as a term of his contract (providing it is not in conflict with other contractual provisions);[……..]
>
> 35. Equally, if not more important, is the wording of a provision under question in an incorporated document containing contractual terms. If put in clear terms of entitlement, it 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. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all."

238. From the helpful guidance in these cases, I draw these principles. First, when considering ancillary documents to the contract of employment on which reliance is placed and the extent to which it is said that they incorporate contractual terms having regard to the intention of the parties, and the aptness of any term, it is unnecessary to take the document as a whole, but appropriate to deal with it on an entirely divisible basis. In other words, some aspects may be clearly contractual, and others clearly advisory or policy based, even within the same paragraph or section. Second, whilst language which expresses certainty in respect of a contractual entitlement will be a powerful indication of incorporation as a term, the fact that aspirational or advisory language is used will not necessarily preclude such incorporation. Third, contractual intention can be derived from the practice of the parties in the application of the provision. Fourth, the "aptness" of a provision to be incorporated as a term requires the court when construing the documentary material to consider a broad range of circumstances, including the existence of other material which might provide the necessary detail of a contractual entitlement, the historical context of the "term" relied upon, and the importance of the provision to the working relationship of the parties. This is clearly not exhaustive.

Incorporation of the HB and PB guide?

239. It seems to me that the matrix of relevant circumstances, which is largely unchallenged, is as follows. The contract of employment of a pilot who joins TUI incorporates the relevant MoA which at all material times to this case contained a provision indicating that pilots were entitled to PHI. There was no further detail of the policy provided, but pilots were referred to the pilot management team. Any pilot who chose to contact the pilot management team would receive or be given access to the relevant HB. It was within this handbook that the details of the benefit that was paid to pilots unable to fly for medical reasons were set out. In fact there was no reason why any active pilot could not also obtain the HB. It was available on the company intranet and therefore any pilot would be able to work out the amount of benefit which he or she might receive were he or she to become sick, and thus upon the expiration of company sick pay be facing a substantial reduction in income. There was no other material available to the pilots which described how this benefit would be paid.

240. Although in the introductory section to the handbook reference is made to an insurance policy which is maintained by the plan manager, and which would fund the benefit, there is no clear indication given that once a pilot reaches 60 years of age, and continues on benefit, that benefit is paid by the company.[26] It is clear that the insurance policy was comprised in the "legal documents" which were not available to pilots, and therefore after the age of 60 that policy had no relevance. The question then arises as to the legal basis, or the source of continuing benefit payment for these pilots, if the details were not contained within the HB. Further, the HB applied to non-pilots as well as pilots, who *were* covered by insurance after the age of 60.

241. One of the principal arguments relied upon by counsel for the Defendant opposing the incorporation of the HB "terms" is the nature of the language that is used in several respects being of a general, or aspirational nature. In particular, in paragraph 2.1 in respect of eligibility, reference is made to "*generally*" in respect of inclusion in the policy ceasing at SPA. In respect of the provision of medical information, it is stated that "*normally*" this is only required for high salary employees. In paragraph 3 where the extent of the cover is defined, "*may*" is the expression used in respect of the insurers' maximum overriding benefit level. In the same section reference is made as to what the insurer is "*likely*" to require in terms of ongoing evidence of continuing incapacity. In section 4, where one of the only references to PB is contained within the flowchart, it is said that the insurer will "*usually consider*" this as a possibility. Most significantly, of course, in paragraph 5.1, it is the company's "*hope*" to continue the plan indefinitely.

242. In my judgment, this objection carries little weight for two reasons. First, invariably where there is language which falls short of certainty within the HB provisions, this is because there is a requirement for a third-party decision or assessment, i.e. that of the insurance company; for instance where a threshold of medical incapacity has to be

[26] There is a single mention in the fourth paragraph of section 2.1 to the payment of benefit by the company rather than the insurer after the age of 60 but this is not expanded elsewhere.

established, as would be the case with a linked claim or PB. Second, there are numerous examples of more certain language being used to describe circumstances of eligibility, by way of example, and the calculations which are used to arrive at benefit levels. Reference is made to the fact that benefit "will" increase in line with the escalation basis, and there are numerous occasions when keywords are set out in bold type.

243. The Defendant's objection to incorporation also relies upon the need to ensure that the administration of the benefit was flexible and that the HB could be changed as appropriate because it was largely insurer funded. However, the evidence does not support the employer adopting a flexible approach to the payment of PHI, or proportionate benefit. In fact, the only significant changes to earlier iterations of the HB involved the removal of the words suggesting that the HB conveyed no legal rights (as in the 2008 version), a qualification which no longer appeared in the later versions. When changes were required for financial reasons both in the context of GIP and PIP, the Defendant chose to implement these only after a process of collective bargaining with the pilots' union.

244. In my judgment when construing the HB on the basis of the contractual intention of the parties, it is abundantly plain that the administration and payment of the benefit was derived from the provisions that were set out in the various versions. It was a company document, signed off by TUI, even if the broker may have had some input, and the only material that was available to the pilots and other employees to explain how their eligibility might arise and how their benefit might be calculated. In the absence of access to the insurance documents (which in any event would not have applied for those seeking to claim who had passed the age of 60) an in-claim pilot who may have received a shortfall, or believed that his or her benefit was not being properly calculated and who wished to legally challenge would have no other recourse than to rely upon the HB for a statement of that benefit.

245. It seems to me that the only way in which PHI would have been workable would have been for the HB, and indeed the associated guide to PB to be the contractual source of entitlement. The intention of the parties over the period leading up to the collective bargaining process in my judgment clearly established the HB and the guide as having contractual status. If this was not so, then the pilots (and other TUI employees who may have been subject to similar PHI) would have had only a bare contractual right without any substance. The absence of certainty, or any understanding as to how remuneration was to be calculated would have left them at the whim of the employer. Further, applying the first of the Andrew Smith J indicia in **Hussain** I am satisfied that not only was the majority of the HB important to the structure of the payment of PHI but also that it was fundamental.

