Case Number: 3346924/2016
3346926/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr G Neiman **v** **British Airways plc**
Ms L Keenan

Heard at: Watford **On**: 11-14 December 2017
Before: Employment Judge Tuck
Mrs J Smith
Mrs G Blinks MBE

Appearances
For the Claimants: In person
For the Respondent: Mr D Leach, Counsel

JUDGMENT

1. The claimants' claims that there was a breach of section 80G of the Employment Rights Act 1996 fails and are dismissed.

2. The claimants' claims of less favourable treatment contrary to the Part Time Workers Regulations are successful, and are upheld.

3. The claimants' claims of indirect discrimination related to age fail and are dismissed.

REASONS

1. By separate ET1s presented on 5 October 2016 the two claimants bring claims of part time workers discrimination, indirect age discrimination and a failure properly to consider a request for a contractual variation. The issues which fall for determination were agreed at a Preliminary Hearing on 20 December 2016 conducted by EJ Smail. Unfortunately, the case could not be heard in August 2017 as originally listed due to a lack of judicial resource. Evidence was heard by this ET on 11 and 12 December 2017, and submissions were made by the parties on the morning of 13 December 2017. The tribunal met in chambers on 14 December 2017.

Evidence

2. We were provided with a joint bundle of documents numbered to page 418, skeleton arguments from both parties, and witness statements for those from whom we also heard oral evidence. Each claimant gave evidence, and

on their behalf Mr David Gilliland, who is a representative of BASSA – the British Airlines Stewards and Stewardesses Association, a branch of Unite and also a cabin service director employed by the respondent. For the respondent, we heard evidence from Ms Anne Pilgrim, a Mixed Fleet Area Manager and Mr Geoffrey Ayres, In Flight Customer Experience Employee Relations Manager. Set out below are the authorities additionally provided to us. We read such documents as were referred to in the witness statements or we were taken do in the course of the proceedings.

Facts

3. Both claimants continue in their employment with the Respondent. Ms Keenan started work for British Airways on 18 April 1988, and Mr Neiman started on 6 May 1998. Both initially worked full time. At the date of presenting the claims, and indeed at the hearing, Ms Keenan was a Cabin Service Director ("CSD") working on a 50% contract, i.e. working 50% of full time hours. She set out the increases and decreases in her contractual hours over the years, and stated that she has worked 50% since June 1996. Mr Neiman reduced his hours to 75% of full time in September 2004 and continues on that basis; in October 2004, he was promoted to be a Customer Service Leader ("CSL"). Both are employed on the Respondent's Worldwide Fleet terms and conditions.

4. Since 2008 all cabin crew recruited by the respondent has been into what is known as "Mixed Fleet". It is common ground that the pay, terms and conditions of those employed on the mixed fleet are less favourable than those employed on the worldwide fleet (and indeed, though not relevant to the issues before us, the Eurofleet). Mr Ayres said that "pay and allowances for members of the worldwide fleet.… are approximately double the market rate. Members of cabin crew on these fleets are also entitled to pay increments each year and they received variable pay and significant meal allowances, making their total pay well in excess of market rate."

5. A pay and productivity review by the respondent in 2009 led to a high-profile dispute with Unite and subsequent strikes in 2010. On 11 May 2011, a joint settlement between BA and Unite was entered into; its preamble states "it is recognised that we are operating in an increasingly competitive market and that in order to maintain a strong business which is mutually beneficial for both parties, managing through change together is essential". A separate negotiating body was established in late 2010 for mixed fleet crew; the agreement stated that for those in the worldwide fleet, their existing collectively agreed arrangements would be maintained for the future unless changed through the agreed procedure. In relation to part time employees it stated:

> "Existing part time lists will be completed in seniority order by grade. Once existing lists are completed a new process will be put in place. New part time lists will be opened every three months across all contract types (75%, 50% & 33%)

> and in seniority order within grade. The intention is to action each part time list during the following three months. All offers will be on existing fleet terms and conditions. ***Once a contract type has been allocated to a crew member it is not envisaged that there will be the opportunity to increase hours***." (emphasis added).

6. The agreement also confirmed that in the worldwide fleet the CDS, Purser (now CSL) and main crew structure would continue, and stated that while crew would be promoted on existing terms and conditions, "future opportunities will be limited". Both claimants are members of the union. The agreement does not mention the "willing to work" scheme – described below – at all.

7. It was clear that the respondent pursued a strategy since around 2008 to recruit only to Mixed Fleet. These terms and conditions whilst being less expensive to the respondent, also gave them increased flexibility in the deployment of staff, making their business more efficient. By way of example Mr Ayres told us that full time mixed fleet crew on average completed 900 flying hours as compared to around 700 or 750 for worldwide crew. The rates for mixed fleet are, Mr Ayres stated, "commensurate with the market rate". Indeed, Ms Keenan told the tribunal that if she worked 100% on mixed fleet terms, she would in fact receive lower remuneration that she currently does on a 50% worldwide fleet contract. The respondents have over recent years moved routes from worldwide fleet to mixed fleet, and they envisage they will continue to do this until they operate entirely with a mixed fleet.

8. We have been told that those worldwide fleet crew who wanted to increase their hours were historically placed on a list, but that there has only been one occasion since 2008 when any offers of increases has been made. It seems that the list has been closed since at least 2011 with no further additions to it. The claimants are not therefore on the list. Ms Pilgrim told us that 88 CSL's were on the list wanting increased hours in 2008; Mr Ayres told us that in 2011 there were 33 CSDs on the waiting list, all received offers to increase their hours with 22 accepting and 11 declining. It is apparent that the lists which were in existence at the time of the joint settlement agreement with Unite were not "cleared".

9. Ms Pilgrim stated that there are currently 5094 Mixed Fleet Crew, while in the Worldwide fleet there are 5148 employees, broken down to 441 CSDs, 821 CSLs and 3886 cabin crew. She said that 73% of employees on the worldwide fleet work part time.

Willing To Work

10. By October 2007 the respondent had introduced a "willing to work" process. This was not agreed with the union, and Mr Gilliland explained that the union adopt a 'neutral' position in relation to the scheme. It permits crew to volunteer to make themselves available for additional cabin crew duties.

