



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107788/2019

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Held in Glasgow on 3, 4, 5 and 6 February 2020

Employment Judge S Walker

10 **British Airline Pilots' Association**

**Claimant
Represented by:
Mr Brittenden -
Barrister**

15 **Loganair Limited**

**Respondent
Represented by:
Mr McLaughlin -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

- 25
- (i) there was a relevant transfer under Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the business of British Midland Regional Limited to Loganair Limited; and
 - (ii) the date of that transfer was 17 February 2019.

REASONS

Introduction

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1. This is a claim made by a trade union brought under Regulation 15 (1)(c) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPER") arising out of the administration of British Midland Regional Limited ("BMIR").
 2. The claimant contends there was a relevant transfer to the respondent ("Loganair") of all of BMIR's undertaking for the purposes of Regulation

3(1)(a) of TUPER or, alternatively, of part of BMIR's undertaking. This hearing is to determine, as a preliminary issue, where there was such a transfer.

3. The claimant also advances the claim on the ground that there has been a "service provision change" under Regulation 3(1)(b). However, that is not to be determined at this hearing as that part of the claim was only clarified shortly before the hearing was due to start.

4. There are a number of other claims by individuals which are contingent on there being a relevant transfer under TUPER.

Findings in fact

5. The Tribunal made the following essential findings in fact.

Corporate structure

6. BMIR and Loganair were subsidiaries of Airline Investments Limited ("AIL").

7. Peter Bond and Stephen Bond were Directors of AIL and the controlling shareholders of AIL, Evelyn Business Services Limited and Sector Aviation Holdings Limited.

8. David Harrison was the executive chairman of Loganair at the relevant time and also a director of AIL, Loganair and Sector Aviation Holdings Limited

9. Jonathan Hinkles was the Managing Director of Loganair.

10. Peter Simpson was the Group Chief Executive of AIL. He was a director of AIL, BMIR and Loganair.

11. Mr Hinkles reported to Peter Simpson.

12. Paul Roberts was the Finance Director of BMIR and a Director of AIL until 17 February 2019.

13. The Boards of BMIR and Loganair were sub-committees of the main AIL Board. Peter Bond and Stephen Bond attended the board meetings of BMIR and Loganair.

Events pre-insolvency of BMIR

14. BMIR was primarily a scheduled airline. It had bases in the following airports
Aberdeen, Bristol, Chester, Derry, Glasgow, Newcastle, East Midlands,
Inverness and Norwich. It also had bases in Brussels and Munich airports.
- 5 15. BMIR had a close working relationship with Lufthansa.
16. At the time it went into administration, BMIR flew about 30 scheduled routes
which included:
- Bristol to Paris, Munich, Frankfurt, Milan, Brussels, Dusseldorf,
Hamburg
 - 10 • Aberdeen to Bristol, Esbjerg and Oslo
 - Newcastle to Stavanger and Brussels
 - Leeds/Bradford to Frankfurt
 - East Midlands to Brussels
 - Frankfurt to Munich and Jonkoping
 - 15 • Munich to Brno, Lublin, Bergamo, Norrkoping, Laage
 - Laage to Stuttgart.
 - Jonkoping to Karlstad
17. BMIR flew a Public Service Obligation route from Derry to London Stansted.
City of Derry and Strabane District Council were the awarding body for the
20 work.
18. Loganair had a shared services contract with Airbus S.A.S (“Airbus”) to
provide a corporate shuttle with two Embraer 145 aircraft between Toulouse
and Bristol. Loganair’s obligations were subcontracted to BMIR. The contract
was structured that way because BMIR had tendered for the contract but had
25 failed the fitness test to be a supplier to Airbus.

19. BMIR had a wet-lease contract with Eastern Airways to fly a route from Aberdeen to Norwich.
20. In July 2017, Loganair won a new contract for an oil and gas company that required them to relocate one of their turbo-prop aircraft to Aberdeen from Inverness. This meant they needed another aircraft to be based in Inverness. Mr Hinkles raised this with the Loganair board. The board members who were also AIL board members said that BMIR had a spare Embraer aircraft. That aircraft was then sub-leased to Loganair.
21. The Loganair pilots who were based in Inverness and who would fly this new type of aircraft were seconded to BMIR to be trained on it. This was because Loganair did not have Embraer aircraft on its Aircraft Operating Certificate ("AOC"). It was easier to have BMIR operate the route than to add a new type of aircraft to Loganair's AOC when they only had one Embraer aircraft.
22. In early 2018, Loganair was leasing five SAAB 2000 aircraft. It was again identified (through the Loganair Board members who were also directors of AIL) that BMIR had a spare Embraer aircraft that could be leased to Loganair to allow Loganair to hand back one of the SAAB 2000s. This was done. As Loganair now had 2 Embraer craft, it was decided to add the Embraer type of aircraft to their AOC and to bring back their seconded pilots from BMIR.
23. The pilots returning from secondment had to be put through an Operator Conversion Course ("OOC") by Loganair. The course was approved by the CAA on 19 October 2018.
24. In June 2018, Loganair took over the management of BMIR's technical records. This work had previously been done for BMIR by a third party.
25. In October 2018, Loganair purchased stock and spare parts from BMIR for £2.2 million. This was to provide working capital to BMIR. BMIR then paid a monthly fee to Loganair for storage and maintenance.
26. In October 2018, the engineering resources of BMIR and Loganair were merged and the BMIR engineers transferred to Loganair under TUPER.

27. During 2018, it was well known in the airline industry that several operators, including BMIR, were in financial difficulties.
28. Mr Hinkles began to plan for how Loganair might take advantage of any opportunities caused by the failure of any of the airlines. This involved an assessment of routes and aircraft that might be of interest. This contingency planning included Flybe (“Project Anneka”) and Eastern Airways (“Project Eric”).
29. On 31 October 2018, the Loganair Board considered a paper that set out the aircraft, routes and slots that might become available in the event of the failure of Flybe.
30. Mr Hinkles also sought board approval at this time to source more Embraer aircraft on the open market to replace some older turbo-prop aircraft and to service new routes. This was called “Project Corbridge” and, over time, expanded to include contingency planning in the event of the failure of BMIR.
31. By the end of 2018, the board of Loganair were aware that the position of BMIR was precarious. BMIR had asked Loganair to make early payments of the lease rentals of the 2 aircraft that Loganair had leased from BMIR.
32. On Monday 11 February 2019, Mr Hinkles attended two meetings with Malcolm Sutherland, the BMIR Chief Operating Officer, with the CAA. The CAA were concerned about the position of BMIR. They were also concerned about how the failure of BMIR might affect Loganair. Mr Sutherland explained they were trying to secure external funding from Lufthansa, another airline or an investment bank. He said there was a potential crunch point the coming weekend and contingency plans were being drawn up to ensure an orderly wind-down in case BMIR ceased trading. Mr Hinkles assured the CAA that if that were to happen, Loganair would not be affected.

The administration of BMIR

33. On Saturday 16 February 2019, Peter Simpson confirmed to Mr Hinkles that no funding had been obtained and BMIR would cease trading about 5pm that day and would formally file for administration on the Monday (18 February).

BMIR contracts

5 34. On 16 February 2019, Mr Hinkles obtained two replacement aircraft, using a brokerage service, so that Loganair were ready on the Monday 18 February to service the Airbus contract which had been subcontracted to BMIR but for which Loganair had the primary contractual obligation to Airbus.

10 35. BMIR sent a letter of novation to Eastern Airways in respect of their contract with them on 16 February and a new contract was entered into with Loganair at or around the same date. Loganair commenced service on the Eastern Airways contract on the Monday 18th by using one of their existing aircraft, pilots and crew.

15 36. Loganair offered to take over the Derry-Stansted route on an emergency basis commencing on 24 February. However, an emergency tender process was run instead by the awarding Council. Loganair bid for the work along with 2 other airlines. The bid was successful and Loganair commenced operations on that route on 27 February 2019.

20 37. Mr Hinkles was contacted by a broker sometime around the 20 February 2019. The broker told Mr Hinkles that BMIR had been going to operate a flight from Bristol to Olbia for Neilson holidays and asked if Loganair would take it on? Mr Hinkles gave a price and the contract was agreed. Loganair flew this charter for one summer season of 12-14 weeks. That contract is now with EasyJet.

25 **Aircraft**

38. On 16 February 2019, in anticipation of the administrator being appointed, BMIR brought all its aircraft back to the UK. Most were detained at the airports at which they landed.