246. Of course it does not follow that every provision in these documents would be so incorporated, because the test of aptness must still be applied. In this respect there is no significant elaboration required in relation to section 2 (eligibility), section 3 (the extent of

the benefit) or section 4 (the process of claiming the benefit and connected claims) save in relation to the SPA aspect, which I will deal with separately. There was no inconsistency in relation to any aspect of the benefit with any other document or contractual entitlement or indeed any internal inconsistency. In all dealings in respect of PHI it was the reference point for both employer and employee stretching back over many years, including previous iterations, as the working document, and although containing what has been described as "aspirations" these are no more than qualifications that some aspects depended upon insurance company approval, as I have indicated.

Paragraph 5.1

247. The construction of paragraph 5.1 as a contractual provision is more complex. If incorporated, it contains two separate rights, one of the company and the other of the employee (pilot or non-pilot). In respect of the company's right to modify or discontinue if conditions warranted such action, i.e. financial/business needs, this right is clearly framed in contractual language and it is not challenged that this was protecting TUI's position in respect of any changes that might be made in the future as to how the PHI benefit would be provided. As long as there remained a contractual entitlement (as there was for the pilots by virtue of the MoA) there would always have to be some form of PHI. Mr Williams KC has submitted that this was a unilateral right (and not one which had to be collectively bargained) and I shall return to that submission shortly when considering the collective bargaining aspect. However, to understand the relationship between the first part of paragraph 5.1, and the *protected* benefit aspect in the last sentence it is necessary to consider the history of the insured and uninsured benefits and how the change came about.

248. Regrettably (if I might be permitted to use that term in a case which is already very document heavy) the court has not been provided with (or directed to) any material which deals with the insurance changes which were introduced when it was no longer feasible to include pilots over the age of 60 in the insurance cover. It was logical that when the retirement age for commercial pilots increased to 65, the cost of covering the risk on an insured basis would rise exponentially, because of the numerous health conditions likely to affect the older pilots in the context of stringent aviation medical requirements. TUI and/or its predecessor could have chosen to exclude[27] new pilot claimants from PHI benefit once they reach the age of 60, but they did not. Instead, doubtless for altruistic and good industrial relations motives, the company took on the burden of self-insuring or self-funding (both expressions have been used interchangeably during the case) the benefit which had to be paid to an in-claim pilot over the age of 60, whether the claim was first intimated after the 60th birthday, or before. Clearly with an insurance policy restricted to 60, the funds were no longer provided by a third party insurer.

[27] Subject to collective bargaining and variation of MoA 10.2

249. However, regardless of the source of the benefit (TUI or the insurance company) there was a seamless process whereby pilots continued to receive their benefits, and if appropriate, PB, through the company payroll once they reached the age of 60. Details of the numbers of over 60 pilots in-claim have not been provided, because this court has only been dealing with seven claimants, but it is axiomatic that there would have been many, including pilots who had passed their 60th birthday when already in-claim, or who had commenced a claim after 60 under the PHI procedure and before the introduction of PIP (including in the GIP period). Despite this, the HB made no differentiation between the insured and the company funded benefit recipients. It is reasonable to assume that the company took on the mantle of determining eligibility and in appropriate cases assessing if PB the insurance company had no interest.

250. In these circumstances, and in the absence of any other recorded procedure dealing with the way in which uninsured PHI recipients continue to receive their benefits, it seems to me that the only way in which the protected benefit provision can be interpreted in 5.1 is by the inclusion of both the insured pilots (under 60) and the company funded pilots (over 60). In other words, in the absence of any consensual variation[28] this provision (if it is to be construed as contractual) was assuring in-claim pilots, regardless of age, that they would be protected from unilateral change, modification etc. However, there is a fundamental difference between those who are funded by the insurance policy, and those who are funded by TUI. For the former group, the insured risk has already materialised, that is the pilot who is covered by the policy has become sick and is entitled to benefit within the terms of the policy paid by the insurer to TUI. The protection, therefore, comes not only from the statement in paragraph 5.1 but from the fact that the benefit is already being paid, and will continue until eligibility ceases. Whilst technically an employer who receives an insured benefit on behalf of an employee which is then absorbed into the payroll may choose to pay less than he has received from the third party, the industrial and potentially legal consequences of such action would be significant.

251. In seeking to attribute a contractual construction to paragraph 5.1, I have come to the conclusion that the protection afforded by the final sentence, which is couched in sufficiently certain language that satisfies the test for aptness, applies to any pilot who is in-claim, and subject to any consensual variation. The contractual intention is also sufficiently clear; the company could change (with appropriate consultation) the way that it provided PHI benefit to future Claimants but not to those who were in-claim, affording this latter group some degree of assurance or protection.

252. I am fortified in this conclusion by considering the position which prevailed in relation to the GIP negotiations. None of those in receipt of PHI benefit were to be included in the new scheme. It was only those who made future claims who might be affected by the potential changes. In other words all in-claim pilots were protected from unilateral change, regardless of their age.

[28] Dealt with below

SPA or 65?

253. As I have indicated above, when construing extraneous material to the contract of employment to consider whether or not terms have been incorporated, a divisible approach may be warranted. In this respect the reference to a potentially higher maximum age to which PHI might be paid arises under paragraph 2.1 and paragraph 3.1, both of which *appear* to extend the payment of benefit to the higher SPA which for all of these Claimants will be older than 65, and in most instances 66 or 67, with the incremental increase in the SPA. Notwithstanding the fact that commercial pilots cannot legally fly after the age of 65 under civil aviation rules, if the Claimants are correct in their contention as to how these paragraphs should be construed, they will be entitled to a benefit which was intended to cover their inability to fly for medical reasons beyond the period when they would have been allowed to fly in any event.