This is entirely voluntary, and is used across all fleets. A cabin crew newsletter dated October 2007 states "by volunteering you are expressing interest in principle to work during some parts of your unavailable / JOS period – your membership of the willing to work group does not commit you to accept every / any trip on any date offered". However, once a person has volunteered and been allocated a trip, they must do it. We were told that the initials "JOS" refers to job shares.

11. Willing to work terms provide that only days worked are paid. Basic pay is paid at an enhanced rate of 1/260 of the incremental point in the full-time salary scale. Crew also earn contractual flying payments (CFP) at the equivalent daily rate for their fleet / grade plus any meal allowances and other allowances related to the trip. However, "MBT" – minimum base turnaround - is not earned, nor does annual leave accrue as a result of operating a trip during an unavailable / JOS period and no pension contributions are made. We understand that 'MBT' provides a period of paid work free days, following a flight. The number of days are determined by the length of flight and number of time zones crossed, and the provision under mixed fleet terms is, Mr Ayres told us, less generous than the provision under worldwide fleet terms. The example used in the hearing before us was that if worldwide crew fly to New York, the trip will be three days duty and three days would be paid as MBT under a permanent contract. The "frequently asked questions" about the willing to work scheme, includes the question "do I earn MBT days for my trip?" The answer given is:

> "Crew volunteering for Willing To Work do not earn MBT from a trip carried out on P/T Days. A crew member must have enough P/T days off after the trip to satisfy the rest for the trip operated unless 24 hrs follows the trip then MBT will apply. If a trip operated prior to the P/T block arrives back into base and the MBT follows the P/T block you must have completed the rest required for the trip prior to operating a willing to work trip."

We were not told what "P/T" stands for. However, the rota of Ms Keenan before us has an entry "PT Non-Working" for the period of her part time rota when she has no work. From that as well as the answer to the question set out above, we understand 'P/T Days' to refer to 'part time days' when no other duties are scheduled.

12. The claimants told us that it is only part time crew who will have "unavailable" periods on their roster, and as crew cannot register for willing to work while on unpaid leave, it is a scheme only available to part time crew. Mr Ayres accepted that he knew of no example of a full-time member of worldwide fleet crew who had registered for willing to work but maintained that it could be possible. Given Mr Ayres' evidence that full time crew on mixed fleet generally completing 900 annual flying hours – which we understand to be an industry maximum – and that the willing to work terms make it clear that no trips will be offered if they take a member of crew over

900 hours, this suggests that for mixed fleet it is a scheme only open to part time crew members. In light of this evidence, and also the terms of the reply to the frequently asked questions document set out above, we find that in practice 'Willing To Work' is only undertaken by part time employees. Mr Ayres sought to give a hypothetical example of where a full-time crew member could put themselves forward for willing to work, if they had been sick on the first day of a trip, and then returned to duty and had time before their next trip. The claimants said that in such circumstances the full-time crew would be shown as "24 hrs available", and could be allocated any suitable work. We have no documentary evidence to confirm or contradict this assertion. We are however satisfied that if a full-time crew member of the worldwide fleet, (who complete an average of around 750 flying hours per annum,) in extreme circumstances, was able to find days to put themselves forward for willing to work (albeit none are ever known to have done so) it would be on the same terms as those offered to the claimants.

13. Mr Ayres stated that this scheme is used to "remedy the effects of a disrupted schedule due to particularly high levels of sickness or annual leave amongst the crew population, or when there is disruption for some other reason". In 2017 it is apparent that willing to work was used on over 150 days in a 10 month period; Mr Ayres explained that the two periods of high usage coincided with bad weather – when crew cannot make it to work or are stranded elsewhere, or when there was industrial action by cabin crew. There was also high usage – approximately every other day in 2016, and again there were specific circumstances being responded to. We do not accept – as suggested by the claimants - that the willing to work usage we have seen demonstrates a need for a permanent increased resource. There are some months with virtually no usage, and we accept Mr Ayres' evidence that willing to work "is not used as a planning tool".

14. Mr Gilliland confirmed to us that willing to work had not been negotiated with or agreed to by the union. The union are silent as to the scheme – albeit he accepted in answering questions, that the union is "not keen" on its members working under the scheme. The 2011 joint settlement agreement referred to above does not make any mention of the scheme at all.

15. Whilst the basic rate of pay under willing to work is higher (at 1/260th of a full-time salary) than the 1/365th paid under the full-time contract, part time crew doing a long-haul trip on willing to work terms will end up earning less money than a full-time crew member doing the same trip. Mr Neiman gave an example of earning £240 less on a 4 day trip to Los Angeles than a full-time member of crew, and for Ms Keenan's grade, she would earn £282 less. The respondent did not challenge these figures and expressly agreed that those on willing to work will receive less than a member of staff fulfilling their contractual hours.

16. Ms Keenan said that between 2015 and 2016 she volunteered for willing to work on 12 occasions and was used on 4 of those; Mr Neiman did not say how many times he had volunteered but said he had only done two trips.

17. Ms Keenan relies on a full-time comparator who was, at the time she submitted her ET1 working full time as a CSD; Mr Geoffrey Palmer. Mr Neiman relies on "the specific example of a CSL engaged on a full-time contract on my same worldwide terms", whose date of birth is 31 August 1972 who receives MBTs allocated after flights are paid in full.

Requesting a contractual variation

18. In May 2016, each claimant requested of their manager an increase in their contractual hours to 100%. Mr Neiman's request was directed to his manager, Michael Elsworth, Inflight Business manager who rejected it on 2 June 2016, citing "additional cost to the business". Ms Keenan's request was directed to her manager, Alexander Hills who by letter dated 26 May 2016 refused the request on the same basis.

19. The respondents have a policy governing applications to request amendments to working practices but this was not in the bundle before us. Ms Pilgrim said that managers receive requests made via the respondent's automated system, and consider them at fortnightly planning and scheduling meetings. There is no evidence that any member of worldwide fleet crew has been permitted to increase their contractual hours since 2008, with the one exception of CSDs set out above. The claimants asserted that this demonstrated a "blanket policy" of refusing such request.

