Appeal No. UKEAT/0333/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 & 7 April 2017
Judgment handed down on 25 April 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR P WEATHERILT — APPELLANT

CATHAY PACIFIC AIRWAYS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR DAVID CUNNINGTON (of Counsel) Instructed by: Simpson Millar Sycamore House 5 Sycamore Street London EC1Y 0SG
For the Respondent	MR JAMES BICKFORD SMITH (of Counsel) Instructed by: Gowling WLG (UK) LLP Two Snowhill Snowhill Queensway Birmingham B4 6WR

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

For the purpose of resolving a dispute under Part II of the **Employment Rights Act 1996** as to whether there has been an unlawful deduction from wages the ET is entitled to determine issues relating to the construction of the contract or the implication of any term of the contract. **Delaney v Staples** [1991] ICR 331 and **Camden Primary Care Trust v Atchoe** [2007] EWCA Civ 714 are binding authority to this effect. **Agarwal v Cardiff University** UKEAT/ 0210/16/RN (22 March 2017) not followed.

On the true construction of the Respondent's Aircrew Conditions of Service 2008 additional forms of payment known as Excess Flying Pay ("EFP") and Hourly Duty Pay ("HDP") did not accrue in respect of unrostered sickness. Appeal dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Patrick Paul Weatherilt ("the Claimant") against a Judgment of Employment Judge Wade sitting in the London (Central) Employment Tribunal. By her Judgment dated 23 August 2016 she dismissed a claim that his employers Cathay Pacific Airways Limited ("the Respondent") had made an unlawful deduction from his wages. This claim was brought under Part II of the **Employment Rights Act 1996** which is entitled "Protection of Wages".

2. The Claimant's appeal is concerned with the interpretation of his conditions of service as a commercial pilot in the Respondent's employment. This was the main focus of argument before the ET, although there were subsidiary arguments to which I will return. The Respondent now seeks to take a new point - that Part II of the **1996 Act** does not permit the ET to interpret a written contract of employment or imply terms into it. This argument derives support from the very recent decision of the EAT in **Agarwal v Cardiff University** UKEAT/ 0210/16/RN (22 March 2017). The Claimant, however, questions the correctness of **Agarwal**; he says it is inconsistent with decisions of the Court of Appeal and should not be followed.

3. In this Judgment I will first outline the nature of the dispute and deal with the **Agarwal** argument. I will then return to the appeal itself, setting out the contractual provisions, the Employment Judge's Reasons, the submissions of the parties and my own conclusions.

The Nature of the Dispute

4. The Claimant was employed within the Cathay Pacific organisation from April 1994. At first he was based in Hong Kong and employed by Veta Limited under a contract which was subject to the governing law of Hong Kong. There his employment was subject to the Veta Conditions of Service (latest version 1999) applicable to Aircrew. In due course he became based in Europe; his employment transferred to the Respondent and became subject to the Respondent's UK Aircrew Conditions of Service (2008).

5. The Claimant's conditions of service included, in addition to his basic salary of about £130,000 per annum, entitlements to "Hourly Duty Pay" ("HDP") and "Excess Flying Pay" ("EFP"). On 1 and 2 July 2015 he was rostered to undertake flights. At some point after he was rostered he became sick and unfit for duty. He was paid his basic salary and since he was on duty at the time also overnight allowances. He says that his sick pay should additionally have included elements for HDP and EFP. He claims that by withholding these elements of pay the Respondent has made unlawful deductions from his wages.

6. The Employment Judge was therefore required to decide whether he remained entitled to these kinds of pay when he was off sick at short notice. It is common ground that the answer to this question depends on the meaning to be attributed to provisions in the Respondent's Aircrew Conditions of Service (2008).

The *Agarwal* Issue

Submissions

7. In **Agarwal** the EAT (Slade J) proceeded on the basis that the ET had no jurisdiction to construe a contract of employment, and held that it had no jurisdiction to decide whether there

were implied terms in that contract, in order to determine a claim under section 13 of the **Employment Rights Act 1996**: see in particular paragraphs 31, 37, 45, 50-51 and 53 of the judgment. It is important, however, to note that all counsel in that case agreed that in a claim under section 13 during the subsistence of the contract the ET had no jurisdiction to construe the terms of the contract: see paragraphs 3 and 32 of the judgment. The EAT therefore received no adversarial argument on this question.