254. In my judgment and applying the same considerations for the incorporation of contractual terms from such material, 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.

255. There was no suggestion prior to the amendment to the HB in 2019 that the pilots who were in-claim were considering that they had such an entitlement. Indeed, Mr Gavin, in researching materials for this case had encountered the 2019 change which he thought was indicative of subterfuge on the part of his employer at a time when he was dissatisfied with the approach which had been taken over PIP and the potential loss of his post 60 benefits. He had not taken a stance in the early stage of representing the interests of the pilots, or engaging in WhatsApp communications that payment to the SPA was an inalienable contractual right.

256. It is quite correct that the option of a higher SPA specifically refers to pilots in paragraph 2.1 but it is acknowledged that the HB was for all eligible employees, including those who were able to work beyond the age of 65 in a ground-based role. Whilst this did not appear to be accepted by the Claimants, I am satisfied on a balance of probabilities that there was no assurance of a ground-based role for a pilot who became compulsorily unable to fly at the age of 65 and thus retired from the company. In any event, if there was the option for alternative suited employment for an incapacitated pilot who would have been dismissed (retired) at 65, the salary would have been substantially less than that of a pilot, and there would have been the incongruous result of that incapacitated pilot receiving substantially more than he would have been able to receive if he had remained able-bodied, and had secured such an alternative role.

257. Mr Williams KC seeks to challenge this alleged entitlement on the basis that eligibility ceased when employment ceased, and a pilot who was in receipt of benefit had no option but to accept retirement as a pilot at the age of 65. However, I do not consider that such a construct is necessary. It seems to me that this provision is entirely anomalous and the most likely explanation, as provided by Mr Dunk is that whilst earlier versions of the HB referred to normal retirement age, being 65 for a pilot, the effect of anti-discrimination legislation, and increased SPA, which would clearly have application to other TUI employees, led to the formulation of these paragraphs which were subsequently corrected. In my judgment it is sufficient to consider this potential contractual provision by reference to the intention of the parties and the aptness of the term. The intention of the parties is expressed most clearly in the opening words of paragraph 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[29] salary." This is what had been expected by pilots who are no longer able to fly and the windfall of a benefit extended beyond their normal flying age made no contractual sense. Thus it would fail to pass the test of being a term apt for incorporation. In my judgment there was no contractual basis for the payment of PHI beyond a pilot's normal retirement age which is 65.

258. The exchange between Tim Taylor and Catherine Stait in 2011, furthermore,[30] made it clear that consideration had been given to the potential anomaly, and that changes to the HB were not immediately introduced on the basis that a pilot would be compulsorily retired at the age of 65 in any event.

Collective Bargaining and potential carve-out in 5.1?

259. On the basis of my determination above, save in respect of a higher SPA for the period of payment of benefit, the HB reflected the contractual terms which applied to PHI. It is then necessary to consider whether by a process of collective bargaining between TUI and BALPA, those terms were changed, whereby the in-claim pilots would transition to PIP after the age of 60. Here, once again, the focus is paragraph 5.1, because the primary argument of the Claimants is that the protected benefit clause provided a "carve-out" from the collective bargaining process. Both sets of counsel have pursued compelling arguments, and I have not found this an easy issue to resolve.

260. The starting point, it seems to me, is not the Claimants' protected benefit clause in 5.1, but the employer's right to modify etc. There is no doubt that this gives rise to a discretion if it is exercised on a unilateral basis, and in such circumstances the principles derived from **Braganza** (*supra*), **IBM v Dalgleish** (*supra*) and other case law may be applicable, which require the rational application of the discretion in discharge of the implied term of trust and confidence. It is self-evident, however, that although the Defendant was entitled to impose changes unilaterally, provided there was individual or collective

[29] My emphasis

[30] See paragraphs 106 & 107

consultation, that is not what happened in this case. In my judgment, there was no discretion exercised by the employer, but a process whereby the employees' representatives were invited to agree to changes which would impact on their benefits, both those who were in claim, and those who might claim in the future. In this respect I agree with counsel for the Defendant.

261. The juxtaposition of the two provisions (the employer's right to vary or modify and the employee's right to preserve benefits already being paid) is relevant in this context. As Mr Williams KC has pointed out, and in respect of which there is no real challenge, most of the Claimants accepted that they could have agreed individually to a variation in the PHI benefit which they were receiving, and this would not have amounted to an imposition of changed terms. 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.

262. In my judgment, this is answered by reference to the contracts of employment of each of the pilots, including the relevant MoA. The consensual variation was validated by the creation of a collective agreement in respect of which each employee had agreed would be incorporated into their individual contracts.[31] If the provision in paragraph 5.1, furthermore, which purported to protect benefits which were being paid both pre-and post-60, had been intended to provide a carve-out from any future collective agreement, thus nullifying the provision in the contracts of employment which allowed for incorporation, specific wording to this effect might reasonably have been expected.

263. Insofar as there was no discretion exercised when the PIP changes were introduced, because those changes were not brought about by a unilateral decision but by a consensual collective variation, there were two consequences. First, there was no requirement for consultation, which was clearly intended to be another layer of protection for pilots whether in-claim, or not in-claim. Second the obligation to act rationally in accordance with **Braganza** principles, as would be expected when a decision which impacts on employee rights is being imposed, was not engaged. Of course it does not follow that the implied term of trust and confidence is precluded when collective bargaining leads to a consensual variation. I will deal with this aspect in the next part of my judgment.

264. It has been argued on behalf of the Claimants by Ms Mayhew KC that on previous occasions the Defendant had recognised the validity of the carve-out, most notably during the GIP proposals, and when individual assurances were given by various TUI personnel, principally Mr Winspear, that clause 5.1 provided protection from any future changes for the in-claim pilots and that this was clearly understood to include not simply the insured benefits, but those which would be paid post-60 by the company. However, in my judgment whilst that may be the case in respect of any unilateral variation, it cannot apply in circumstances where

[31] See paragraphs 7 and 8 above

the pilots' acknowledged agent, namely BALPA, agrees to that variation, and it is not imposed.