20. Both claimants appealed, and their appeals were considered by Ms Pilgrim who held a meeting on 24 June 2016. Each claimant represented the other, and Mr Neiman's case was considered immediately followed, without any break, by Ms Keenan's. Both claimants confirmed that Ms Pilgrim conducted the meeting in a professional manner, was empathetic, and listened carefully to all the points they had to make. We have seen the manuscript notes taken by Ms Pilgrim; this confirms the evidence of Ms Keenan, that one of the matters ventilated in the meeting was the question of whether her contract might be increased to 75% to match that of Mr Neiman. The two claimants were by this date in a relationship and also sought to have their flying rosters synced. The events surrounding the latter issue (of wanting their rosters to match) and what happened thereafter are subject to further litigation between the parties, and we expressly make no findings about this matter.

21. The grounds of appeal by both claimants were detailed. Those which have been explored during the course of this hearing, concerned the number of times that willing to work had been used, the cost of increasing hours of crew on worldwide terms as compared to recruiting new staff or having to

make additional payments to crew because of crew shortages, and whether (as set out in Mr Neiman's letter of appeal and discussed in Ms Keenan's hearing,) it was cost neutral to the respondent if the claimants waited to increase their hours, until another worldwide fleet crew member decreased theirs. Mr Neiman also argued that it was not ethical to refuse to increase his contract when recruiting on mixed fleet.

22. By letters dated 1 July 2016 Ms Pilgrim wrote that the claimants' requests were rejected on the basis, as given in the original decision outcomes, of "additional cost to the business". She confirmed that willing to work had been used on 11 occasions in the first six months of 2016, saying that the gaps had been caused by how part time days off fall in line with the operation; she said that the respondent did not have any need to increase manpower on the worldwide fleet. As to Ms Keenan's point about flights taking off one crew member short, resulting in an additional payment of £200 to all other crew members, Ms Pilgrim stated that all 'minus one working' is unplanned and had occurred most recently due to weather disruption and that the 'union had given dispensation'. In relation to the respondent's decision that additional permanent staff needs would be met by recruiting to mixed fleet rather than increasing worldwide fleet capacity, Ms Pilgrim explained "this is effectively a cost decision which was taken to change the cost base to our fleet and business, we made a decision not to increase contracts on the worldwide and eurofleet… [this is a] business decision based on ensuring that our cost structure is as lean as possible and we have a model which is solid in such a competitive industry".

23. An issue aired fully in tribunal was whether permitting the claimants to increase their working time at a point when another crew member reduces theirs, was "cost neutral" or not. There is, at the time of this hearing in December 2017, a proposal under consideration to make alterations to pension provisions. As part of a package being considered, there is prospective offer to permit a "one off opportunity" for those who are prevented from putting themselves forward for increased hours, to do so, and on the basis of seniority when a crew member on the same fleet at the same grade reduces their hours, to permit another to increase theirs. A partner at the firm of solicitors instructed by the respondent in this case, in an email to the claimants sent the night before this hearing started described this as being a "cost neutral proposal". This indicates, the claimants contended, that their proposal in May 2016 was therefore "cost neutral" and did not impose an additional cost to the business. Mr Ayres in his evidence accepted that the description of this proposal as "cost neutral" was accurate. This is at odds with the respondent's case, which is that to permit an increase in Worldwide fleet capacity at any point, leads to greater cost as compared to increasing resource on mixed fleet or using willing to work. Even if only permitting an increase when there is a corresponding decrease, this would require the respondent to forego a cost saving, and

may well result in higher costs in the long term. For example, if a CSD on a 50% contract retired, the respondent would anticipate a significant saving, but if Ms Keenen got those hours, the respondent would have to continue to pay not just salary, but also associated employment costs for the remainder of her career. In her updated statement of remedy, Ms Keenan values this from the date her application was made until her intended retirement, to be £399,750 for her basic pay and contractual flying payments.

24. Finally, Ms Pilgrim stated that the respondent has a surplus of around 400 CSLs on worldwide fleet, and that they can be used to act up to CSD, or be required to 'work down' to cabin crew, with 88 CSL's on the list from 2008 wanting to increase their hours. We note that Mr Neiman questioned why more CSLs could not be used on the A380 aircraft; Mr Ayres replied that a business decision as to crew levels had been taken, with one CSL required per flight. There was no challenge to the assertion that there is such a surplus, and on its face, it seems that Mr Neiman's question about additional usage of CSLs on other aircraft is also indicative of there being a surplus at that grade.

Issues

25. The issues as identified at the PH conducted by EJ Smail are as follows:

<u>Statutory right to request a contract variation (section 80F Employment Rights Act 1996)</u>

1. Did the Claimant(s) make a request to vary his/her contract under section 80F ERA in that she/he requested an amendment to the hours he/she is required to work?

2. Did the Claimant(s') application comply with the requirements of section 80F ERA?

3. Did the Respondent fail to comply with s 80G(1)? In particular:

    a. ***Did the employer deal with the application in a reasonable manner?***

    b. ***Was the application refused because of one of the applicable grounds, namely*** **the burden of extra costs?**

4. If so, can the Respondent rely solely on the consideration of costs? The Claimants' rely on the case of *Cross v British Airways plc [2005] IRLR 423.* (The need for costs plus justification).

5. Was the Respondent's decision to reject the application based on the incorrect facts (s 80H(1)(b))?

6. If the tribunal finds the complaint well founded, what is the appropriate remedy:
    1. ***An order for reconsideration of the application; and/or***
    2. ***Compensation?***

Part time worker discrimination (section 5(1)(a) Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000/1551)

7. Have the Claimant(s) been treated less favourably than comparable full-time workers?

8. Who is the actual full-time comparator?

9. Is that treatment on the ground that he/she is a part time worker?

10. Is the treatment justified on objective grounds?

11. If the tribunal finds the complaint well founded, what is the appropriate remedy:
    1. ***A declaration; and/or***
    2. ***Compensation?***

Indirect age discrimination (section 19 Equality Act 2010)

12. In failing to allow the Claimant(s) to increase his/her contractual hours, has the Respondent applied a provision, criterion or practice (PCP) to the Claimant(s)?