39. All of BMIR's aircraft were leased. None were owned by BMIR. 3 were owned by a Californian company which had leased the aircraft to AIL and they had then been sub-leased to BMIR. 14 other aircraft were leased from Sector Aviation Limited which was a company owned by Peter Bond and Stephen Bond. 2 other aircraft were leased from a subsidiary of Air France
40. Discussions took place between Loganair and Bristol and Aberdeen airports to release 6 aircraft from detention. It was intended that two of the aircraft would be used to service the Airbus contract, one would be used to fly routes from Aberdeen to Bristol, Esbjerg and Oslo, one would fly the Eastern Airways contract, One would service the PSO route from Derry if required and one would be back-up and standby.
41. Mr Hinkles had a telephone discussion with David Harrison and Peter Simpson on 17 February 2019. It was agreed that Loganair would enter into new leases for the ex-BMIR aircraft that were owned by companies controlled by Stephen and Peter Bond.
42. On 17 February 2019, Loganair entered into leases with Evelyn Business Services Limited (a company owned by Peter and Stephen Bond) for 13 aircraft previously operated by BMIR.
43. On 18 February 2019, Loganair entered into leases with AIL for 2 further aircraft, previously operated by BMIR.
44. It was agreed with AIL and Evelyn Business Services Limited that the aircraft would be utilised by Loganair as and when they could make commercial use of them. It was hoped that they would be able to make use of all of them although there was not required. In the meantime, Loganair were not required to make the full rental payments but were responsible for storing and maintaining the additional aircraft and they charged this back to the owners of the aircraft.
45. Loganair took steps to add 6 of the aircraft to its AOC on 21 February 2019. They were in fact added on 25 February 2019. The remainder of the aircraft were added to Loganair's AOC between March and June 2019.

Employees

46. There is a scarcity of pilots in the UK. Loganair wished to employ as many ex-BMIR pilots as they could. A recruitment pack was prepared by Mr Hinkles based on the information gained during Project Corbridge. He started work on this on 13 February 2019. This was issued to all the BMIR pilots by Malcolm Sutherland on 17 February 2019.
47. Other airlines were also keen to employ the ex-BMIR pilots. Mr Sutherland also gave details to BMIR pilots about opportunities at Thomas Cook.
48. Ryanair issued an invitation to ex-BMIR pilots on Twitter on 16 February 2019.
49. The Loganair recruitment pack was issued in the name of Maurice Boyle, the Chief Operations Officer of Loganair, and invited former BMIR pilots to join Loganair on their Embraer fleet. It indicated that Loganair intended to introduce some Embraer aircraft to fly some ex-BMI routes and also to fly existing and new Loganair routes. It mentioned the Airbus contract and bidding for the Derry-Stansted PSO. It said that it would be a UK based operation focussing on Scotland and it did not envisage taking on any of BMIR's intra-European routes or its European routes from Bristol.
50. The pack said Loganair were recruiting to the following base airports:
- Aberdeen
 - Bristol ("gateway" arrangements to 31 October 2019 only with relocation to other bases thereafter)
 - Chester
 - Derry
 - East Midlands (fixed term to 31 May 2019 only with relocation to other bases thereafter)
 - Glasgow
 - Inverness
 - Newcastle
 - Norwich

51. Pilots were offered either full-time employment or alternatively a contract based work. Terms and conditions would be preserved and there were some additional incentives including a signing on bonus if the offer was accepted by 24 February 2019.
- 5 52. 145 former BMIR employees were taken on. This included 80 pilots which is about 78% of UK based BMIR pilots.
53. Loganair also took on 35 cabin crew, 28 engineers and 2 administrative staff previously employed by BMIR.

Routes/Slots

- 10 54. On 17 February 2019, Loganair announced that it would fly three of the previous BMIR routes from Aberdeen to Bristol, Esbjerg and Oslo from the beginning of March. This was about 5-6 flights a week. These were the only routes operated by BMIR from Aberdeen and were routes identified as being of interest during the contingency planning work. A Danish airline announced services on the Aberdeen-Oslo route on the same day (before Loganair did).
- 15
55. On 18 February, Loganair announced it would fly from Newcastle to Brussels and Stavanger, two former BMIR routes. These were serviced by one aircraft.
56. Flying these new routes did not require consent from anyone. Loganair had simply to send a message to the relevant airport. No UK airport slots were "transferred" from BMIR. These simply lapsed on administration.
- 20
57. Passengers who were booked on BMIR flights were told by the administrator that their flights were cancelled. Bookings were not transferred to Loganair. Loganair had no access to BMIR's customer data or marketing lists.
58. Slots at Level 3 airports (which include Frankfurt, Paris Charles de Galle, Munich and Brussels) were in demand and BMIR's slots at these airports did potentially have value and could be sold or transferred. These would have been automatically surrendered to the slot co-ordinator when BMIR surrendered its AOC (which it would have had to do when it went into administration). These were transferred to Loganair from BMIR on Friday 15
- 25

February 2019. It was not the intention of Loganair to utilise these slots but Mr Hinkles had agreed with Peter Simpson in the previous week that, in the event of administration, Loganair would hold these slots for the administrator. No buyers were found for the slots and they were subsequently returned at the request of the administrator to the slot co-ordinators in France, Germany and Belgium.

Stock

59. Loganair bought some stock from the administrator for £76,376. The remainder of the stock was disposed of to another purchaser (who outbid Loganair) for £537,000.

60. BMIR had 70 iPads which pilots used as an electronic flight bag. These contained details of maps, routes etc. These were leased from GE. Loganair approached GE about a week after the administrator had been appointed, having agreed with the administrator that they would liaise direct with GE to purchase the iPads from GE. The software on the iPads was wiped and replaced with Loganair software

Premises

61. Loganair continued to use the hanger in Aberdeen which had been jointly used with BMIR (BMIR had been the leaseholder) after BMIR went into administration.

Current position

62. Loganair has negotiated a new lease of the Aberdeen hanger.

63. All of the 15 aircraft leased by Loganair on 17/18 February 2019 are in use by Loganair. The last one started to fly in July 2019. They are deployed across the Loganair network.

64. Loganair does not have, and has not had at any time, an operational presence at Bristol although some training pilots work out of there. It continues to have a base in Aberdeen, Glasgow, Inverness and Norwich and it has a new base

in Derry. Despite the content of the recruitment pack, Loganair does not have, and has not had, a base in Chester, East Midlands or Newcastle.

65. Loganair has introduced 34 new routes since the BMIR administration. 6 of those were ex-BMIR routes (2 of which have now ceased to operate).
5 Loganair has expanded its presence in Newcastle with a second aircraft and routes to Aberdeen, Newquay, Bergen and Guernsey which were not routes flown by BMIR. The Aberdeen-Oslo route has been discontinued
66. Loganair commenced flying East Midlands to Brussels (a route previously flown by BMIR) in September 2019. They had decided to delay operating this
10 route because of public speculation about asset stripping.
67. About 50% of the pilots currently employed by Loganair were previously employed by BMIR.
68. Loganair does not operate any flights from Europe.

Observations on the evidence

- 15 69. The witnesses gave their evidence in a straightforward way. Most of the facts were not in dispute. Where there was a dispute it was because the claimants' witnesses suggested there had been a co-ordinated strategy to transfer the business of BMIR to Loganair over a period of time. Mr Hinkles disputed that and gave clear evidence about the rationale for each transaction. Mr Brade
20 very frankly accepted he was not in a position to challenge Mr Hinkles' evidence.
70. Recruitment pack. Mr Hinkles said that he started to draft this on 13 February 2019 after the meeting with the CAA. The claimants suggest he must have started drafting this at an earlier date. I have no reason to doubt Mr Hinkles'
25 evidence on this but he was clearly in a position to draft the pack in such detail (which was far more detailed than an offer from other airlines) because of the planning in Project Corbridge and he started drafting it because of his knowledge that BMIR were close to collapse on 13 February and it was likely to happen that weekend.

71. One of the difficulties in evidence was the limited evidence relating to the operation of BMIR before administration. While the witnesses were able to give some evidence about those matters there were gaps in their knowledge.