265. Accordingly, I am unable to accept that clause 5.1, which I have determined was incorporated into the contract for reasons given above, provided the carve-out from variation to PHI benefit by collective bargaining or that it prevented consensual variation.

Implied term of trust and confidence and collective bargaining

266. In the absence of the exercise of a discretion, which would have been the case with the unilateral imposition of a new benefits scheme, there still remains an obligation on the employer to conduct itself in the context of collective bargaining in a way that does not breach the implied term of trust and confidence. This is not seriously challenged, although the Defendant through counsel places heavy reliance on the statutory scheme for the provision of information by an employer which carries with it certain sanctions. Nevertheless, I agree with Mr Williams KC that the employer's obligation in respect of the implied term of trust and confidence is a significantly lesser one, with a higher threshold of proof to be discharged if it is to be challenged, and the line of authorities which equate the responsibility with that of a decision-maker, closely allied to the public law context, are not applicable. Reference was made to the case of **Malik** where the court should be asking whether the employers had conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with employees. Thus an irrationality or Wednesbury unreasonableness element which would be appropriate where a discretionary decision is made is not applicable. The focus is likely to be the conduct of the employer.

267. In determining whether the employer has acted in breach of the implied term, the reality of the situation which was faced by BALPA, TUI and the in-claim pilots cannot be ignored. Although there is criticism by Ms Mayhew KC of a dearth of evidence from senior management which might have enabled an assessment to be made as to the affordability of continuing to provide PHI benefit, either exclusively, or in tandem with a revised benefit scheme not covered by insurance but self-funded by the pilots, I am satisfied on the evidence from the management level witnesses, including Mr Winspear, Ms Tindale and Mr Dunk that there was no realistic prospect of meeting the exponential increases in the insurance premium, and that significant changes were justified from the business perspective.

268. Equally, although the in-claim pilots had the misfortune to be prevented from flying for medical reasons, and each would have undoubtedly wished to return to a pilot role if possible, they were in receipt of benefits which were generous, and unlikely to be replicated in any future scheme that was agreed. Although BALPA have indicated through their

witnesses (Mr Godesar and Mr Coker) that the risk of an imposed scheme by the employers, which was to the disadvantage of the majority of pilots, was at the forefront of their policy when approaching the collective bargaining, and that they were required to arrive at a solution that suited the majority, even if a small minority (i.e. the in-claim pilots) were affected, the court has received little or no evidence as to the steps which could have been taken, or were taken to protect those in-claim pilots who were going to be affected by the proposals in a significant way once they reached the age of 60, with the loss of PB and reduced pension entitlement. During the negotiations which led to the GIP ballot, the in-claim pilots were excluded from any changes, even after 60. In these circumstances it might have been expected that BALPA representatives could still have acted in the interests of all the pilots in the PIP MoA by proposing an agreement which continued to exclude the in-claim pilots. The court has not received any evidence that BALPA did anything other than accept that these changes would apply to all pilots over 60 with a transition process for the PHI recipients when they reached 60 years of age.

269. The role of BALPA is therefore relevant when considering the position of the Claimants and the complaints which they have made in the context of consultation, information provision, and understanding the changes. It is also important to note that at some point in this litigation an allegation was pursued that BALPA was acting as the agent of TUI in its dealing with the pilots. The agency point was abandoned before the trial, and therefore it was *all* the pilots' interests, which included not only the able-bodied, but the in-claim incapacitated pilots which the union was representing.

The identified issues

270. I now turn to address the list of issues which the parties have agreed. To a substantial extent most have already been answered by my determinations set out above. It is largely the Claimants' alternative case in relation to allegations of breach of the implied term of trust and confidence in the collective bargaining process which requires some amplification.

(1) Were paragraphs 2.1 and/or 3.1 and/or 4.6 and/or 5.1 of the 2015 PHI Handbook and/or the content of the Guide to the Calculation of Proportionate Benefits, expressly incorporated into the Claimants' individual employment contracts by clause 10.2 of Schedule M to the 2018 Memorandum of Agreement ("MOA") and if so, were such paragraphs apt for incorporation?

271. Counsel for the Defendant had taken issue with reliance upon the PB guide as a component part of the incorporated terms because of the lack of any specific reference in the pleading. The court did not receive any detailed argument on this point, although it was maintained in the closing submissions. Whilst as a strict pleading point this may well be correct, in my judgment it could not be said that the Claimants' case is unclear, with

numerous other references in the pleaded case to the link between PB and the HB. At all times the matter has proceeded with the full understanding of the parties on the basis that both documents extraneous to the MoA were alleged to contain the incorporated terms relating to PHI.

272. Therefore, for the reasons set out in paragraphs 231 to 252 above, I am satisfied that the paragraphs of the PHI HB referred to, and the guide to the calculation of PB were incorporated into the individual employment contracts of the Claimants and were apt for such incorporation, save in respect of the retirement age (dealt with in issue 2 below).

(2) If paragraphs 2.1 and 3.1 of the PHI Handbook were so expressly incorporated into the Claimants' contracts of employment, did they provide the Claimants with a contractual entitlement to PHI Benefits (as defined within the Particulars of Claim) assessed against their pilot salary:

(a) until their state pension age; or

(b) The employer justified retirement age for pilots (currently at 65)?

273. As indicated in paragraphs 253 to 258 above, I have determined that there was a contractual entitlement to PHI until the pilot's employer justified retirement age set at 65.