8. Mr Bickford Smith submitted that I should follow and apply **Agarwal**. He accepted that this argument was not taken below. He submitted that the argument based on **Agarwal** is the kind of discrete, hard-edged, point of law going to jurisdiction which the EAT should permit even though it was not taken below (see, for a summary of this area of law, **Secretary of State v Rance** [2007] IRLR 665 at paragraph 50); and that permission to amend the cross-appeal should be given, especially since the point has been taken promptly after the decision in **Agarwal** became known.

9. Mr Cunnington submitted that the decision in **Agarwal** is incorrect and incompatible with decisions of the Court of Appeal which dealt directly with claims under Part II of the **1996 Act**: in particular **Delaney v Staples** [1991] ICR 331 and **Camden Primary Care Trust v Atchoe** [2007] EWCA Civ 714. These authorities were not drawn to the attention of Slade J in **Agarwal**. The line of cases to which Slade J referred, culminating in **Southern Cross Healthcare Co Ltd v Perkins** [2011] ICR 285, were directed to provisions within the **1996 Act** of a different nature.

10. Mr Bickford Smith accepted that the decision in **Agarwal** was not capable of reconciliation with the decisions of the Court of Appeal to which Mr Cunnington referred. He

A argued, however, that **Agarwal** followed logically from the decision of the Court of Appeal in **Southern Cross**; and if **Agarwal** was not correct the scope given to Part II would be inconsistent with the decision in **Southern Cross**. He accepted that claims under Part II have become an important ET jurisdiction since **Delaney**; but he pointed out that Lord Browne-Wilkinson reserved his position on the correctness of **Delaney** on this question in the House of Lords.

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Discussion and Conclusions

11. Part II of the **Employment Rights Act 1996** contains provisions which are derived from Part I of the **Wages Act 1986**. This Act in turn repealed the **Truck Acts** and reformed the law concerning deductions from wages.

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12. Section 13 is entitled "Right not to suffer unauthorised deductions". It prohibits an employer from making a deduction from wages save in certain circumstances: see section 13(1). One circumstance is if the deduction is authorised to be made by a relevant provision of the worker's contract: section 13(1)(a). Section 13(3) contains the following important provision:

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> **"(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

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13. A worker may present a complaint to an ET that his employer has made a deduction from his wages in contravention of section 13: see section 23.

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14. The statutory predecessor of section 13 was section 8 of the **Wages Act 1986**. This was considered by the Court of Appeal in **Delaney v Staples** [1991] ICR 331. Nicholls LJ, giving

A the leading judgment with which Ralph Gibson LJ and Lord Donaldson MR agreed, said (pages 339-340):

> **"… But section 8(3) makes plain that, leaving aside errors of computation, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction. That being so, a dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction. …"**

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15. Later he said (page 341):

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> **"… it is pertinent to keep in mind that the wider construction of the Act does not have the consequence that employees are obliged to bring all claims for unpaid wages, as defined in the Act, by way of complaint to an industrial tribunal. Under section 6(1), an industrial tribunal has exclusive jurisdiction to entertain complaints of alleged contraventions of the statute. But an employee is not compelled to assert a contravention of the statute and advance a claim for unpaid wages on that footing. If he so wishes, he may disregard any question of contravention of the statute, and bring a simple claim in contract for unpaid wages in the county court or exceptionally, if the sum involved is above the county court limits, in the High Court."**

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16. He approved an earlier decision of the EAT - **Greg May (Carpet Fitters & Contractors) Ltd v Dring** [1990] ICR 188 in which the EAT (Knox J presiding) held that an industrial tribunal had jurisdiction to resolve any dispute as to what was properly payable; and that "properly payable" meant payable according to common law and any statutory provision.

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17. **Delaney** was also concerned with the scope of the concept of "wages". Nicholls LJ held that commission and holiday pay came within that concept; but wages in lieu of notice did not. The case went to the House of Lords on that point alone: see [1992] ICR 483. The decision was affirmed on that point. Nothing in the decision of the House of Lords affects the authority of the judgment of the Court of Appeal as to the scope of what is now section 13 of the **1996 Act**.