5 72. One example relates to the scheduled routes flown by BMIR at the time of administration. A map was produced (p 664) which gave a number of routes (about 21) . However, Mr Hinkles in his witness statement referred to “about 30” routes and referred (unchallenged) to routes which were not on the map. For example, he said that BMIR flew from Bristol to Munich and Milan these did not appear on the map. He also referred to a “Brussels – Nantes” route
10 which was not on the map. It would appear that there may be other routes which are not included and so the finding is that there were “about 30 routes” and cannot be more specific.

15 73. Similarly, Mr Hinkles made an unchallenged statement that, as far as he know, the BMIR pilots were not allocated to any particular route but could be pulled at short notice to fly any of the routes. I accept that this was Mr Hinkles’ understanding but there was no direct evidence about the way that BMIR organised its staff in relation to particular bases or routes.

20 74. Mr Hinkles also referred in cross-examination to BMIR having other contracts beyond those mentioned above including PSO routes in Europe and shuttle flights for a car manufacturer. There was no other evidence about that and I have made no finding to that effect.

Relevant law

75. The relevant law is not in dispute.

76. Regulation 3 of TUPER provides that the Regulations apply to

25 *“a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity”*

77. Regulation 3 (2) provides that “*economic entity*” means “*an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*”

78. Regulation 3(6) provides that a relevant transfer—

5 (a) *may be effected by a series of two or more transactions; and*

 (b) *may take place whether or not any property is transferred to the transferee by the transferor.*

79. In ***Cheesman v R Brewer Contracts Ltd*** 2001 IRLR 144 , the Employment Appeal Tribunal said that it is normally appropriate for the Employment
10 Tribunal to first address whether there was a relevant and sufficiently identifiable economic entity for the purposes of Regulation 3(2) before considering whether there was a transfer of all or part of the undertaking.

80. The meaning of “*an economic entity which retains its identity*” was clarified by the ECJ in ***Spijkers v Gebroeders Benedik Abattoir CV***: 24\85 [1986] 2
15 CMLR 296 . They said “*It is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activity.*”

20 81. Whether or not there is a relevant transfer depends upon a multi-factorial assessment of all of the circumstances. In ***Spijkers*** C-24/85 [1986] ECR 1119 the ECJ confirmed that it is important to consider (where relevant) the following matters:

25 (1) the type of undertaking or business concerned (i.e. whether or not it is “asset-reliant”);

 (2) whether assets, tangible or intangible, are transferred;

 (3) whether employees are taken over;

 (4) whether customers are transferred;

- (5) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

82. Each of the above are all single factors in the overall assessment, and cannot
5 be considered in isolation.

83. The Employment Appeal Tribunal in **Cheesman** reviewed the authorities and identified the following principles:

(i). As to whether there is in any relevant sense a transfer, the decisive
10 criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed

(ii). In a labour-intensive sector it is to be recognised that an entity is
15 capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity.

(iii). In considering whether the conditions for existence of a transfer are
20 met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation

(iv). Amongst the matters thus falling for consideration are the type of
25 undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if
30 any, in which they are suspended.

- (v). In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.
- 5 (vi). Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.
- 10 (vii). Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.
- (viii). Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.
- 15 (ix). More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.
- 20 (x). The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship:
- (xi). When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.
- 25 (xii). The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor.

84. The EAT stated that the necessary factual appraisal is to be made by the national court. The Directive applies where, following the transfer, there is a change in the natural person responsible for the carrying on of the business who, by virtue of that fact, incurs the obligation of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred. The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership and the courts have adopted a purposive approach.

Issues

85. The issues to be determined at this hearing are:

(1) whether there was relevant transfer to the respondent (“Loganair”) of all of BMIR’s undertaking for the purposes of Regulation 3(1)(a) of TUPER;

(2) alternatively, whether there was a relevant transfer of part of BMIR’s undertaking.

(3) If there was a relevant transfer, what was the date of that transfer.

Although the original notice of hearing referred to the issue of time bar, neither party addressed me on that. I have therefore not determined that issue at this hearing.

Discussion and decision

86. The claimant’s primary case is that, from at least the Autumn of 2018, coordinated steps were taken by Loganair to enable it to acquire substantial assets and staff from BMIR. Separately, even if the Tribunal rejects that case, the claimant argues that there was nonetheless a relevant transfer of the business of BMIR around the time that it went into administration. Alternatively, there was a transfer of part of BMIR. The respondent rejects all of those contentions for the reasons I will set out below.

Was there a transfer of the whole of the business of BMIR?

87. I will consider first the contention that there was a transfer of the whole of the business of BMIR.

What is the economic entity?

5 88. The respondent does not dispute that the whole of the business of BMIR is an economic entity. It does not dispute that the economic entity was situated in the United Kingdom.

89. There is a disagreement however as to what the economic activity of BMIR was. Mr Brittenden, for the claimants, says that the relevant activity is simply
10 air passenger transport. Mr McLaughlin contends that the economic activity includes the routes, customers and slots. He submits that the economic entity was the organisation of staff, aircraft and routes to provide scheduled flights to paying customers across BMI's European wide route network with its principal UK base being at Bristol and a strong presence in Germany.

15 90. I consider that the correct analysis is that the economic entity of BMIR was the organization of resources (including aircraft, pilots, other staff, equipment and physical bases) which had the objective of providing scheduled routes and some contract flights to customers across the UK , from the UK to Europe and within Europe.

20 91. The Level 3 aircraft slots were clearly an integral asset allowing BMIR to fly certain routes and form part of the "resources" which make up the economic entity while those routes are being flown.

92. Where there was a physical base, that would also form part of the resources.

93. However, I do not consider that the specific routes flown form part of the
25 economic activity. It was clear that although some routes are flown fairly steadily, other new routes are adopted and existing routes are discontinued on a regular basis in this type of industry. The exception would be routes flown under a specific contract (such as Airbus and Eastern airways) or where there an obligation to fly the route (such as the PSO Derry route).

Did this economic entity transfer to Loganair over a period that pre-dated the administration?

Claimant's submissions

- 5 94. Mr Brittenden points out that Mr Hinkles confirmed in evidence that in September 2018 Loganair had decided to take active steps in preparing to acquire business opportunities in relation to 3 commercial airlines, including BMIR. Each potential target was given a "*project*" name: Project Eric for Eastern Airways and Project Anneka for FlyBe. BMIR was also given a project name "Corbridge".
- 10 95. Mr Brittenden suggests that Mr Hinkles' evidence was unclear as to when work started in respect of Project Corbridge in the sense of acquiring opportunities from BMIR. Although he appeared to suggest that this only began in extremely close proximity to 16 February 2019. Other evidence demonstrates that work actually began in September 2018. This is also
15 consistent with his contemporaneous correspondence (which Mr Brittenden suggests is to be preferred).
- 20 96. The contemporaneous evidence referred to by Mr Brittenden includes a letter from the BALPA CC Chairman to Mr Hinkles that describes the situation as analogous to a "*merger or take-over*", and said "*... we cannot see how the plan that has been put in place to secure pilots, cabin crew, engineers and aircraft from BMI, has been thought up and actioned since BMI's announcement on Saturday*" Mr Hinkles' reply states: " As the failure of any or all of those three airlines could present opportunities for Loganair, **we've been working on separate plans** and have variously had a Project Manager, legal counsel, our Commercial team and HR advisors working in the
25 background **for four months...**"
- 30 97. Mr Brittenden suggests that Mr Hinkles' response to that letter is relevant in what he does not dispute and he invites me to accept this account at face value. He submits that Mr Hinkles is an articulate witness and did not seek to deny the accusation that this had been planned for months. He corroborated the CC chairman's concern, and went even further, even justifying the pre-

planning which had taken place. Mr Brittenden also asks me to note that Mr Hinkles' witness statement makes countless references to such "*contingency planning*" in relation to BMIR.

5 98. Mr Brittenden suggests that the paucity of documents disclosed in relation to Project Corbridge is troubling. He invites me to accept that it is significant for any commercial airline to acquire 15 additional aircraft, a substantial number of staff, and expansion into new routes. All of this self-evidently requires meticulous planning, assessment of operating costs, and estimated profitability. However, materially, no documents have been disclosed in
10 relation to any of these matters.

15 99. Mr Brittenden submits that documents must exist otherwise all of those working on Project Corbridge would be lacking in direction or guidance as to what work they had to do on the project, or understand why certain opportunities should not be pursued. Instructions must have been issued, tasks set, and people instructed to provide various reports setting out options. None have been provided. One would expect there to be memos, requests for information, costings, discussion about the viability of routes, what bases were needed, and the compliment of staff required for such expansion. Surprisingly, there is not one email, report or paper disclosed. Given the
20 significance of the matters under consideration, one would have expected there to be some communications between the "*Project Manager, legal counsel, ... Commercial team and HR advisors*" who had been working "*in the background for four months*".