(3) If paragraph 4.6 of the PHI Handbook was so expressly incorporated into the Claimants' individual employment contracts, was it an express contractual term that, once in claim, if the Claimants' returned to work but subsequently became incapacitated as a result of the same or related reason within a 52 week period, their PHI Benefits would be reinstated?

274. This deals with the question of the linked claim. On the basis of my findings that paragraph 4.6, amongst the other identified paragraphs, was expressly incorporated, in my judgment the pilots were entitled to have their PHI benefits reinstated if there was a recurrence of the same condition within a 52 week period, although the role of the insurer exercising a discretion and making a decision on the medical presentation could not be ignored. The fact that the words *will usually* are used does not preclude a contractual status, and in this respect I do not agree with Mr Williams KC. However, this is largely an academic question, because it does not arise in relation to any of the in-claim pilots who have become Claimants within this action and the "connected claim" provision has become part of the new PIP scheme, even though the circumstances in which this was conceded are somewhat opaque. There has also been an agreement that a PHI in-claim pilot returning to work will be able to rely upon the former linked claim provision up to the age of 60 in the event that he or she is medically suspended for the same condition, with the company providing the benefit if declined by the insurer.

(4) If paragraph 5.1 of the PHI Handbook was so expressly incorporated into the Claimants' individual employment contracts, was it an express contractual term that, once in claim, the Claimants' PHI Benefits could not be amended and/or changed?

275. This issue is somewhat nuanced, and it is dealt with by my determination at paragraphs 247 to 252 above. Paragraph 5.1 protected the in-claim pilots from unilateral changes to their PHI entitlements whether they were in receipt of insurance funded benefit or employer funded benefit. However, it has to be considered in the context of the answer to the next question.

(5) If so, was the contractual effect of paragraph 5.1 of the PHI Handbook to prevent any changes to the Claimants' PHI Benefits, including as a result of variation through collective bargaining with BALPA?

276. At paragraphs 259 to 265, I have determined that there was no carve-out from collective bargaining, and that paragraph 5.1 did not have that contractual effect.

(6) If each or any of paragraphs 2.1, 3.1, 4.6 or 5.1 of the PHI Handbook were incorporated into the Claimant's individual contracts of employment, were such terms varied by the incorporation of Schedule B to the Memorandum of Agreement between BALPA and TUI?

277. The answer to this issue is yes, they were so varied for the reasons I have given.

(7) By applying PIP to each of the Claimants did the Defendant breach the Claimants' contracts of employment as particularised at paragraphs 34.1 to 34.7 of the Particulars of Claim?

278. The question of any breach of contract is dependent upon the Claimants establishing that there was no entitlement on the part of the Defendant to change the terms of the PHI benefit for those in-claim over the age of 60. The seven separate allegations of breach, save for the reduction in the pension contributions, relate to the entitlements removed by the changes brought in by the collective bargaining process. In so far as I have found that these were consensual variations through the agency of the union and that the changes were incorporated into the individual contracts by virtue of the MoA, these breaches cannot be established by the introduction of the changes (subject to the Claimants' secondary case dealt with below).

279. In relation to the pension contributions, it is acknowledged that the entitlement to the employer contribution based upon the notional salary, and not the PHI benefit received had never been an insured "benefit", and was not referenced in the HB. It is derived from appendix D and schedule N of the 2018 MOA which refers back to paragraph 13.3. Therefore, it could not be said that there was any element of 5.1 protection provided to pilots who were in-claim and receiving a higher level of pension contribution. It was simply a contractual term which could be varied by agreement. This was the effect of the collective agreement when BALPA chose to accept a variation on behalf of the pilots in the new collective agreement on 16th August 2021.

280. In so far as I have found that those pilots who were in claim and over age 60 were contractually required to transition from the PHI scheme to the new PIP scheme it must follow that their employer pension contributions came under the new collectively agreed arrangements.

(9) If the Claimant's alleged contractual rights to PHI were able to be varied through collective agreement, nevertheless:

(a) did paragraph 5.1 impart a contractual discretion upon the Defendant to modify, suspend or discontinue PHI Benefits?

281. The obvious and straightforward answer to this question is that the Defendant did have a contractual discretion to modify, suspend or discontinue PHI, by virtue of the first part of paragraph 5.1. This aspect relates to unilateral action on the part of the Defendant which requires consultation. It is dealt with in paragraphs 270 to 272 above.

(b) did the Defendant exercise such a contractual discretion as alleged by the Claimants?

282. As I have determined, this was not a unilateral exercise of a contractual discretion, but an agreement brought about by collective bargaining to change the terms of the permanent health benefits. In this respect I agree with the submissions of counsel for the Defendant.

(c) If so, was it an incident of the implied term of trust and confidence that such a discretion could only be exercised reasonably and/or fairly and/or rationally and/or after a fair and/or rational and/or reasonable process?

283. On the basis of the principles set out in **Braganza** by Lady Hale, I am satisfied that if the discretion had been exercised as a concomitant part of the implied term of trust and confidence there would have been a requirement for the Defendant to act rationally and fairly.

However this is not the test which is applied to the approach required in the collective bargaining process, as it elevates the responsibility of the Defendant in what is effectively an arm's length arrangement. This is dealt with at paragraph 266 above.

(10) Was it an incident of the implied term of trust and confidence contained within each Claimants' contracts of employment that the Defendant would carry out the process of collective bargaining reasonably, rationally and fairly?

284. To some extent this repeats the issue that has been defined at 9(a) above. Insofar as a collective bargaining process is a commercial arrangement between an employer and the union which represents the employees, even if the implied term had the incident of requiring reasonableness, rationality and fairness, this would be difficult to reconcile with the reality that each side would be seeking to protect its own best interests. As I have indicated above, in respect of the implied term of trust and confidence where the discretion was not exercised, but a collective bargaining process followed, the requirement on the employer was limited although clearly prescribed by the statutory obligations relating to the provision of information under section 181 of the Act. I accept that there may be some circumstances where the absence of reasonable and proper cause (the lower threshold) might equate to unfairness or irrationality, say for instance where information has been deliberately manipulated, or where the a fundamental set of circumstances which would otherwise erode the bargain which is being negotiated, was not communicated to the union, but in the process that is followed in my judgment it is not appropriate to identify every step taken by the employer and seek to fit it within the matrix of decision-making, as if this were a public law scrutiny. With that in mind, I consider each of the separate bases on which it is alleged that there may have been a breach of the implied term, but by reference to the lower threshold.