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18. In **Atchoe** the Court of Appeal made it clear that in order to apply section 13 the ET might be required to consider whether there was an implied term of the contract. Sir Peter Gibson, giving the leading judgment, said (paragraph 33):

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> **"33. As the ET rightly said, the correct starting point must be to consider what wages were properly payable to Mr Atchoe within Section 13(3), and this requires consideration of all the relevant terms of his contract of employment. However, that requires consideration also of any implied terms. …"**

19. I consider that these cases, which are directly concerned with the provisions found in Part II of the **Employment Rights Act 1996**, are binding authority which the EAT and ETs are required to follow.

20. I do not think there is any basis within Part II of the **1996 Act** for carving out questions of contractual interpretation and implication and holding that the ET has no jurisdiction to determine them. As Nicholls LJ held, the ET is required to determine a dispute "on whatever ground" as to the amount of wages properly payable as a necessary preliminary to discovering whether there has been an unauthorised deduction. This must include a dispute as to the interpretation of a contract or the existence of an implied term. It would be surprising if the ET could not construe a provision of the contract to see whether it authorised a deduction when this very question is central to the operation of section 13. Indeed in my experience it is not unusual for cases at ET level and EAT level to decide such questions in an application under Part II (see for a recent example **Cabinet Office v Beavan** UKEAT/0262/13).

21. This does not, of course, mean that the ET has exclusive jurisdiction to determine questions of contractual interpretation, as Nicholls LJ explained in the passage to which I have referred above. A worker may bring a claim in the civil courts to claim the debt or seek a declaration; likewise an employer may seek a declaration as to the meaning of a contractual provision. The ET may, if it is justified, stay proceedings under Part II to enable the civil courts to resolve an important issue.

22. In **Agarwal** the EAT did not have the benefit of citation of these authorities. Moreover the Court of Appeal in **Southern Cross**, upon which the EAT relied in **Agarwal**, did not discuss or refer to Part II of the **Employment Rights Act 1996**: it was concerned with very different provisions in Part I. I accept that there is a degree of tension between the approach of the Court of Appeal in **Southern Cross**, concerned with Part I, and the approach in **Delaney** and **Atchoe** concerned with Part II; but this is to my mind explained by the different origins, purpose and terms of the statutory provisions.

23. I will grant to the Respondent permission to amend the cross-appeal to argue the **Agarwal** point; however I hold that the EAT (and ETs) are bound by **Delaney** and **Atchoe**. I will therefore not follow **Agarwal** and I will dismiss this ground of cross-appeal.

The 2008 Conditions of Service

24. The 2008 Conditions of Service are expressed to be subject to the law of England and Wales.

25. Condition 7 provides for the payment of salary monthly in arrears in accordance with salary scales which are set out in Schedule 1.

26. Condition 9 succinctly provides as follows:

> ***"9. EXCESS FLYING PAY (EFP) and HOURLY DUTY PAY (HDP)***
>
> **9.1. EFP and HDP will be calculated and paid one month in arrears.**
>
> **9.2. EFP and HDP are as specified in Schedule 2 of these Conditions of Service."**

27. It is therefore necessary to go to Schedule 2 in order to find the detailed provisions relating to HDP and EFP.

28. Within Schedule 2 the concept of "Credit Hours" underlies both EFP and HDP. Once credit hours have been calculated EFP and HDP can then be determined. EFP is paid at an enhanced rate called the "EFP factor" on hours in excess of 84 Credit Hours in a particular month. HDP is paid on Credit Hours below those for which EFP is paid, but at lesser rates than EFP.

29. Credit Hours are calculated in accordance with a table set out in Schedule 2. For the most part the table identifies the nature of the duty undertaken and specifies the rate: Credit Hours accrue at the highest rate for flying duties, but they accrue at some rate for most kinds of duty, including office duty, training, study, the delivery of instruction and reserve duties (after the first 30 days in a year). Boxes (i) and (j) however deal with annual leave and "Sickness on the published Roster":

"(i)	**Annual Leave**	**2.0 hours per day**
(j)	**Sickness on the published Roster**	**2.0 hours per day"**

The reference to "Sickness on the published Roster" is the only reference to sickness in the table: there is no provision in the table for unplanned sickness.