13. Did that PCP put employees of a similar age (on the Worldwide Contract) to the Claimant(s) at a particular disadvantage when compared with the Claimant's comparators?

14. Who is the actual or hypothetical comparator?

15. Did the PCP put the Claimant(s) at that disadvantage?

16. Can the Respondent show that the PCP is a proportionate means of achieving a legitimate aim?

17. If the Tribunal finds in favour of the Claimant(s') claims for age discrimination, what should be awarded for injury to feelings in recognition of the discrimination suffered?

Law

26. Three causes of action are relied upon; the right to request a contractual variation pursuant to section 80F ERA 1996, the right not to suffer a detriment because of being a part time worker contrary to the Part Time Worker Regulations 2000, and the right not to suffer discrimination at work contrary to section 39 EqA 2010, namely indirect discrimination contrary to section 19 EqA.

Requesting a contractual variation

27. The relevant provisions of the Employment Rights Act 1996 are as follows:

> 80F Statutory right to request contract variation
> (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
>
> *(a)* the change relates to—
>
> (i) the hours he is required to work,
> (ii) the times when he is required to work,
> (iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, …

[(*b*) ….]

(2) An application under this section must—

(a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective, [and]

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with,

(*d*) ….

[80G Employer's duties in relation to application under section 80F

[(1) An employer to whom an application under section 80F is made—

[(*a*) shall deal with the application in a reasonable manner,

(*aa*) shall notify the employee of the decision on the application within the decision period, and]

(*b*) shall only refuse the application because he considers that one or more of the following grounds applies—

(i) the burden of additional costs,
(ii) detrimental effect on ability to meet customer demand,
(iii) inability to re-organise work among existing staff,
(iv) inability to recruit additional staff,
(v) detrimental impact on quality,
(vi) detrimental impact on performance,
(vii) insufficiency of work during the periods the employee proposes to work,
(viii) planned structural changes, and
(ix) such other grounds as the Secretary of State may specify by regulations.

[(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—

(a) the decision on the appeal, or
(b) if more than one appeal is allowed, the decision on the final appeal.

80H Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(*a*) that his employer has failed in relation to the application to comply with section 80G(1),
(*b*) that a decision by his employer to reject the application was based on incorrect facts [or
(*c*) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).].

28. ACAS Code of Practice on handling in a reasonable manner requests to work flexibly provides guidance. The fifth code issued by ACAS begins with a note which provides that "It is intended to provide guidance on the handling of requests by employees to work flexibly, following the implementation of major changes made by the Children and Families Act 2014 to the legal framework for employees' rights to have such requests considered by their employer. The principal changes, which came into effect on 30 June 2014, are the removal of restrictions on the categories of employees entitled to make requests, now comprising all employees with 26 weeks' continuous employment and who have not made a previous request within the preceding 12 months, and the repeal of the detailed procedural requirements imposed on employers when a request is made; employers are now required simply to consider requests in a reasonable manner, give a decision within three months of the request, and reject requests only if the employer considers that one or more of the reasons listed in the ERA 1996 s 80G(1)(b) applies. The ACAS Code is intended to replace the former prescriptive regime governing the consideration of requests with guidance as to how `in a reasonable manner' should apply in practice. The Code is made under TULR(C)A 1992 s 199, and was brought into force by SI 2014/1665 on 30 June 2014 following approval by the Secretary of State and Parliament under TULR(C)A 1992 s 200. The legal status of the Code, as for the other four ACAS Codes, is as provided for by TULR(C)A 1992 s 207A. This Code is intended to help employers deal with written requests made by employees to change their working hours or place of work under the statutory right in the Employment Rights Act 1996 to request flexible working. The guidance in this Code, as well as helping employers, will also be taken into account by employment tribunals when considering relevant cases."

29. At paragraph 8 the code states that an employer should "consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the

changes… In considering the request, you must not discriminate unlawfully against the employee."

30. The code confirms that "although a tribunal cannot adjudicate on the reasonableness of the employer's rejection per se, it can look into the factual correctness of the grounds relied on by the employer which may entail an investigation into what the effects would have been of granting the application: *Commotion Ltd v Rutty* [2006] IRLR 171*, EAT." This authority and its guidance was referred to us by Mr Neiman in the course of closing submissions.*

PTWR

31. **The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide at regulation 5 as follows:**

> **5 Less favourable treatment of part-time workers**
>
> (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
>
> (*a*) as regards the terms of his contract; or
> (*b*) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) The right conferred by paragraph (1) applies only if—
>
> *(a)* the treatment is on the ground that the worker is a part-time worker, and
> *(b)* the treatment is not justified on objective grounds.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.
>
> (4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

32. Regulation 1 provides definitions and at 1(2) states "'pro rata principle' means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be

entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker". Regulation 1 (3) provides;

> (3) In the definition of the pro rata principle and in regulations 3 and 4 'weekly hours' means the number of hours a worker is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours.

33. The guidance notes issued with the regulations – which do not of course form part of the regulations and are not binding on this tribunal - but which may assist in their interpretation, state:

> **Rate of pay**
>
> The Regulations have a direct effect on pay. As a result of the Regulations, part-timers must not receive a lower basic rate of pay than comparable full-timers.
> Part-timers can only be given a lower hourly rate when this is justified on objective grounds. One example where a different hourly rate might be objectively justified would be a performance related pay scheme. If employees are shown to have a different level of performance measured by a fair and consistent appraisal system this could justifiably result in different rates of pay.
>
> *To comply with the law:*
>
> Part-timers should receive the same hourly rate as comparable full-timers.
>
> **Overtime**
>
> As case-law currently stands, part-timers do not have an automatic right to overtime payments once they work beyond their normal hours. However, once part-timers have worked up to the full-time hours of comparable full-timers they do have a legal right to overtime payments where these apply.
>
> *To comply with the law:*
>
> Part-timers should receive the same hourly rate of overtime pay as comparable full-timers, at least once they have worked more than the normal full-time hours.