(11) If any of the terms at (9) or (10) were implied into the Claimants' contracts of employment, did the Defendant breach such terms:

(a) By allegedly 'changing' the PHI Scheme for those in-claim?

285. In the light of my finding that the Defendant did not unilaterally seek to change the PHI scheme, exercising its discretion as identified in paragraph 5.1, but instead entered into a negotiation to introduce a new benefit, this is of no relevance. As I have indicated above, it was open to the representatives of the in-claim pilots to acknowledge the unique position in which they found themselves and to seek to negotiate some form of protection. BALPA chose not to, because it was considered that the basic elements of the new scheme provided advantages for the vast majority of pilots, even though some may potentially lose out.

(b) By allegedly failing to consult adequately or at all (whether directly or collectively) on the impact of the proposed changes to the PHI Scheme?

286. The consultation that was required of the Defendant would undoubtedly have arisen if this had been a unilateral decision to introduce PIP. Clearly it was not. As the Defendant has pointed out a number of the allegations relate to the failures of BALPA in respect of information provision to pilots and its accuracy, whereby it is said that the Defendant had ownership of the detail and I deal with this below under (h) below (at paragraph 300). Furthermore, insofar as it is part of the Claimants' case that an obligation to consult with individual pilots arose independently of negotiation or communication with the union, in my judgment this is misconceived. The situation here was somewhat unusual because of the closeness between pilot management, the union, and the pilots themselves, as evident in the WhatsApp communications. The most prominent of the Claimants, of course, Mr Gavin, had been a close friend of Mr Winspear who was leading the collective bargaining on behalf of the Defendant. However, the fact that he had a direct line, so to speak, and was able to bypass the union negotiators did not give rise to any separate obligation to consult or to advise. Again this must be considered in the context of the lower threshold that arises in relation to the implied term of trust and confidence.

287. Aside from any question of individual consultation, on the basis of the way in which this issue has been defined it seems to be the Claimants' case that BALPA should in some respect have been consulted about the impact of the proposed changes by the employer. In my judgment this has no substance. BALPA was fully informed as to how the new PIP scheme was going to impact on the pilots. In any event in the collective bargaining process where both parties were acting in their own best interests, and on the assumption that the necessary information was provided, I do not accept that there was any additional responsibility on the employer to undertake any further consultation in relation to impact.

(c) By allegedly introducing PIP without providing any or any sufficient information about the true impact of those changes?

288. Essentially this amounts to a rephrasing of the allegation under (b) above. Further, in relation to the alleged inadequacy of information, and its implication in any breach of the implied term I deal with this under (h) below at paragraph 300.

289. However, it is arguable that if there had been a manifest intention on the part of the Defendant to conceal the passing on of the GIP gap liability, (that is the uninsured element after five years,[32]) to the pilots to be included in the payroll element to be covered by future contributions from them, this had the potential to amount to misleading information, or at least the failure to communicate an important and material fact which would impact upon the calculations and thus inform BALPA in the negotiations. In such circumstances it would not only have given rise to the potential for these Claimants to have established a breach of the

[32] Paragraphs 135-146 above

implied term, on the basis that the employer without reasonable and proper cause conducted itself to the detriment of the relationship with the employees, but would also have undermined the integrity of the collective bargaining process.

290. Insofar as I have allowed the Claimants to pursue this matter by way of amended pleading, it is necessary that findings are made. In this respect the evidence was curious on any interpretation. It is clear that at a senior executive level there was an understanding that the replacement scheme for PHI would allow this liability to be passed on to the pilots.[33] However, it is correctly pointed out by counsel for the Defendant that in the financial modelling that was considered by BALPA's representatives the only liability to be taken on by the pilots was that which might arise under the new scheme in the event of a future shortfall; the GIP gap liability was not included. Further, on the basis of the evidence of Mr Hari and Mr Murphy. I accept that the current financial records (essentially the payroll figures) make no reference to any additional liabilities, and therefore the liability is likely to have been absorbed elsewhere, as was anticipated by the union in its negotiation.

291. In the circumstances, I am unable to find on a balance of probabilities that there was a deliberate manipulation here, with the intention on the part of the employer that at some point the uninsured shortfall from GIP (after five years) would be passed on to the pilots. It seems to me that the only explanation for this incongruity is that there was a misunderstanding at senior executive level which was not translated into implementation. Whether this means that the head of operations (Mr Winspear) and his colleagues were permitted to negotiate a scheme which had not been envisaged at a more senior level is not a matter which this court has to determine. It is sufficient for me to find that this does not represent a breach of the implied term on the basis of what would amount to a deliberate manipulation of the information.

(d) By allegedly introducing PIP through a flawed and/or unfair process?

292. Insofar as I have rejected any unilateral introduction of PIP, it seems to me that this allegation amounts to a criticism of the collective bargaining process. In my judgment if there had been any flaw, deficiency, or unfair dealing this is a matter to have been taken up by BALPA. It is correct, of course, that PIP was not the subject of a ballot by union members save in respect of the two separate versions of the scheme. I do not understand the Claimants to be alleging that the failure to provide a yes/no ballot which would have enabled pilots to reject the new scheme, as had been the case with GIP, amounted to a flaw in the process; in any event BALPA had accepted that the changes to the old scheme would not be subjected to a members' ballot. The Claimants' case is that a fuller and more open presentation of the advantages and disadvantages of PIP, including the loss of PB is likely to have changed the landscape, and may well have led to a pilot backlash and had the effect of persuading BALPA to provide a more robust response. However, these were all matters which could have been

[33] See paragraph 136

dealt with by the union and in my judgment this does not amount to any unfairness which could be visited at the door of the Defendant, even if this came within the more restricted interpretation of the implied term.