30. There are two other references to sickness within Schedule 2. In Note (6) to the Credit Hours Table it is provided that:

> **"Reserve Duties that are changed to days off at the behest of the crew member, or to sickness or Leave will not count towards the cumulative total of Reserve Duties in the crew member's Birth Year."**

Then, within a section entitled "Hourly Duty Pay (HDP)" it is provided:

> **"2. Hourly Duty Pay will not be paid for Credit Hours accrued from Sickness on the Published Roster."**

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31. Sickness allowance is provided for by Condition 27. Paragraphs 27.1-3 so far as relevant provide as follows:

> ***"27. SICKNESS ALLOWANCE***
>
> **27.1. When calculating Sick Leave, every seven (7) consecutive days of sickness or disablement will be deemed to comprise of five (5) days' Sick Leave plus two (2) Guaranteed Days Off.**
>
> **27.2. An Officer will be entitled to Sickness Allowance as follows:**
>
> **a. … such amount of Salary, allowances and benefits which that Officer would have earned under normal circumstances up to a maximum of one hundred and twenty six (126) calendar days; or**
>
> **b such amount of Sickness Allowance in accordance with, and subject to , the provisions of the employment legislation of the United Kingdom;**
>
> **whichever is higher.**
>
> **27.3. An Officer assessed unfit for duty by a recognised medical practitioner will, in any one period of three hundred and sixty five (365) days, be granted a maximum of ninety (90) days' Sick Leave and paid Sickness Allowance to a maximum of one hundred and twenty-six (126) calendar days."**

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Those provisions apply to the first 126 calendar days. Paragraph 27.4 then provides:

> **"27.4. Following the payment provided for in 27.2 and 27.3, the Company may place the Officer on fifty percent (50%) of Salary for a further period of one hundred and twenty six (126) calendar days. During this period, the following will apply:**
>
> **a. Appointment Allowances will not be paid.**
>
> **b. Entitlement to all other allowances and benefits will continue to apply.**
>
> **c. Company payments in lieu of Provident Fund contributions will continue in full."**

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After that period, paragraph 27.5 provides for leave without pay for a further year during which some defined benefits are payable but "Entitlement to all other allowances and benefits will cease".

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32. The foregoing are the principal relevant provisions of the Conditions of Service. But it is necessary to refer to a few others in summary.

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33. Condition 8 makes provision for what is known as "Bypass Pay". In effect Officers whose promotion is delayed by the retention of a captain beyond retirement age will receive what is termed within the condition as "Command Bypass Pay". Thus a First Officer will receive "Captain's Salary, allowances and benefits on a one for one basis commencing upon the date that the retained Captain reaches the Retirement Age". Similar provision, adopting the same wording, applies to a Second Officer, who will receive "First Officer's Salary, allowances and benefits".

34. Certain entitlements within the Conditions of Service are described as allowances. Condition 10 makes provision for Appointment Allowances: these are allowances made to Officers appointed to specific positions. Condition 35, coupled with an "Overnight Allowances Policy Agreement" to which it refers, makes provision for Overnight Allowances. These are quite specific allowances, set out in detail, for breakfast, lunch, dinner, taxi, beers, tips and laundry. They apply to an Officer on duty away from home base.

35. Many words and phrases in the Conditions of Service are capitalised. In a legal document this often signifies that a definition of the word or phrase is to be found elsewhere. Although some definitions are to be found in the Respondent's Operations Manual there are no definitions which are in any way central to the appeal; for example there is no definition of "Salary" or "Sickness Allowance" outside the provisions to which I have referred.

The Employment Tribunal Hearing and Reasons

36. At the ET hearing the principal issue related to the meaning of the 2008 Conditions of Service. On behalf of the Claimant Mr David Cunnington submitted that paragraph 27.2 was determinative: HDP and EFP fell within the wide words "Salary, allowances and benefits which

A that Officer would have earned under normal circumstances". He relied on various aspects of the 2008 Conditions of Service in support of this submission. On behalf of the Respondent Mr James Bickford Smith emphasised the provisions of Schedule 2 as a self-contained provision relating to HDP and EFP; he argued that HDP and EFP were neither salary, nor allowances nor benefits to which paragraph 27.2 applied.