25 100. Mr Brittenden invites me to conclude that the lack of transparency provides legitimate cause for suspicion.

30 101. He also invites me to take into account that on 19 October 2018 an Embraer aircraft was transferred from BMIR to Loganair. An application was made to the CAA to add this to its AOC. He suggests that it is difficult to consider this development in isolation. It occurred in the midst of the contingency planning process in respect of BMIR which had commenced in September 2018. Further, because Loganair had added the Embraer type rating to its AOC, it

necessarily positioned itself to be able to absorb and speedily deploy aircraft it was considering acquiring from BMIR as part of its contingency planning process.

- 5 102. On 19 October 2018 the CAA granted approval for Loganair's OCC. Once again, Mr Brittenden suggest that this cannot be considered in isolation. Without such approval, Loganair would not have been able to absorb pilots as quickly as it did, or deploy them into commercial service.
- 10 103. Mr Brittenden invites me to find that Neil Hughes' email to the CAA on 30 September 2018 only makes sense if it is considered alongside one of the key aims of project Corbridge – to acquire BMIR aircraft, routes and pilots. In that eventuality, Loganair's need to facilitate the continuing "*seamless transition*" of BMIR pilots is self-evident.
- 15 104. Although the significance of the OCC approval has been downplayed by Mr Hinkles by reference to "ring-fencing", it is clear that ring-fencing would not have been authorised by the CAA and such a practice would go against its published guidance in CAP 789 [701]. This only applies in the case of a transferring fleet provided that "*... it remains as a complete entity with its management and training structure intact*". In other words, it would (in all likelihood) necessitate a TUPE transfer of an organised group.
- 20 105. Mr Brittenden submits that context suggests that the acquisition of BMIR routes, aircraft and staff was not merely a fanciful or speculative exercise. There was a material risk that BMIR would enter into administration if the majority shareholders did not invest funds, or further finance could not be obtained from another source
- 25 106. On 5 September 2018, Stephen Bond (majority shareholder) raised the suggestion of BMIR transferring its equipment and spares to Loganair under an asset transfer agreement. Although seen in isolation, this may appear innocuous, Mr Brittenden suggests that the sole reason why this asset sale occurred - with Loganair paying £2.2 million for the equipment/assets - was to enable BMIR to continue trading, and so that it could continue to pay its wages for October through to Christmas (as put to Mr Brade in cross-
- 30

examination). There is no evidence that any different rationale existed when Stephen Bond first made the suggestion on 5 September 2018. The asset sale was effected on 15 October 2018.

5 107. Mr Brittenden submits that it is clear that not all of the £2.2 million was actually received by BMIR. The asset purchase agreement confirms that sums were paid directly by Loganair to Stephen and Peter Bond. This feature arouses suspicion - the proposal was raised by a shareholder, and both principal shareholders received direct pecuniary benefit. This transaction underscores just how precarious BMIR's trading position was. If it would not be able to trade without the cash injection (the amount it received is unclear), it would certainly not be able to trade without further investment as all must have known.

108. Mr Brittenden suggests that the whole transaction appears odd, not just in relation to the payments made to the two shareholders. The prevailing 15 circumstances are that BMIR's fleet consisted exclusively of Embraer aircraft, it made little sense for it to sell assets and equipment related to those aircraft; or for that matter for Loganair to purchase the assets and equipment when it only had 2 Embraer aircraft.

20 109. However, he submits, the arrangement makes perfect sense if it is viewed alongside Project Corbridge – and that Loganair contemplated being in a position to acquire the entirety of BMIR's fleet. It was an important stepping-stone in facilitating Loganair being able to acquire substantial Embraer aircraft from a sister company. It would also have acquired title to the equipment and spares in the event that BMIR went into administration.

25 110. It is not in dispute that on 8 October 2018, all of the BMIR Aberdeen based engineers transferred to Loganair by way of a TUPE transfer. Mr Brittenden suggest that, seen in isolation, again, this may not appear significant. However, again he suggests that it was an important foundation or stepping-stone to position Loganair to be able to secure and continue operating BMIR's 30 fleet of Embraer aircraft.

111. Mr Brittenden submits that analysing the above developments through the lens of project Corbridge, it is clear that Loganair had achieved all of the necessary precursor steps to be in a position to acquire the entire BMIR fleet and pilots, and to be ready to deploy them rapidly.

5 112. By late October 2018, Loganair:

- had certain pilots trained by BMIR to operate Embraer aircraft;
- had received CAA approval to add Embraer-type rated aircraft to its AOC;
- had obtained CAA approval for a condensed 2 day OCC training programme;
- owned all of the engineering equipment and spares needed for servicing and maintenance of the entire BMIR fleet;
- now controlled BMIR's maintenance function and staff based at Aberdeen.

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15 113. When viewed alongside project Corbridge, Mr Brittenden submits that the irresistible inference is that this was part of a coordinated or pre-meditated strategy. Further, judging by the events that transpired, and the speed within which Loganair was able to absorb 15 BMIR aircraft, staff, to train and deploy them, it cannot be the case that the above events were the product of mere
20 coincidence or happenstance. They are the product of contingency planning done at a time when BMIR's future was precarious. The planning required for such an expansion must have been enormous.

Respondent's submissions

25 114. For the respondent, Mr McLaughlin submits that, prior to its insolvency, BMIR and Loganair engaged in mutually beneficial financial transactions with one another. These is nothing suspicious, inappropriate or choreographed about these transactions which included the mutually beneficial purchasing of insurance and fuel and the selling of spare parts to one another.

- 5 115. Mr McLaughlin submits that Mr Brade was not close enough to the BMIR insolvency event or any transactions before or after it which involved Loganair to give reliable evidence on the events that took place. Mr Brade stated in his evidence that his knowledge was based largely on 'rumours' from pilots and staff.
- 10 116. Loganair leased aircraft from BMIR when they were no longer required by BMIR and Loganair did engage in a TUPE transfer in relation to engineering staff in Aberdeen. Mr McLaughlin submits that these were normal transactions between two airlines and the fact of these transactions no longer being suspicious have largely been conceded by Mr Brade.
- 15 117. Mr Hinkles stated that he had been alert to the fact that in 2019 several UK airlines were in financial trouble. That being the case, the Respondent was alert to any opportunities there may be for the Respondent in light of the failure of a competitor airline. The Respondent appointed a project team to assess what benefit could be derived for it from the decline of Flybe, Eastern Airways and BMIR.
- 20 118. The Claimant's pleadings and the witness evidence from Mr Brade refer to their suspicion of the circumstances giving rise to the BMI insolvency event and that it had been orchestrated by the Respondent in order to obtain BMIR's business without the application of TUPE. Mr McLaughlin submits that the sum total of that suspicion derives from the evidence of Mr Brade who was suspicious of the fact that administrators had been on standby for a period of time prior to the demise of BMI. Mr McLaughlin submits that this is common practice in potential insolvency scenarios and, as has recently been reported,
- 25 administrators have been sitting behind the scenes at Flybe in light of its recent financial distress. Mr McLaughlin also submits that it is noteworthy that the administrators have not attempted to reverse any of the transactions which occurred between BMI and the Respondent which they would have been entitled to do had they had genuine concerns.
- 30 119. Further, the Administrator's Report makes clear that BMIR was a business in genuine financial trouble. Michael Brade in his statement comments on the

fact that both Stephen and Peter Bond had personally financed BMI's debts, supplemented by Mr Hinkles in evidence who commented that the Bonds' investment to BMIR prior to its insolvency was in the region of £44 million. Mr Hinkles in his statement comments on the fact that Lufthansa injected cash into BMI around December 2019 to save it from collapse at that time. Mr Hinkles also states that BMIR had asked the Respondent to make early payment in relation to the aircraft it leased from BMI. Mr Hinkles also gave evidence to the extent that the Respondent paid £2.2 million for BMIR stock in October 2018 in order to help it pay its wage bill. Mr McLaughlin submits that one may question why the Respondent would have done this if its ultimate intention was to take on the business of BMIR?