34. This is in essentially the same terms as the Guidance currently set out on www.gov.uk, issued by BEIS, which states:

> Part-time workers' rights
>
> Part-time workers are protected from being treated less favourably than equivalent full-time workers just because they're part time.
>
> A part-time worker is someone who works fewer hours than a full-time worker. There is no specific number of hours that makes someone full or part-time, but a full-time worker will usually work 35 hours or more a week.
>
> Part-time workers should get the same treatment for:
>
> - pay rates (including sick pay, maternity, paternity and adoption leave and pay)
> - pension opportunities and benefits
> - holidays
> - training and career development
> - selection for promotion and transfer, or for redundancy
> - opportunities for career breaks
>
> Some benefits are applied 'pro rata' (in proportion to hours worked). For example, if a full-time worker gets a £1,000 Christmas bonus, and a part-time worker works half the number of hours, they should get £500.
>
> Overtime pay - part-time workers may not get overtime pay until they've worked over the normal hours of a full-time worker.

35. The commentary in Harvey on Employment Law and Industrial Relations, at paragraph A1 [147] is as follows:

> "Part-time workers do not have an automatic right to overtime payments once they work beyond their normal 'part-time' hours. Only if part-time workers have worked the normal hours of a comparable full-time worker, do they have the right to overtime payments (reg 5(4)). This does not affect the right of a part-time worker to receive, for example, unsocial hours payments, weekend payments or other forms of enhanced pay on comparable terms to full-time workers."

36. We were referred to the case of ***O'Brien v Ministry of Justice*** [2013] UKSC 6, [2013] IRLR 315 which was primarily concerned with the question of whether recorders could be workers for the purposes of these regulations, and with objective justification. Lord Hope and Lady Hale in a joint judgment held, at paragraph 43, that "the usual expectation is that part time workers will receive the same remuneration and other benefits as comparable full time workers, calculated on a pro rata basis, unless there are objective grounds for departing from this principle."

37. Mr Leach for the respondent reminded us that in considering 'justification' we are to ask whether the treatment complained of may be justified – thus the question under this provision is different from that under consideration for the claimant's claim of indirect discrimination, in which the question under consideration is whether the 'pcp' applied to the claimants is justified. It is well established that we must consider separately whether there is a legitimate aim, and if so whether the respondents have acted proportionately in pursing that aim. The opinion of the Advocate General in ***O'Brien***, which was adopted by the Supreme Court, was as follows:

> "The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued."

The Supreme Court confirmed that treatment can be justified even if no thought was given to the relevant equality principles at the time when it was adopted, but it will be more difficult for an employer to justify the proportionality of means chosen to carry out its aims if it did not conduct the exercise of examining the alternatives, or gather the necessary evidence to inform the choice at the time.

38. It was accepted in ***O'Brien*** (paragraph 63) that cost alone cannot justify discriminating against part time workers, but that 'cost plus' other factors may do so. Mr Neiman drew our attention in particular to the passage of the judgement (paragraph 74) which held that "the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or on how the state chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the State in its capacity as employer".

39. In considering the question of proportionality, Lady Hale in ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601 held that "to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so".

Indirect Discrimination.

40. The claim of indirect discrimination calls for consideration of section 19 of the Equality Act 2010:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> *(a)* A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (*c*) it puts, or would put, B at that disadvantage, and
>
> (*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are—
> age; …

41. Once a "pcp" has been identified, one must consider the pool to which that PCP is applied. As set out by Mr Leach in his skeleton argument, the guidance of Lady Hale in ***Essop and others v Home Office'; Naeem v Secretary of State for Justice*** [2017] IRLR 558 on this point, at paragraph 41, states:

> "… all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it. … in general therefore identifying the PCP will also identify the pool for comparison".

42. The approach to objective justification when considering section 19 of the Equality Act is authoritatively set out in ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601, SC. The PCP will be justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to social policy or objectives derived from the European Directive, but can encompass a real need on the part of the employer's business. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.

Submissions

43. Both parties produced skeleton arguments, and spent an hour supplementing those orally. Additionally, Mr Leach produced for us copies of the following authorities:

    a. Cross v British Airways Plc [2005] IRLR 423
    b. Woodcock v Cumbria Primary Care Trust [2012] IRLR 491

c. Essop and others v Home Office; Naeem v Secretary of State for Justice [2017] IRLR 558
d. Chief Constable of West Midlands Police v Harrod [2017] IRLR 539
e. O'Brien v Ministry of Justice [2013] IRLR 315
f. Chandhock v Tirkey [2015] IRLR 195
g. Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601.

Request for contractual variation.

44. Mr Leach submitted that it was clear that permitting an addition to the worldwide fleet crew capacity would incur extra cost, and that it was a "misnomer" for Mr Ayres to have agreed that it could be done in a cost neutral way; that it was "blindingly obvious" that it would result in an increased cost, and that to find otherwise would be "an absurdity". Additional cost is of course a permissible reason to deny the request. He urged us not to consider whether the request had been dealt with "reasonably" as this had not been in the ET1 – and that it was insufficient that it was in the agreed list of issues – he relied on ***Chandhock v Tirkey***. As to the allegation of there being a 'blanket policy' of saying no to requests by worldwide fleet to increase their hours being indicative of a failure to consider matters reasonably, he said this was "mealy mouthed" as the claimants knew of the position since the joint agreement in 2011 with Unite, and knew that their requests would be successful. In any event, the requirement to consider requests reasonably could, he submitted, only be a procedural requirement as Parliament only intended that tribunals be able to interfere with decisions of employers on limited grounds.

45. The claimants stated that their former solicitors had made a mistake in alleging that cost could not justify a refusal under this provision given the clear terms of s 80G. However, they submitted that it cannot be said that an application is dealt with 'reasonably' if there is a predetermined decision before the hearing begins which was the case here. They submitted that the description in December 2017 of increases in working hours for individuals which take effect at the same time as others decrease their working hours as "cost neutral" indicates that the facts relied upon were erroneous. They also submitted that slowing down the transfer of work to mixed fleet would have enabled their hours to be increased.