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37. Mr Bickford Smith mounted alternative arguments: he submitted that a term should be implied into paragraph 27.2 or Schedule 2 to the effect that unrostered sickness should not acquire credit hours; that this reflected "invariable custom and practice"; that there was a variation by reason of conduct; that estoppel by convention applied; and that there was no jurisdiction to hear the case because it was at most a case about loss of a chance, not a case about deduction from wages: see **Lucy v British Airways** UKEAT/0033/08/LA.

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38. The Employment Judge received material about earlier conditions of service, including Veta Conditions of Service. She noted that EFP had existed since prior to 1999; that HDP was not introduced until 2001; and that EFP was revised at that point.

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39. In her Reasons the Employment Judge listed the issues to be decided. She identified that the principal question was whether HDP and EFP fell within the phrase "Salary, allowances and benefits which that Officer would have earned under normal circumstances" for the purposes of Condition 27: see paragraphs 11.1-3 and 5. She noted that there were alternative arguments about implication of a term and estoppel by convention: see paragraph 11.5. She noted the **Lucy** argument: see paragraph 11.7.

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40. The Employment Judge heard evidence from the Claimant and from Mr McEwan for the Respondent. There are, however, few findings of fact. In one sense this is not surprising: the skeleton arguments before the ET concentrate on questions of law and construction with limited reference to evidential material. Some findings of fact would however be necessary to deal with the Respondent's estoppel by convention argument. Although the Employment Judge noted the existence of the argument, she did not address it, perhaps because she thought it unnecessary to do so, having decided the question of construction in the Respondent's favour.

41. The Employment Judge, while paying tribute to Mr Cunnington's arguments, concluded that the Conditions of Service did not allow for the payment of HDP/EFP during periods of unpublished sickness. She concluded that HDP and EFP were not salary for the purposes of Condition 27. She concluded - here accepting a submission on the part of the Claimant - that the phrase "Salary, allowances and other benefits" denoted the "generic catch-all of 'normal pay'", but she concluded that this did not encompass HDP and EFP. She said:

> **"18. In conclusion, whilst I accept that the clause is about pay in the broad sense and that the key concept is that normal pay should be payable during the initial periods of sickness this does not mean it encompasses HDP and EFP because:**
>
> **1. HDP did not exist when sickness allowance was formulated (not an insurmountable problem but an indication of what was intended at the time) and**
>
> **2. HDP/EFP are only payable if credits are earned according to schedule 2.**
>
> **An alternative way of putting it is that there might be a generic right but it would result in zero sick pay unless the pilot earns credits under schedule 2."**

42. The Employment Judge then discussed in detail the meaning of Schedule 2. At the end of this discussion she said:

> **"19.9. It does not make commercial sense to pay sick pay at a higher level for ad hoc absence than for planned absence on the roster nor does it make sense to pay nothing [for] sickness when on reserve duty whilst paying when the pilot is meant to be working. Ad hoc absence is very difficult in a service industry and many employers take strong measures to try to control it whereas long-term absence is easy to plan for and is often associated with distressing situations of long-term ill health."**

43. Thus the Respondent was successful on the construction point. The Employment Judge would, however, have rejected the **Lucy** point: she said that if sick pay had been payable it would be easy to calculate the flying duty hours and any consequent pay.

Submissions

44. Mr Cunnington submitted that paragraph 27.2 applied to HDP and EFP because they were encompassed within the words "Salary, allowances and benefits which that Officer would have earned under normal circumstances". Those words, where they were found in paragraph 8 relating to Bypass Pay, plainly encompassed HDP and EFP. They should be accorded the same meaning in paragraph 27.2. "Under normal circumstances" meant if the Officer had worked as rostered; and Schedule 2 contained provisions which set out what the Officer would have earned as rostered. If "under normal circumstances" was read in this way, the treatment of rostered sickness in Schedule 2 was consistent with paragraph 27.2.

45. He accepted that on this interpretation the Officer would earn more for ad hoc sickness than for rostered sickness. He submitted that there was an alternative view to the "commercial sense" set out in the Employment Judge's Reasons at paragraph 19.9. No Officer should take part in a flight when unfit to do so; and therefore no Officer should be deterred from reporting unfit for duty by the prospect that any form of pay, including HDP and EFP, should be lost. He accepted also that on this interpretation full HDP and EFP would be payable in full after the first 126 days (unless HDP and EFP were defined as "Salary"); but he said that generally after this length of time sickness would be rostered sickness in any event, payable at the lesser rate.