120. Mr McLaughlin submits that all of these factors identify a business in financial difficulty. This is distinguishable from the circumstances which arose in **Ferreira da Silva e Brito v Estado Portuguese [2016] I.C.M.L.R. 26** where AIA (the BMIR equivalent in that case) was voluntarily wound up by its majority shareholder. There was nothing voluntary about the circumstances which arose in BMIR. There was no obligation on Loganair, regardless of the common owner, to take steps to save BMIR from insolvency.

121. Mr McLaughlin also points out that at no stage in the lead up to and prior to this claim being raised did the claimant assert to Loganair that it considered the circumstances surrounding the BMIR demise to give rise to a relevant transfer for the purposes of TUPER.

122. Mr McLaughlin provided the following comments on Mr Brade's evidence:

- a) In cross-examination, Mr Brade accepted that the fact that Loganair was willing to offer employment to former BMIR pilots was welcome news and he was not aware that other airlines, including Ryanair and Maleth-Aero were also actively looking to recruit former BMI pilots on and around the 16 February 2019. Mr Brade accepted that the claimant did not communicate in writing its position regarding the possible application of TUPE to Loganair and Mr Brade accepted that he did not challenge Mr Hinkles or the administrator

when both suggested that TUPE would not apply. Mr Brade in cross examination indicated this was because there was a lot going on at the time of BMIR's demise. Mr McLaughlin considers it is noteworthy that the claims were not raised until June 2019.

5 b) In Mr Brade's witness statement he describes it as 'odd' that Mr Hinkles attended meetings at the CAA with Malcolm Sutherland, BMI's Chief Operating Officer in advance of BMI's insolvency. However, in cross examination, it was put to Mr Brade that Mr Hinkles had attended the meeting in light of the CAA's anxiety about the potential for BMIR's predicament to impact the Respondent. Mr Brade ultimately conceded that it may be natural for both parties to be present at such a meeting.

10 c) In his witness statement, Mr Brade commented that he thought it was 'significant' that pilots who had been seconded to BMI from the Respondent were returned to it. It was put to Mr Brade in cross examination that it would be logical for the pilots to return if the wet-lease arrangement came to an end and that there was nothing odd about this. Mr Brade accepted that was the case.

15 d) Mr Brade in his witness statement comments on the steps Loganair took to have an Operator Conversion Course approved. The Respondent's position is that it did so for those pilots returning to it from secondment. Mr Brade states that the email *'envisages more than just the transfer of a small number of BMIR pilots'*. However upon cross examination he accepted that the emails he quotes from in support of his statement do not say this.

20 e) In his witness statement, Mr Brade suggests that the Respondent engaged in transactions in relation to BMIR spare parts and engineering equipment with the ultimate goal of taking them 'beyond the reach of the Administrators'. In cross examination, it was put to him that the transaction in relation to stock which occurred in October 2018 was done in order to generate cash for BMIR so that

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it would meet its wage bill commitments. The Respondent paid £2.2 million for this stock. Mr Brade indicated that he would not aware of this, and if that was the case it would lift his suspicions in relation to that transaction.

5 f) Related to the above, Mr Brade in cross examination acknowledged that he was broadly aware that the administrators could seek to reduce pre-administration transactions if they considered there had been inappropriate alienation of assets.

10 g) Mr Brade also asserts in his statement that aircraft are the most important asset of an airline. However, he accepts that BMIR did not own any of its aircraft.

15 h) In paragraph 59, Mr Brade states that he had not seen any board resolutions pertaining to a lease agreement in respect of one of the Embraer aircraft. He does so in a manner which suggests the failure to produce such a board report is suspicious. However, at paragraph 60 Mr Brade directly quotes a side letter in which it is made clear that a board resolution was not required. His statement in these two paragraphs is contradictory.

20 i) In paragraph 65 of his statement, Mr Brade makes reference to CAT II and states that this was an approval from the CAA which would be easier for the Respondent to obtain if it had access to BMI's training records. However, in cross examination it was put to him that CAT II approvals would be obtained by running practice landing runs in different conditions and the records of those landings is what enables an airline to obtain CAT II approvals. That being the case, it was put to Mr Brade that it was wrong to link the CAT II records to training approvals and he accepted that was the case.

25 j) In paragraph 68 of his witness statement Mr Brade makes comment on the transfer of records between BMIR and Loganair and describes this as Loganair 'stepping into the shoes of BMIR'. Mr Brade was then taken to paragraph 9 of Mr Hinkles in which the

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context of situation concerning BMIR's training records was explained and he accepts that he was not aware of his and was not in a position to dispute Mr Hinkles' evidence.

- 5 k) When it was put to Mr Brade in cross-examination that there was nothing wrong in contingency planning taking place in relation to BMIR, Mr Brade accepted this. Mr Brade also accepted that it would be of benefit to members of BALPA to be able to commence employment with Loganair quickly after the demise of BMI.

Discussion and decision

10 123. I have considered carefully the submissions of both parties and the evidence that was before me. I do not consider there is evidence of a carefully choreographed transfer that started before the administration. Mr Hinkles gave clear evidence about the rationale behind each of the transactions that took place in the period leading up to BMIR going into administration.

15 124. It is quite clear that BMIR had been in financial difficulties for some time. They had been rescued from insolvency by cash injections from various parties including the shareholders of AIL. It is clear that this was well known to those in Loganair (including Mr Hinkles) but also by the airline industry in general. I do not think it is suspicious that Loganair undertook contingency planning for what they would do if BMIR stopped trading. Mr Hinkles gave evidence that they had made similar plans in relation to other unconnected airlines which were also believed to be in financial difficulties. I accept that it makes commercial sense to carry out such contingency planning to be able to move quickly if another airline ceases flying.

25 125. It is also not unusual for agreements to be made among connected companies that are not truly commercial. So, for example, Loganair bought stock from BMIR. It has not been suggested that the stock was bought below a fair value but it was clear from Mr Hinkles' evidence that the only reason for the purchase was to release funds to allow BMIR to continue trading and that BMIR would buy back what they needed. This is not a commercial arm's length arrangement. However, that does not mean it is part of a choreographed

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take over by Loganair of BMIR. On the contrary, I accept Mr Hinkles' evidence that the purpose of the transaction was to allow BMIR to continue trading which is not consistent with such a plan.

5 126. In relation to the 2 Embraer aircraft which were leased by Loganair before the administration and the issues around the AOC and the training, Mr Hinkles gave clear reasons why each event had happened. BMIR had surplus aircraft (which would have a cost implication) and Loganair needed to acquire one aircraft (and then two). Again, this is not a pure commercial transaction but a reasonable arrangement between connected companies. There is no
10 evidence that this was to the detriment of BMIR. The aircraft did not belong to BMIR and so this was a cost saving for BMIR. It was not any kind of "asset-grab".

15 127. Mr Hinkles also gave evidence that Loganair's AOC certificate did not include the Embraer aircraft and that it was easier to second the pilots to BMIR where they could receive training and fly the aircraft under BMIR's AOC. He also explained how, when Loganair had acquired another Embraer aircraft, the point had come for that type of aircraft to be added to the AOC and how the pilots had to be specifically trained by Loganair under a separate OCC. I accepted that evidence.

20 128. There were a number of other transactions that were not entirely "commercial" transactions. However, Mr Hinkles gave clear evidence about the motivation for the various transactions. Some were partly or wholly a result of BMIR's financial difficulties. Others were arrangements put in place because of the close relationship between Loganair and BMIR (such as the transfer of the
25 engineers). Mr Brade conceded in cross-examination that he was not in a position to challenge Mr Hinkles' explanations. Further, Mr Hinkles' explanations were consistent with efforts to keep BMIR afloat rather than to hasten its demise.

30 129. I am not prepared to draw the inferences that Mr Brittenden urges me to from the various transactions that occurred some time before the administration taken as a whole nor from the lack of documentation in relation to Project

Corbridge. It is not for Loganair to prove there was no transfer. It is for the claimant to prove that there was a transfer. It is not for Loganair to provide all documents that might be relevant to the claimant's case.

130. I do not accept, therefore, that the transactions before the weekend of 15-17
5 February 2019 formed part of any scheme or conspiracy to effect a transfer over a period of time and I find that there was no transfer at that time.

Was there a relevant transfer of the whole of BMIR's undertaking on the occasion of the administration?