PTWR

46. Mr Leach for the respondent submitted that the comparison the claimants seek to draw is wrong in law. Willing to work, he said, is "overtime". He addressed firstly regulation 5(4), which meant, he said, that there is no entitlement for a part time worker to be paid the same for their overtime as a full-time worker receives for their standard hours. He accepted that the willing to work terms are only in fact taken up by part time crew. He said

that regulation 1(3) has the effect that overtime hours are not included when considering the pro rata principle.

47. The tribunal asked Mr Leach if this meant, in a scenario of full time hours being 40 per week, and part time hours being 20 per week, this meant it would be permissible to pay a part time worker a lower rate for hours 20 – 40 if they worked them by way of overtime. Whilst he declined to answer, this was clearly the thrust of his case – as set out in his skeleton argument (paragraph 20) that "there is no obligation… to pay part time worldwide fleet staff the same rate for additional willing to work duties as is received by full time worldwide fleet staff for their standard contracted hours".

48. In his skeleton argument at paragraph 19 Mr Leach asserted that regulation 5(4) has the effect that the "respondent could in fact pay a lower rate for willing to work duties performed by part time worldwide fleet staff, than it pays or would pay to full time worldwide fleet staff performing the same additional willing to work duties (subject to the qualification set out above.) In paying the same rate to full and part time worldwide fleet staff, without requiring part time to work the equivalent of full time hours first, the respondent does "more than is required of it".

49. Mr Leach said the claim was misconceived – comparing apples with pears - but that in any event it was objectively justified.

50. Mr Leach's skeleton argument at paragraph 28, which in turn refers to paragraph 26, sets out the aim relied upon. To differentiate between obligatory and voluntary work where the latter is not covered by any collective agreement such that there is not "the same imperative to provide paid rest". Orally he added that "willing to work is designed to be cheaper than worldwide fleet terms - to be consistent with the 2011 [Joint Settlement] agreement. The agreement explicitly envisages not allowing extra hours on worldwide fleet, so willing to work is used instead as it avoids the need to increase hours on worldwide fleet. The aims are aligned, and are legitimate aims. Proportionate to achieve them in this way. Seeking payment for overtime hours at full time rate flies in face of the agreement." Finally, he submitted that it is not for a tribunal to state that an employer could pay more, relying on paragraph 27 of the judgment in ***Harrod.***

51. Ms Keenan simply emphasised that working alongside her comparator, or any other full time employee, she was when working on willing to work terms receiving less money for doing the same work. If she managed to complete a 100% schedule by making up 50% of her time on willing to work, she would get significantly less than her comparator.

52. Mr Neiman emphasised that his full-time colleagues could not in fact work overtime, stating "the respondents have tried to jump through hoops of fire

to show that a full timer can apply for willing to work, but this is like a father applying for maternity leave. Sure, he can apply – but he won't get it as it is not designed for him".

Indirect Discrimination.

53. Mr Leach reminded us of the guidance set out by Lady Hale in the ***Essop*** and ***Naeem*** cases, and in particular that the identification of the PCP will generally also identify the pool for comparison. He said that the PCP here – that those on worldwide fleet terms and conditions could not have increases to their contracts – was applied only to those on worldwide fleet terms. He said that to compare those individuals to people on mixed fleet terms and conditions – who could extend their contracts – was comparing apples with pears. In any event, he said that the PCP was justified being in accordance the 2011 settlement agreement.

54. Mr Neiman agreed that the correct characterisation of the PCP was that that those on worldwide fleet terms and conditions could not have increases to their contracts. He pointed to the agreed facts that those on worldwide fleet terms and conditions were on average older than those on mixed fleet terms and conditions. The younger staff were able to get an increase to their contracts. He said that neither he nor Ms Keenan could increase their hours on mixed fleet terms as they would both earn less doing 100% on mixed fleet, than they did on their part time contracts under worldwide fleet terms. Orally he stated "we don't have the opportunities of our younger colleagues. They subscribe to those contracts and have the energy to have fewer days rest / longer duty hours etc. Doesn't justify not offering the same opportunities they have to the older crew." He argued that the only justification relied on was cost and that ***O'Brien*** made it clear this was impermissible.

Conclusions on the issues.

Request for Contractual Variation.

55. The claimants did make a request for a variation of their contract under the Employment Rights Act 1996, and their requests did comply with the requirements of section 80F ERA.

56. The respondent states that the tribunal is not entitled to consider whether the application was dealt with in a "reasonable manner" in accordance with s80G(1) because although it appears in the agreed list of issues, it is not within the ET1. They refer to the case of ***Chandhock v Tirkey*** in which the EAT made it clear that an ET1 is not simply a starting point, but must set out the claims being pursued.

57. The obligation to deal with an application in a "reasonable manner" is essentially a procedural requirement to hold a meeting and conduct it

professionally, listening to the points made and weighing the request against the impact it would have on the business. We are satisfied that Ms Pilgrim complied with this requirement. The claimants alleged that a 'blanket policy' was being applied not to permit any increases of hours for worldwide fleet crew. It is clear that an industrial strategy which has openly been pursued by the respondent since at least 2011, and is clear from the settlement agreement with Unite, is to increase the mixed fleet capacity and over time reduce the worldwide fleet capacity. Making a decision in accordance with this stated aim does not amount to dealing with the application in an unreasonable manner. Whether the issue was properly pleaded or not is therefore of no practical consequence.

58. The claimants confirmed that they recognised that their applications could be refused, under s80G, on the ground of additional cost (and cost alone); their former solicitors having mistakenly argued that cost alone was not a sufficient reason under this head.

59. The key matter in dispute therefore was whether the conclusion of Ms Pilgrim was based on "incorrect facts" contrary to s80H(1)(b). As set out above, despite the categorisation by the solicitor for the respondent in an email of 10th December 2017, stating that an increase in capacity on worldwide fleet terms is cost neutral if not implemented until a corresponding decrease, and despite Mr Ayres agreeing with this proposition, we find that it would not in fact be cost neutral. It would amount to an additional cost to the business. Consequently the facts relied upon by Ms Pilgrim were not incorrect.