(e) By negotiating with BALPA and effecting the change to the PHI Scheme in light of its alleged previous policy statements and/or written assurances that the PHI Benefits of in-claim pilots would not be so affected?

293. I have some sympathy with the in-claim pilots in relation to the previous position that had been adopted by their employer in respect of the protection of their benefits. This was exemplified in the approach to the GIP proposal, in which they were precluded from any changes. It was at this time that Mr Winspear by WhatsApp communication provided an assurance to Mr Gavin that he would not be affected (January 2020). The later assurance in July 2021 which was clearly lacking in accuracy suggesting that he would only be affected in relation to the rate of increase, with no mention made of PB, was provided at a time when the negotiations were already well underway and indeed the initial information had been provided in the FAQ 1. It is easy to understand how this approach by the TUI management caused disquiet amongst the in-claim pilots who clearly felt that they had been marginalised and were having their expectations dashed. However, in my judgment, none of the earlier assurances relied upon, or the policy which may have been derived from the way in which GIP was dealt with, prevented the Defendant from pursuing a change to this policy by way of a negotiated resolution with the pilots' representatives.

294. Of course if all the pilots had accepted the GIP proposals, the in-claim pilots would have no grievance; they would simply have continued to receive their benefits, including basic PHI, together with PB, increased pension contributions and escalation in a much more advantageous scheme. The fact that this was rejected, it seems to me, justified the Defendant in revisiting the entire question of PHI for all pilots both those who were already claiming and covered by insurance, at least to the age of 60, and those who were active and still able to fly. At that point it became a matter for BALPA as to the steps which might be taken to protect the small cohort of pilots who would be disadvantaged by the new scheme, namely the in-claim pilots over 60.

295. In the circumstances, I am simply unable to accept that anything which may have been said by way of assurance or any policy which may have been expressed indicating some sort of protection prevented the Defendant from seeking to change by collective bargaining and agreement the entitlement of all pilots to PHI. Once again it was a matter for BALPA to take up the cudgels on behalf of this cohort, relying upon previous policy and/or assurances to protect them. BALPA chose not to do this. In my judgment, it could not be said that by negotiating a new scheme, even if it involved a policy change, that the Defendant was in breach of the implied term as narrowly defined.

(f) By allegedly failing to notify the Claimants of changes to the pension contributions made by the Defendant?

296. There was undoubtedly some obfuscation in relation to the way in which pension contributions from the Defendant, which fell outside the HB, and which were dealt with by way of separately negotiated changes to the MoA, were to be calculated, and how the in-claim pilots would be affected. However the specific allegation here identifies a failure on the part of the Defendant in relation to notification of the individual Claimants with the suggestion also made in cross examination that if there had been changes to pension arrangements there was an obligation on the company to consult those affected. The simple answer to the allegation that this was a breach of the implied term is that contained within the drafts of Schedule B which were provided initially at paragraph 3.24, but in the final version of paragraph 3.28. Although this was a complex document which was difficult for even the union representatives to understand (particularly in the context of the transitional arrangements) there was no equivocality in relation to the fact that the pension contributions from the employer would be based upon benefit and not a notional salary going forward, once a pilot moved onto the PIP scheme.

297. In any event if there had been confusion and uncertainty, this was a matter for BALPA to address, who were presenting the material to the pilots. In my judgment there is no breach of the implied term made out.

(g) By allegedly informing the Claimants of changes to their PHI entitlement weeks after PIP was introduced?

298. The context of this allegation, as I understand it, is that the Claimants were not able to make an informed decision in respect of the ballot without knowing how the changes to their benefit entitlement would arise. It is clear from the evidence that several of the Claimants were struggling with the projections and were unable to understand how they would transition from PHI to PIP with the loss of PB and other reductions. For some this was a number of years off, and they were able to establish that there was no immediate effect on benefit levels. However, it is to be noted that the ballot was a simple choice between two schemes, one of which provided a higher level of benefit over a shorter period (with other incentives), whilst the other provided a lower level but over a longer period. For all the in-claim pilots, PIP would only be received for a period of five years from the age of 60 (or potentially seven/eight if the SPA argument was valid).

299. Whilst it might have been indicative of good employer/employee relations for information to have been provided within a reasonable time upon request, it is difficult to see how the delay, which probably arose in circumstances where payroll staff and management were seeking to familiarise themselves with a very complex scheme, and making future projections, could give rise to any contractual failure whether under the higher threshold of

the implied term of trust and confidence, or the lower one which in my judgment was applicable here. In any event the information which the pilots needed to vote on the alternatives did not require individual projections, and it would not have been reasonable to expect the Defendant to have provided these in the context of collective bargaining when the pilots had union representation who ostensibly at least were in a position to provide the requisite information.

(h) By allegedly misrepresenting the changes to the PHI Scheme made by PIP and thereby procure and/or engineer PIP to be accepted to the detriment of the Claimants and/or all in-claim pilots?

300. The key feature of this allegation is the procurement or engineering of a result, namely the acceptance of PIP by BALPA and the pilots by misrepresentation. It is not a stand-alone allegation of contractual misrepresentation, as such, but the exemplification of a breach of the implied term that is relied upon by the claimant. In the light of my findings, I consider the allegation by reference to the lower **Malik** threshold, and not the **Braganza** threshold. The Claimants' case is based upon an assumption that if there had not been such a misrepresentation, or accurate material had been provided, the pilots would have been sufficiently mobilised to demand at the very least a yes/no ballot, or to have required the union, acting on their behalf, to negotiate a far more robust deal in their favour.