46. Mr Bickford Smith submitted that Schedule 2 set out the Officer's entitlement to HDP and EFP; its terms made it clear that it was intended to set out that entitlement in full, including

A sickness on the roster; there was no entitlement to sickness allowance other than sickness on the roster. HDP and EFP were plainly not "Salary" within the meaning of paragraph 27.2: this concept was defined in Condition 8. There was no reason to include them in the concept of "allowances and benefits". He accepted that an Officer who was entitled to Bypass Pay would receive HDP and EFP as appropriate; but it did not follow that the same applied in the case of sickness allowance, given the specific provision in paragraph 27.2. He submitted that the Employment Judge was correct in her reasoning about the "commercial sense" behind the provisions.

47. Mr Bickford Smith further submitted that the Claimant's claim could not be brought under section 13 of the **Employment Rights Act 1996** because it was a claim for loss of a chance. Rosters could and did frequently change; an Officer was not entitled to work in accordance with a planned roster; so there was no certainty as to what he would have earned under normal circumstances. In these circumstances there was no claim under section 13. He took me to **Lucy v British Airways** UKEAT/0033/08 in support of this proposition. In reply Mr Cunnington submitted that the claim was for sickness allowance, not for loss of a chance; the sickness allowance was in principle quantifiable on a particular occasion as required by section 13.

48. Mr Bickford Smith pursued other grounds of cross-appeal. He submitted that if there was no express term in his favour that HDP and EFP were not payable in the case of unrostered sickness, such a term should be implied; that the Employment Judge did not deal with an argument that he raised concerned with estoppel by convention. In reply Mr Cunnington submitted that there was no room, given the express provisions of the 2008 Conditions of Service, for implication of a term. He accepted that an argument on estoppel by convention

A was raised before the Employment Judge and that her Reasons do not appear to address it. He submitted however that the argument had no prospects of success; the Claimant had not been shown to have foregone HDP or EFP on any previous period of sickness - he had claimed on the first occasion he was entitled to claim.

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49. In the course of their submissions counsel took me to leading cases on the interpretation of written contracts. I will turn to the most recent of these now.

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Discussion and Conclusions

50. The principles which should be applied in interpreting the 2008 Conditions of Service

D are found in a line of cases most recently summarised by the Supreme Court in **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900 at paragraphs 14-30 (Lord Clarke JSC) and **Arnold v Britton** [2015] AC 1619 at paragraphs 14-23. These passages always repay study in full; but it

E is sufficient for the purposes of this Judgment to set out paragraph 15 of the judgment of Lord Neuberger:

> **"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the**

F **relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …"**

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51. Commercial common sense, in the context of conditions of service governing employment, of course encompasses the common sense of employment relations - see Singh J in **Cabinet Office v Beavan** at paragraph 17.

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52. Within the 2008 Conditions of Service HDP and EFP are particular forms of pay additional to a substantial salary for which provision is made in Condition 7. HDP and EFP are dependent on the accrual of credit hours; and the table within Schedule 2 shows that credit hours depend for the most part on the performance of duties, the accrual being weighted to the performance of certain kinds of duties - in particular flying duties. Where the Officer is not performing duties at all credit hours are accrued only to a limited extent: 2 hours per day for annual leave or sickness on the published roster. Even then HDP will not be payable in respect of sickness on the published roster.

53. In my judgment Schedule 2 reads naturally as setting out an exhaustive list of the circumstances in which credit hours are to accrue. It encompasses sickness in so far as any credit hours are to accrue for sickness. Given the absence of unrostered sickness from the table within Schedule 2, it is in my judgment clear that no HDP or EFP is payable in respect of unrostered sickness. I do not find this at all surprising in the context of a provision for additional pay based to a large extent on the performance of particular duties.