PTWR

60. The treatment complained of is the lower remuneration received under the terms of willing to work, for the period of time between the conclusion of contractual part time hours, and reaching 100% of full time hours. For Ms Keenan, this is any hours above her contractual 50% (for which time she is paid the same as her full-time comparator) until she reaches 100% (at which time, if she and her comparator managed to undertake any willing to work trips, both would be paid on willing to work terms). For Mr Neiman, it is the period between 75% and 100%. The respondent expressly agrees that the claimants are indeed paid less than full time crew for these hours.

61. The actual full time comparator relied upon by Ms Keenan is Geoffrey Palmer, who was employed on the same terms and conditions at the same grade as her during the period when the treatment complained of took place.

62. We have considered carefully the question of comparator relied upon by Mr Neiman; he has given a specific example of a person engaged on worldwide fleet terms as a CSL, and given their date of birth. He was not asked the name of this person. Is this enough to satisfy the requirement to identify a comparator. We have had regard to regulation 2(4) PTWR. The Respondent does not dispute that there are indeed full time CSL's who are

engaged on worldwide fleet terms. No issue was taken as to any lack of a comparator, and we are satisfied that a specific person (rather than a hypothetical) was in the claimant's contemplation when he gave his statement and listed their date of birth. In these circumstances we find that he has identified a comparable full time worker who is employed under the same type of contract and is engaged in the same work, at the same establishment.

63. The ET1s of the claimants claim that the treatment is contrary to regulation 5(1)(a), as regards a term of their contract on the basis that when they are carrying out willing to work with less favourable contractual benefits, they are being treated less favourably. We have found that the claimants' terms and conditions under their substantive contract – until they work their 50% / 75% - are the same as their comparable full time colleagues (Mr Palmer and Mr Neiman's CSL colleague), and indeed if their colleagues engaged in hours in excess of 100% of full time, both would be engaged under willing to work terms. We accept however that paying the claimants a lower rate for the period between completing their contractual part time hours and reaching 100% of full time hours is less favourable treatment as regards the terms of their contract. Further or alternatively however, we would accept that if not regarding a term of the contract, it amounted to a detriment under regulation 5(1)(b). Whether 'pleaded' in this way or not, it is the (agreed) fact of receiving lower remuneration under willing to work terms which results in lower pay than their full-time comparators when working the same number of hours, which is the subject of their complaint, contrary to regulation 5(1) of the PTWRs.

64. We consider that it amounts to less favourable treatment when the overall pay of full time employees is higher than that of part time employees, for the same number of hours worked doing the same job, in the same establishment for the same employer.

65. An act is only unlawful under regulation 5(1), if a claimant is able to establish that the treatment is "on the ground that the worker is a part time worker" as required by regulation 5(2)(a). We have found as a fact that it is, in practice, only part time workers who carry out willing to work trips. We consider this sufficient to find in the claimants' favour that they have been subject to the detriment in question on the ground of being a part time worker.

66. As set out above, Mr Leach suggested that when comparing the claimants to their comparators, it is not legitimate to take into account any overtime worked, because of regulations 1(3) and 5(4). To consider these submissions, we took an example of a full-time worker having a requirement to work 40 hours per week, and a part time worker having a requirement to work 20 hours. Mr Leach's case is that the regulations are such that the same rate must be paid for the first 20 hours, but that if the part time worker works any hours between 20 and 40 by way of overtime, they may be paid at a lower rate than a full-time worker is for those hours. He says this expressly in his skeleton argument (paragraph 20) that "there

is no obligation… to pay part time worldwide fleet staff the same rate for additional willing to work duties as is received by full time worldwide fleet staff for their standard contracted hours".

67. We consider that regulation 1(3) leaves out of account overtime – and indeed absences – in order to determine what is commonly referred to as the basic rate of pay, in order to apply fairly the pro rata principle. It is of course not every question raised by regulation 5(1) which will require the application of the pro rata principle, it must be considered separately as to whether that is appropriate.

68. As to regulation 5(4), this provides that there will not be less favourable treatment of a part time worker if they do not receive the same rate for overtime as a full-time worker "in the same period", until the total number of hours worked by the part time worker including overtime reaches the number of hours the comparable full time worker is required to work. Bearing in mind the guidance and explanatory notes, we consider that the purpose of this provision is to ensure that part time workers do not receive any enhanced rate of pay for additional hours worked, until they reach the number of hours a full-time worker is required to work. We have not been referred to any authorities as to how to approach what is meant in regulation 5(4) by "the same period". In our view, the "same period" must be hours in excess of those contracted - for example, the first five hours of overtime. Extending our example of a full-time worker being required to complete 40 hours per week, if they receive a higher rate for hours 40-45, a part time worker will not be treated less favourably for only getting their standard rate of pay (calculated using the pro rata principle) for hours 20 – 25, and indeed for any overtime hours until they have completed 40 hours. They too would then get an enhanced rate for hours 40-45. An alternative approach appears to be proposed by Mr Leach at paragraph 19 of his skeleton argument in which he says that part time workers could be paid a lower rate for willing to work duties than full time workers receive for "the same additional willing to work duties". It is difficult to follow this line of argument, because full time workers cannot carry out "overtime" until they have completed their standard hours. The "same period" cannot therefore refer to what is, for a full-time employee, standard hours. In this case, the scenario is of course is hypothetical as there are no cases of a full-time worker being known to do willing to work, but they could not in any event carry out willing to work duties, effectively in hours 20 – 40, but only over and above their full-time hours, at which point they do – as is required by regulation 5(4), get the same rate as the part timer workers.

69. The tribunal rejects the submission that either regulations 5(4) or 1(3) permit an employer to pay a part time worker a lower rate of remuneration for hours which are 'overtime' for a part time worker, but part of standard hours for a full time worker – i.e. for hours 0 – 20 both are paid at the same rate, and for hours 40 plus both are paid at the same rate, but that it is permissible to pay a lower rate to part time workers for hours 20 – 40. This is not in our view the purpose or effect of regulation 5(4).