Claimants submissions

10 131. If I do not accept his primary contention of a carefully choreographed transfer, Mr Brittenden submits that, nonetheless, the facts demonstrate that there was a relevant transfer of all of BMIR's undertaking for the purposes of reg. 3(1)(a) TUPER. Reg 3(1)(a) TUPER must be construed and applied compatibly with the ARD and judgments of CJEU as to its scope, in particular **Ferreira**.
15 Accordingly, he submits that the following principles are of particular relevance to these proceedings:

- In order for an undertaking to retain its economic identity, it need not maintain its organisational structures which existed pre-transfer: **Ferreira**. That is "*irrelevant*".
- 20 • BMIR was an asset reliant undertaking. Accordingly, the significance attached to its assets (in a non-proprietary sense) is in emphasis on these facts: **Spijkers; Ferreira**.
- The fact that the "assets" are not owned by the transferor is immaterial. See **Ferreira** where the aircraft were leased. They are
25 still regarded as assets.
- There is no need for a direct contractual link between BMIR and Loganair in respect of the matters which are acquired: **Cheesman** and **Ferreira**. A transaction entered into by a parent or shareholder can suffice.

- There is no need for Loganair to have acquired all of BMIR's assets, or continue with all of its routes: **Ferreira** . The continuation of activity is key.
- The reasons why Loganair took on the leases for the Embraer aircraft are "*immaterial*": **Ferreira**
- The fact that any aircraft were subsequently used for other operations not undertaken by the transferor is not germane. The assets need be used "*only in part*" in respect of the former activity.

132. The numbers of former BMIR staff employed is material, even where Loganair has been selective: **Ferreira**

Aircraft

133. Applying **Ferreira**, BMIR was an asset-reliant undertaking. The fleet of Embraer aircraft were essential to it being able to operate as a commercial entity.

134. Loganair acquired 15 Embraer aircraft formerly used by BMIR upon it entering into administration. It was suggested that these were not "assets" because the aircraft were never owned by BMIR. This is wrong – see **Ferreira** where this argument was rejected. Further, rather than "asset" being given a technical meaning of proprietary ownership, the importance is that BMIR had exclusive rights under the leases to use the aircraft for its business operations. Loganair acquired those rights.

135. Further, this was in no sense a truly arms-length transaction. The lease of 3 aircraft were leased to Loganair by its parent AIL. Further, in respect of the other aircraft, the only 2 directors of Evelyn are the two principal shareholders of AIL and its subsidiaries. This is not coincidental. Each have common interests. It was plainly driven by the majority shareholders and parent company. As JH confirmed in relation to the lease agreements, in relation to the aircraft

136. It is also surprising that aside from the concluded lease agreements, there is not one solitary document, board minute or note, or email concerning the proposal to enter into the two lease agreements. Given the significance of the decision to invest in 15 aircraft, one would expect there to be more.
- 5 137. It is no answer that Loganair was merely exploiting a gap in the market or pursuing an opportunity. See *Ferreira*. The distinguishing feature in this case is the involvement and knowledge of the group in facilitating the transfer of assets, staff and routes.
138. Within 4 days of BMIR entering into administration, Loganair had added 6
10 aircraft to its AOC and wished to begin utilising them “*from tomorrow*”.
139. Accordingly, essential assets transferred which were central to Loganair’s opportunity to expand its operations formerly conducted by its sister company, and for the benefit of or direction of AIL and its shareholders.

Acquisition of employees

- 15 140. Loganair circulated a recruitment pack on the morning of 17 February 2019. This is a detailed document, which would have taken a considerable amount of time to formulate, cost, and plan. No other document has been disclosed relating to this recruitment pack or the proposals contained therein. Associated documents must exist. Other individuals must have been
20 consulted and asked for their views or to provide input as to the viability of what was proposed. It is difficult to accept that no other documents exist, or that Mr Hinkles first began working on this document on 13 February 2019. The proposals must have been based upon matters considered as part of project Corbridge which pre-dated this document.
- 25 141. It contains a number of incentives for pilots to apply for employment.
142. Loganair accepts that it employed 145 former BMIR employees, comprising: 80 pilots, 35 cabin crew, 28 engineers, and 2 administration staff.

143. Materially, Loganair accepts that it employed 80 out of 103 UK based pilots. 78% of BMIR's UK based pilots were employed by Loganair – the vast majority. The opportunity to apply extended to all.

5 144. 28 engineers were employed. This is a sizeable number, particularly bearing in mind that the Aberdeen based engineers transferred in October 2018. The documentary evidence however suggests that certain engineers were recruited as an entire "team" in respect of the function that they performed. The Board minutes of March 2019 confirm that the "Part M team" were "secured" (i.e. recruited) on 17 February and "started work ... on the following
10 day"

Bases

145. It is accepted that BMIR operated some bases outside of the United Kingdom (e.g. Munich, Brussels). However the majority of its bases were within the UK.

15 146. There is a dispute as to whether or not Bristol is operated as a base by Loganair, although it is clear that it had a team of engineers permanently based there and Mr Hinkles confirmed that Training Captains were also based there.

20 147. The Tribunal is invited to find as a fact that Loganair effectively acquired all of the UK bases operated by BMIR, alternatively, the vast majority. This is confirmed by the pilot recruitment pack and Mr Hinkles' evidence in re-examination.

148. Although Loganair had a presence in Aberdeen, its base expanded upon the acquisition of BMIR routes. There was a merger of operations.

25 149. It also refers to bases at Chester, Derry, East Midlands and Newcastle. Loganair had no presence in relation to these before BMIR's administration.

150. Accordingly, Mr Brittenden submits that the evidence demonstrates that Loganair operated bases or otherwise acquired a presence at each of those operated by BMIR where it did not formerly have a base.

Acquisition of routes

151. Loganair acquired the majority of the routes operated by BMIR which originated in the United Kingdom.

5 152. The Tribunal is referred to the routes listed by Mr Brade in his witness statement.

153. Mr Hinkles confirmed that shortly after BMIR entered into administration, Loganair provided commercial services on 3 Aberdeen routes: Bristol; Esbjerg; Oslo.

10 154. The only route operated by BMIR from East Midlands was to Brussels. This was deliberately delayed because of negative publicity and concerns raised by the Shadow Transport Minister in relation to alleged “asset stripping” as explained by Mr Hinkles in his witness statement.

155. Newcastle – the two BMIR routes operated by BMIR to Brussels and Stavanger were resumed.

15 Derry/Stansted

156. Loganair offered to stand in BMIR’s stead as early as 16 February 2019. It proposed to commence the service on 24 February 2019 and to make a public announcement and be in a position to sell tickets on 17 February (i.e. the day before BMIR went into administration).

20 157. BMIR intended to broaden its routes to include Derry/Manchester. Loganair agreed to implement that planned route.

158. BMIR also treated all Derry-based pilots and cabin crew as a discrete organised grouping by offering them employment – this was the only route operated by BMIR out of Derry.

25 Eastern Airways

159. BMIR was contracted to provide a wet-lease operation for Eastern Airways from Norwich to Aberdeen. The email from Mr Hinkles on 17 February 2019 confirms that this “*contract to operate an Embraer 145 ... will be undertaken*

by Loganair using a Saab 2000 next week and then replaced by an Embraer 145 in the following week". This latter point is not mentioned in Mr Hinkles' witness statement.

5 160. Mr Hinkles explained that BMIR sent Eastern Airways a contract of novation on 16 February 2019. Although this has not been produced, it is clear from Mr Hinkles' evidence that Loganair gave its prior agreement to this. The terms upon which the service was provided were identical. This involved a direct transfer from BMIR to Loganair. It also attests to the close dealings of the group companies.

10 Airbus

161. The contract between Airbus and Loganair is dated 5 December 2018 This was subcontracted to BMIR to perform. The letter from Loganair to BMIR dated 20 December 2018 confirms that BMIR was not awarded the contract in its own right because it did not satisfy financial stringency tests. Mr Hinkles confirmed that but for this, the contract would have been entered into by BMIR.

162. There was a seamless transition in the provision of this service. There is also a reference to pilots being allocated "*touring patterns*" on the Airbus contract.

20 163. The Board minutes at [386] confirm that it was operated in the first week post-administration using Loganair aircraft. Thereafter "*former bmi Regional aircraft and crews deployed from second week onwards*". This latter point is not referred to in Mr Hinkles' witness statement: para. 77.

Bristol to Olbia (summer season)

25 164. Capt. Dick confirmed that this was a charter contract operated by BMIR in the summer season for approximately 3-4 years prior to BMIR's demise. It was a service provided to Neilson. Loganair assumed responsibility for this at some point before the Board meeting in March 2019 [386].