54. I accept - as did the Employment Judge - that the phrase "Salary, allowances and benefits" is capable of being read as a "catch-all" applying to HDP and EFP. Indeed I have no doubt that this is its meaning in Condition 8 relating to Bypass Pay. Bypass Pay is intended to enhance the pay of Officers whose promotion is delayed by the retention of a Captain beyond retirement age. There would be no commercial sense in excluding HDP and EFP from Bypass Pay; and it is not at all surprising that the Respondent pays HDP and EFP to an Officer entitled to Bypass Pay.

55. However, like the Employment Judge, I do not consider that HDP and EFP are encompassed within the phrase "Salary, allowances and benefits which that Officer would have earned under normal circumstances" in paragraph 27.2. I consider that, looking at the 2008 Conditions as a whole, Schedule 2 is intended to govern the extent to which HDP and EFP is payable in all circumstances, including sickness. This is, as I have explained, the natural reading of Schedule 2 in its commercial context.

56. There are, moreover, obvious difficulties in reading Condition 27 as applicable to HDP and EFP when rostered sickness is considered. One would expect the phrase "which that Officer would have earned under normal circumstances" to encompass what he would have earned if he was not sick or disabled - certainly that must be the intention as regards salary. But it is clear from Schedule 2 that a person who is rostered as sick is not to be paid in that way in respect of HDP and EFP.

57. If Condition 27 is read in such a way as to include HDP and EFP it will follow that unplanned sickness will be treated far more generously than rostered sickness. I agree with the Employment Judge that this does not make commercial sense for the reasons she gives. She did not accept the argument that Condition 27 might apply to HDP and EFP on the basis that no Officer should be deterred from reporting unfit for duty lest HDP and EFP should be lost. I do not accept that argument either. An Officer retains his substantial salary as sickness allowance. HDP and EFP were additional pay largely based on the carrying out of duties with limited provision for annual leave and rostered sickness. It makes no sense to compensate unrostered sickness far more generously than annual leave or rostered sickness. It would put a premium on reporting sickness only after the roster was notified; and I cannot see any objective reason to suppose that this was the intention of the parties.

58. There is at least one other problem in reading Condition 27 as including HDP and EFP. Salary is reduced to 50% after 126 calendar days: see Condition 27.4. I do not think either benefit can be described as "Salary": this is defined in Condition 7 and Schedule 1. Express provision is made that appointment allowances will not be paid (paragraph 27.4) but no provision is made to exclude HDP or EFP or reduce the amount to 50%. This is a surprising omission if Condition 27 was intended to include HDP and EFP. Mr Cunnington suggested that this is because absence after 126 days will be rostered sickness; but I do not think it is unusual to find a "mix" of planned and unplanned sickness absence even in the case of an employee who has considerable sickness absence.

59. I would just add one word - although it is not essential to my reasoning - about overnight allowances. Condition 35 says that Officers on duty will be paid these allowances in accordance with company policy; and there is a detailed company policy governing their payment. If paragraph 27.2 were applied to these allowances it would follow that an Officer who was sick at home would be entitled to them, even though they are allowances for meals, laundry and the like when on duty. I doubt whether this can have been intended by anyone; it would seem preferable to read Condition 35 and the policy as self-contained; and it is another reason to my mind why paragraph 27.2 cannot be read as applicable across the board.

60. I therefore consider that the Employment Judge was correct in her conclusion that HDP and EFP are not payable in respect of unrostered sickness. In effect she gave primacy to Schedule 2, noting that HDP and EFP were only payable if credits were earned in accordance with that Schedule. I agree with that approach.

61. Given this conclusion I will deal succinctly with Mr Bickford Smith's other arguments. (1) If I had construed Condition 27 as applicable to HDP and EFP I would not have accepted his submission that Part II of the **Employment Rights Act 1996** was inapplicable. Unlike the claimants in **Lucy** the Claimant would not merely have lost the chance of earning wages; the Claimant would have lost an element of sickness allowance which was quantifiable by reference to what would have happened if he had been rostered to work. (2) I would not have accepted his submission that a term could be implied; given the express terms of the contract there was no sensible room for implication of a term, as opposed to interpretation of the terms which the parties agreed. (3) While his argument concerning estoppel by convention does not seem strong, the Employment Judge should have made findings about it and addressed it in her Reasons (or at the very least explained why she did not), and I would have remitted the matter for her to deal with it. However, the appeal having been dismissed, there is no need for any Order on the cross-appeal.