70. We have considered whether the pro rata principle ought to apply to the treatment complained of in this case. We do not consider that it does. The standard contractual rate of pay is clear. It is also clear that the lower rate under willing to work is only paid to part time workers; they are the only ones who have capacity to and do sign up to 'willing to work'.

71. We have also considered whether the fact that this scheme is 'voluntary' ought to make any difference. However, we cannot see that it does. Once a member of crew makes themselves available and is assigned a trip, they are then contractually obliged to carry it out. At that point, they ought to be paid (subject to it being objectively justified) the same rate as a comparable full time worker.

72. As to justification, we heard evidence about when willing to work is used by the respondent - to provide flexibility and cover unexpected peaks in demand, and we accept this evidence. This does not however address why the willing to work terms as to remuneration set in the manner they are.

73. As set out above, under willing to work, there is a higher rate for basic pay of 1/260th. However, the non -payment of MBT leads to the rate of remuneration being lower than under standard worldwide fleet terms, and the fact that the additional trips do not attract pension contributions or lead to any additional annual leave are clearly also less favourable than standard worldwide fleet terms. These facts are agreed.

74. We did not however have any evidence as to *why* the remuneration under willing to work is lower. In closing submissions Mr Leach told us that willing to work was "designed to be cheaper than worldwide fleet terms", and that to pay overtime hours at full time rates would "fly in the face" of the 2011 joint settlement agreement. The joint settlement agreement is silent about the use of the willing to work scheme. We draw no inference from that silence one way or another. It is correct that the agreement explicitly envisages not allowing increase of hours on the worldwide fleet. However, as to the submission that the agreement in some way sanctions or encourages the use of willing to work as a substitute, this is contrary to the evidence given on behalf of BA by Mr Ayres. He said that willing to work is, as he puts it in his statement, "not used as a planning tool". He described – and we accept – that as the worldwide fleet gradually reduces its capacity over time, routes are moved over to mixed fleet.

75. The legitimate aim Mr Leach identified then was to "differentiate between obligatory work and voluntary work to reflect those fundamental differences identified at para 26 and to be consistent with the essence of the 2011 Unite Agreement". At paragraph 26 he said that the willing to work scheme is "both voluntary and not covered by collective agreement. Therefore, the same imperative to provide **paid** rest does not exist". The emphasis of the word "paid" is ours – because we note that the willing to work scheme does set out the imperative for cabin crew to take rest

around their trips, albeit that for part time workers the rest is unpaid PT (part time) days.

76. The argument that using willing to work is consistent with the 2011 settlement agreement's aim to reduce worldwide fleet capacity depends on Mr Leach's submission that willing to work is designed to deal with capacity issues. However, this is contrary to the evidence of Mr Ayres which we accept, that it is not used as a planning tool and only to cover unexpected peaks in demand. It is difficult to ascertain in these circumstances any aim other than cost – the lack of an imperative to provide paid rest as opposed to unpaid rest.

77. ***O'Brien*** makes it clear that cost alone cannot amount to a legitimate aim. The aims of that collective agreement – to bring an end to an industrial conflict – cannot be imported and relied upon in this setting. The issues about the need for flexibility – which we readily accept – go to the need for the scheme, not as to the payment rates for it.

78. In any event, even if a legitimate aim had been identified, we have had insufficient evidence to be satisfied that the respondent acted in a proportionate manner. We have had regard to the direction of Lady Hale in ***Homer v Chief Constable of West Yorkshire Police*** that "to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so".

79. Whether this measure of paying a lower rate to part time workers was appropriate to reduce cost (and absent any collective agreement requiring payment for rest periods) Mr Leach submits that the "guiding principle" was that "no new capacity would be generated on worldwide fleet terms" as agreed with Unite. However, this addresses the aim rejected by us, on the basis of our having accepted evidence of Mr Ayres - that willing to work is used to cover unexpected demands.

80. We are not able to identify any evidence as to why the remuneration was set as it was, or that the rates / the decision not to pay MBT or have the time count towards pension or leave calculations were appropriate and reasonably necessary. We note that a higher base salary rate of 1/260th of annual salary is paid rather than 1/365th, but were not provided with any evidence as to why this was set or whether it was considered to be a counter balance to the non- payment of MBT or other benefits. Without any evidence of such a balancing exercise being conducted –whether before or after the events complained of, we are not in a position to be satisfied that the respondents acted proportionately.

Indirect Discrimination.

81. We start from the agreed position that the Respondent did apply to the two claimants a PCP of refusing to permit them to increase their contractual hours.

82. This PCP is applied to those on the worldwide fleet contract.

83. The PCP is not applied to those on the mixed fleet contract. Indeed, both claimants accept that they could increase their hours to 100% by moving to mixed fleet terms, but point out that as their aim at present is to increase their incomes, this would be nonsensical for them.

84. It is an agreed fact that on average those on the worldwide fleet contracts are older than those in the mixed fleet. However, the PCP is being applied only to those on the worldwide fleet, and it is this which, applying the dicta of ***Essop*** and ***Naeem***, must be the pool for comparison.

85. The respondent is not applying this PCP to persons with whom the claimants do not share the characteristic of being, on average, older and no particular disadvantage can therefore be shown.

86. In any event, even if there was a comparison between the two fleets, we would be satisfied that the Respondent's adoption of not permitting the increase of hours to those on the worldwide fleet was justified. It is in pursuance of a legitimate aim of "maintaining a strong business which is mutually beneficial for both parties" – as expressed at the start of the 2011 agreement. The means adopted have been proportionate in circumstances where a negotiated solution to industrial action set out expressly the expectation of no further increases to the permanent capacity of the worldwide fleet. We note that even some six years after that agreement, there are still over 5000 worldwide cabin crew, a slightly larger number than mixed fleet crew, showing the gradual approach taken to this reduction of capacity. We have no hesitation in concluding this is a proportionate approach.

Conclusion.

87. The claims for failure to deal properly with a statutory right to request a contractual variation and indirect discrimination therefore fail and are dismissed. The claim for less favourable treatment contrary to the PTWRs succeeds. A remedy hearing will take place on 9 July 2018.

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Employment Judge Tuck

Date: 2 January 2018…….

Sent to the parties on: .....

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For the Tribunal Office