Routes - summary

165. Loganair therefore acquired 10 UK routes formerly operated by BMIR. It ceded 6 European routes serviced by Bristol. It used the Embraer aircraft it had recently acquired to provide the continued services. It would have been much more difficult for it to have provided these without the aircraft formerly used by BMIR. Mr Hinkles confirmed (in chief) that Loganair would have required **7 aircraft** to operate the services referred to at Mr Brade's w/s para 93 (a) – (e) only. **NB** that excludes the 2 Newcastle routes, Bristol and Derry at 93(f)-(i). The figure would therefore have been higher.

10 Clients

166. The following clients transferred: Derry/Dept for Transport, Airbus, Eastern Airways, as well as the contract with Neilson (the Olbia route).

Equipment

Aircraft Hangar: Aberdeen

15 167. Mr Hinkles confirmed that BMIR had leased a hangar from the Aberdeen Airport Authority. BMIR had pre-paid the rent on this lease which was due to expire on 30 April 2019. In the interim, Loganair used these premises at no cost. It became the lessee after the expiry of the lease. However analysed, it obtained the benefit of the lease and upon expiry stood in the place of BMIR as lessee.

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Mini-iPads

168. BMIR leased the iPads. It is not in dispute that these were merely desirable or a perk of the job. Mr Hinkles confirmed in evidence that it was "*essential*" for transferring BMIR pilots to have these. On 20 February 2019, Loganair took over the lease and then apparently purchased them at some later point in time.

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169. As Mr Hinkles' confirmed in his witness statement: w/s para 72

5 We also needed to take on iPads as every BMI pilot had an iPad Mini which had their charts, radio frequencies and technical manuals (known as an electronic flight bag) loaded to it. To operate airplanes quickly, the pilots needed these devices as we could not replace these with paper manuals or a Loganair iPad device within the short space of time available...

10 170. The importance of this (when seen in context) i.e. the need to deploy pilots quickly, cannot be dismissed. Without the acquisition of the iPads, Loganair would have faced the prospect of having “idle” pilots and aircraft it could not lawfully operate.

Consumable stock

171. Nothing untoward is suggested here, but Loganair admits that it purchased some stock from the Administrator at 50% of the book value.

Slots

15 172. On 15 February 2019 the slots were transferred from BMIR to Loganair. The BDO report confirms that these slots had been transferred to Loganair “*prior to*” the appointment of the administrators.

20 173. It is difficult to accept that the “*sole purpose*” of this was to enable the Administrator to realise value. There were other motives/reasons why Loganair wished to be in possession of the slots:

- Ordinarily, the surrender of the AOC would result in the slots being cancelled by the airport authorities.
 - By effecting the transfer to Loganair, it thereby controlled the slots and prevented these being opened up for offer by airport authorities to other competitors.
 - It is also apparent that Loganair sought to maximise its commercial opportunities in offering wet-lease facilities to Ryanair and EasyJet. Under those proposed wet-lease arrangements, Loganair would deploy former BMIR aircraft and crews to operate the routes relating
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to such former BMIR slots for reward. The fact that this intention did not come to fruition is immaterial.

- The fact that the slots were eventually handed back to the administrator is also immaterial (in the same way it was immaterial that the parent company returned aircraft to the lessor in **Ferreira**).

Respondent's submissions

174. Mr McLaughlin invites me to consider the test in 2 parts. Was there a relevant transfer and then whether the economic entity retained its identity? He submits that there was no transfer. He points to the lack of any "bilateral" agreements. He submits that the Claimant cannot gather together standard business transactions and label them a relevant transfer for the purposes of TUPE. He submits that the authorities require there to have been something more than a succession of events causally linked to one another.
175. He referred to **Longden and anor v Ferrari Ltd and anor 1994 ICR 443** which provides guidance on the series of transactions question and states that the Tribunal will be directed to: *'look at all the circumstances, including the extent to which the undertaking or part was controlled by the transferor and transferee respectively before the last transaction, to the lapse of time between the transactions and the intention of the parties...'*
176. He further submitted that this case and the case of **Key Communications Ltd v Rose EAT/1291/00** suggest that there must be some degree of mindful connection between transactions at the point they were entered into as opposed to an attempt to collate them after the event.
177. Mr McLaughlin submitted that there was a distinct absence of bilateral character attached to how the Respondent came to use the various resources. There was no bilateral transfer of routes, slots, aircraft, staff, ipads and only one contract transferred directly.
178. Mr McLaughlin points out that the burden of proof is on the Claimant to prove that a relevant transfer occurred.

179. The respondent does not accept that the whole undertaking of BNIR has transferred. He first addressed each of the elements which the Claimant asserts have transferred from BMIR to the Respondent.

Aircraft

5 180. No aircraft transferred from BMIR to Loganair. BMIR did not own its aircraft, they were leased to it. Upon the insolvency event, all of BMI's aircraft were returned to the aircraft owners. Owners of 15 of those aircraft then engaged in a separate commercial leases with Loganair. All of those aircraft are used across Loganair's full route network, not simply routes formerly operated by
10 BMIR. The former BMIR aircraft were leased Loganair over a number of months from early February 2019 to as late as July 2019.

Slots

181. Loganair acquired none of BMIR's slots, not even the marketable slots at level 3 airports.

Routes

15 182. Loganair does not operate the same slots as BMIR. Mt Hinkles has given evidence that post BMIR's insolvency event, Loganair began to operate flights on 6 former BMIR routes of its portfolio of over 30 routes. This equated to around 20% of BMIR's route network. Another airline, Danish Air Transport,
20 also began to operate on one of those routes at the point of BMIR's demise. One of those 6 routes was the East Midlands to Brussels route which Loganair commenced in September 2019 after a 7 month gap in service. Loganair has ceased service delivery on that route and one other former BMIR route.

183. Of the 34 new routes opened up by Loganair between 16 February and 16
25 September 2019, only 6 were formerly operated by BMIR and two of those were dropped because they were not profitable.

Equipment and engines

184. Items of equipment and engines were sold by BMI to the Respondent in October 2018 to inject cash to enable the Respondent to meet its wage bill.

Pilots

185. BMIR ceased trading on 16 February 2019 and its pilots were made redundant. Loganair, along with Ryanair and Thomas Cook, took steps to recruit pilots and cabin crew who had lost their jobs as a result of the BMIR
5 insolventy. It was very competitive and Loganair had a genuine need to take on pilots to service its existing route network. The former BMIR pilots and cabin crew who joined Loganair have been utilised across Loganair's route network.

186. In respect of pilots and cabin crew, there is no evidence that they are carrying
10 out identical tasks to those that they carried out with BMIR.

Contracts

187. The contract with Airbus was between it and Loganair. Following the demise of BMIR, Loganair was contractually obliged to step in and deliver the service.

188. In relation to the Derry – Stanstead PSO, this was awarded to Loganair
15 following a competitive tender exercise. This contract was not transferred rather it was won independently in a competitive process.

189. The Eastern Airways wet lease contract was novated to Loganair.

Engineering staff

190. BMIR's engineering operation at Aberdeen merged with that of Loganair in
20 October 2018. It was treated as a TUPE transfer. Following the insolvency, some other engineers were taken on under new contracts of employment.

Minipads

191. Minipads used by BMI pilots were bought by Loganair from GE Leasing. This was done for convenience not necessity.

Customers

192. BMIR's customer database was not acquired.

Bookings

193. These were not honoured by Loganair. Bookings were cancelled and customers were told to rebook with a number of different airlines.

Goodwill/IP

5 194. No branding or other IP rights were transferred

Office/Admin Assets

195. Loganair has not taken on any office space, furniture, computer equipment or office equipment

Consumable Stock

10 196. Loganair has not taken on large parts of BMIR's stock which it owned at the point of its insolvency. It is also noteworthy that Loganair has not commenced flights on the vast majority of BMI's pre insolvency route network.

15 197. The present case can be distinguished from the circumstances which arose in **Ferreira**. AIA (the BMIR equivalent) was predominantly a charter carrier for package holidays. Its business was charter flying in connection with package holidays. Its customers were companies and tour operators. TAP stepped into the contracts with those tour operators and therefore took on AIA's customers. There was no suspension of operations. It honoured pre booked flights and began flying those immediately. AIA's employees were taken on by TAP to
20 carry out identical tasks.