301. It seems to me that there is little doubt that the initial presentation of information of information was shambolic. There were several inaccuracies emerging from the various versions of the FAQs and the initial drafts of schedule B. The most significant of these were:

1. the failure to make any reference to the loss of PB in each of the versions of the FAQs;
2. the provision of a comparative table in FAQ 2 which suggested that pilots would be significantly better off under PIP, again with no mention of the loss of PB;
3. a statement in FAQ 2 that there were higher pension savings under PIP when this clearly was not the case;
4. calculations within iterations of schedule B were agreed to have been fundamentally incorrect in relation to the way in which the transitional benefits were determined, and where incorrect definitions have been used.

302. An issue arose as to the extent to which the material, and in particular the FAQs, were BALPA documents, or controlled by / inputted to TUI. There is little doubt that whilst they were created by BALPA for the benefit of its membership, and their understanding as to how the changes were being negotiated, they were considered for "accuracy" by TUI, and in particular Mr Winspear. Although in his reply to Mr Gavin's letter Mr Winspear used the expression "our" in respect of the FAQs, suggesting a degree of ownership by TUI, his

explanation of that this was drafted by lawyers does not excuse what is either a careless reading of the letter before it was sent out, or perhaps an element of acknowledging that it was a shared information process for the pilots.

303. In my judgment, however, this does not remove the responsibility from BALPA for ensuring that the members were provided with the correct information to enable them to make a choice between the two options which were on the table, (namely the seven year benefit, or the ten year benefit. I am satisfied that Mr Godesar, on behalf of the union was sufficiently informed about the new scheme to be able to identify that there were inaccuracies in the FAQs, most notably pension changes and the absence of any proportionate benefit. A simple reading of the FAQs suggests to me that the union was keen to sell the proposal to its members and there was a somewhat slapdash way in which the comparisons between the new and the old scheme were laid out.

304. The difficulty for the Claimants in the pursuit of this allegation, in my judgment, is that their own representatives were fully on board with the new scheme, having spent a number of weeks, possibly months in advance of the presentation of the material to the members. A decision had been made by the CC, as was their prerogative, that acceptance or rejection would not be put to the vote. Therefore, even if the complexion of the material had been different, and statements had been made about the loss of PB and less advantageous pension benefits, at the end of the day these aspects had been negotiated by their representatives and it is highly unlikely that they would have altered their position even if there had been a pilot "backlash". In any event the prospect of pilot mobilisation, in my judgment, is a distant one. As I have indicated, this was a very small cohort of affected pilots who had their own particular interests to represent, and who may not have been favourably supported by the vast majority of the pilot workforce.

305. In the circumstances I am unable to identify any breach of the implied term in respect of the alleged misrepresentation of information by the Defendant in the collective bargaining process. If any failures have been established, they were clearly the responsibility of BALPA, and cannot be visited at the door of the Defendant.

(i) By allegedly failing to ensure that the Linked Claim Clause was retained and/or enforceable against the third-party insurer?

306. This issue is largely academic, in the light of the Defendant's acceptance that in the unlikely circumstances of a PHI pilot returning to work, only to become absent again for the same medical reason within 52 weeks he or she will be treated as under the same cover even if declined by the insurer (providing under the age of 60). However, in my judgment the alleged failure falls substantially short of the threshold necessary to establish any breach of the implied term of trust and confidence. The policy of insurance was cancelled following the

conclusion of the collective agreement between the Defendant and the pilots' representatives, BALPA. The linked claim clause in the original scheme was in any event subject to an insurer discretion and it was clearly identified that a pilot could have no legal rights against the insurer.

(12) Should any breaches of contract be established, what (if any amount) is the appropriate quantum of damages for the First, Second, Fourth and Eighth Claimant?

307. Damages had been agreed regardless of my findings in relation to breach of contract. Clearly, however, in the light of my conclusions those Claimants who might otherwise have been entitled to damages, do not recover the agreed amounts. Further, it is unnecessary to address the alternative causation argument advanced by the Defendant in the absence of any finding of breach.

(14) Should a declaration be made that the Claimants' alleged contractual entitlement to PHI Benefits are protected from any and all change, including pursuant to the purported changes introduced by PIP in August 2021?

308. On the same basis, the Claimants are not entitled to the declarations sought.

Summary of findings and conclusions

309. I can summarise my findings as follows. Paragraphs 2.1, 3.1, 4.6 and 5.1 of the HB were incorporated into the pilots contracts of employment, and apt for such incorporation providing the details of the PHI benefit to which they were entitled. Similarly, the guide to PB set out the contractually entitled details, subject to insurance acceptance, of the workings out of PB. The PHI benefit to which the in-claim pilots were entitled was payable to age 65 and not a later SPA. Paragraph 5.1 protected in-claim pilots from any *unilaterally* imposed change by the employer. However by virtue of the employment contract it did not protect them from consensually agreed variations to the benefit undertaken by BALPA as part of a collective bargaining process. Thus when changes were introduced and a collective agreement arrived at its terms applied to the in-claim pilots, the Claimants within this action. The implied term of trust and confidence relied upon as part of the Claimants' alternative case is narrowly defined, as the introduction of PIP did not involve the discretionary imposition of permanent health insurance changes, but arose from collective agreement. The Claimants have not established in the respects relied upon that the Defendant has acted in breach of the implied term of trust and confidence. Accordingly, the Claimants are not entitled to the declarations sought, or in respect of those who have allegedly suffered any loss, to the damages claimed.

310. It must follow that judgment should be entered for the Defendant. I invite the parties to agree any consequential orders, including costs. In the event that agreement cannot be reached, the matter should be listed before me (remotely) for a short hearing with the provision of written submissions when this judgment is formally handed down.

GW

17.9.2024