198. Guidance can be found in the case of **Cheesman** where the EAT set out principles to be applied in assessing whether an economic entity exists. Those principles include the following:

- There must be a stable economic entity which is an organised
25 grouping of persons and of assets enabling the exercise of an economic activity that pursues a specific objective. In order to be such an undertaking it must be sufficiently structured and autonomous.

199. Mr McLaughlin submits that the components relied upon by the Claimant in support of their case that there was a relevant transfer were not '*organised*' nor '*sufficiently structured and autonomous*'. Nor did those components pursue a clear economic activity. These are essential requirements for the identification of an economic entity. We refer to the following cases in support of our submission.

200. Mr McLaughlin points to paragraph 12 of **Spijkers** which states: "*Consequently it cannot be said that there is a transfer of an enterprise, business or part of a business on the sole ground that its assets have been sold*"

201. **Whitewater Leisure Management Ltd v Barnes [2000] ICR 1049**, paragraph 8 identifying the two formulations most frequently used to assess whether an economic entity exists as follows:

Is there a stable economic entity?...it may be appropriate to talk of a 'stable and discrete economic entity'...(2) The alternative version...whether the entity is 'sufficiently structured and autonomous'

202. In addition, at paragraph 21, in answering this question it states:

Was there an economic entity? There is plainly a substantial argument that there was not a stable and discrete entity, or a sufficiently structured or autonomous entity, because of the fact that the leisure centre was so intricately bound up with the rest of the operations of the company.

203. **Suzen v Zehnacker Gebäudereinigung GmbH [1997] 1 CMLR 768**: '*The degree of importance to be attached to each particular factor depends upon the activity being carried on, or the production or operating methods in the relevant undertaking, business or part of a business.*'

204. '*...the mere fact that the service provider by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management, the way in which its work is organised, its*

operating methods or indeed, where appropriate, the operational resources available to it.

205. Mr McLaughlin submits that none of what was ultimately taken on by Loganair, whether aircraft, consumable stock parts, staff or contracts were grouped or organised by BMIR prior to its insolvency. The Tribunal has heard no evidence that this was the case. What we really have is a collection of discrete pieces none of which were transferred from BMI to the Respondent and which do not naturally fit together in any way. The Claimant is trying to contort this collection of related pieces into an economic entity when it is no such thing. It lacks structure and organisation.
206. Mr McLaughlin submits that what the Claimant has presented is some unorganised resources and which have no economic entity to pursue. The key missing ingredients are customers, slots and routes. That is the economic activity and that economic activity ceased on 16 February 2019.
207. In addition, the decision of **Fairhurst Ward Abbotts Ltd v Botes Building Ltd and ors 2004 ICR 919 CA** requires that when assessing whether part of an undertaking amounts to an economic entity, that question should be assessed on the occasion of the transfer separation the part from the whole. Mr McLaughlin submits that there is no obvious answer as to when that assessment ought to take place on the facts in this case. Any former BMI staff, routes and aircraft which came to be used by the Respondent did so over a period of several months, from a period as early as summer 2018 to as late as September 2019. At what point then did the part separate from the whole? The very real difficulty in answering that question points very clearly to a conclusion the components relied upon by the Claimant amounted to an economic entity and also gives rise to issues concerning the transfer date which is dealt with below.
208. Further, that stable economic entity must pursue an economic activity. The economic activity of the entirety of the BMIR business was the operation of scheduled flights across BMIR's European wide route network for customers. These is no obvious, definable economic activity of the discrete parts of

former BMI which are now 'in use' by the Respondent. The vast majority BMI's route network and the customer base it served were scattered to the wind following its insolvency. The economic activity of BMIR ceased to exist and therefore simply cannot be said to have transferred. This is an unorganised selection of some resources that did not pursue an economic activity.

Retention of Identity

209. The final component of the test is whether, having found that there was an economic entity and that entity transferred, that it retained its identity. This is largely a question of fact for the Tribunal. There are some key authorities from which principles can be derived:

210. In **Spijkers**, the ECJ said that

'The decision criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity'

'It is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern'

'[This] will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer with the same economic or similar activity.'

211. The decision in **Spijkers** also indicates that the focus should be on the identity of the entity transferred and that all factual circumstances of a transactions should be assessed including:

- The type of business or undertaking
- The transfer or otherwise of tangible assets such as buildings and stocks
- The value of intangible assets at the date of the transfer
- Whether the majority of the staff are taken over by the new employer

- The transfer or otherwise of customers
- The degree of similarity of the activities before and after the transfer and
- The duration of any interruption in these activities

5 212. These factors were restated in the decision of **Suzen** :

10 *'In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all of the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets such as buildings and moveable property are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely*
15 *singly factors of the overall assessment which must be made and cannot therefore be considered in isolation.*

213. Finally, in the UK the principles were largely mirrored in the decision of **Cheesman**.

20 214. **Kelman v Care Contract Services Ltd & Grampian Regional Council [1995] ICR 260:**

25 *'The theme running through all of the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer.'*

215. Mr McLaughlin submits that the retention of identity component of the statutory test has not been satisfied with reference to several of the **Spijkers** factors individually.

216. In relation to intangible assets, although there is no evidence as to the value of any goodwill, intellectual property or branding at the point of BMIR's insolvency event, these components of BMIR did not transfer to Loganair.

217. In relation to the similarity of activities, the activity of a commercial airline is the provision of flights across the airline's route network to paying customers. BMIR's route network pre insolvency spanned a large proportion of Europe and has been described as Mr Hinkles as '*disparate*'. It operated flights on around 30 routes. The Respondent route network is more focused and is centred arounds flights commencing or ending in the UK, particularly Scotland. The Respondent has commenced flights on only a small number former BMI routes and only on those routes which were in keeping with its own business model. It is the Respondent's position that the activities of BMI pre insolvency and the activities of the Respondent post BMI's insolvency are not materially similar.

218. In relation to interruption of activities, as noted in the course of the evidence, there was a gap between the cessation of BMI's flight activity and the Respondent commencing flights on a discrete number of former BMI flights. In particular, the East Midlands to Brussels route did not commence until September 2019; gap of around 8 months. While it is accepted that an interruption of activities does not preclude a relevant transfer taking place, the present circumstances are distinguishable from **Colino Siguenza v Ayuntamiento de Valladolid and ors 2018 IRLR 1056** in which the closure for 5 months was found not to be a sufficient cessation of activities because for three of those months, the music school was closed for school holidays.

219. In relation to the transfer of customers, no customers transferred from BMIR to the Respondent. The absence of the transfer of customers from BMI to the Respondent, whether by way of customer lists or the transfer of pre booked

flights, is fatal to the assertions that an economic entity existed or that an economic activity was being pursued.

220. The respondent acknowledges that where an economic activity is subsumed into the transferee's business following a transfer that does not preclude a finding that an economic entity has transferred and retained its identity.
221. With reference to this principle and in support of its position, the Claimant relies on the decisions of *Klarenberg v Ferrotron Technologies GmbH 2009 ICR 1263* and *Farmer v Danzas (UK) Ltd UKEAT/0858/93*. We distinguish both of these cases from the present circumstances.
222. In the decision of *Farmer*, what is noteworthy is that immediately following the transfer of the entity in question, it continued to operate much as it had pre-transfer. The only difference identified was the name of the transferor had been removed from the lorries. That is a key point of distinction in the present case. It can be said that the business of BMI has continued in the Respondent's name.
223. In the decision of *Klarenberg*, the case arose out of circumstances in which the prospective transferee had acquired intellectual property, hardware, customers and suppliers of the transferor. It had been concluded that these elements did amount to an economic entity. The question arose as to whether that entity had retained its identity as followed the transfer, the component pieces had been absorbed into the business of the prospective transferee. In assessing the situation, the ECJ states that the Directive would apply where *'a functional link of interdependence and complementarity was retained between the various elements of production which had been transferred'*. This phraseology has not had the benefit of any substantial clarification or elucidation by the courts. The respondent does however consider that the circumstances in *Klarenberg* are distinguishable from those in the present case in light of the fact that a readily identifiable economic entity was found to exist and the respondent says that such an entity does not exist in the present circumstances.

Discussion and decision

224. I am grateful to Mr Brittenden and Mr McLaughlin for their detailed submissions. I should say first that there was no evidence at all that the actions of Loganair, BMIR, AIL or the ultimate owners of the company around
5 the time of the administration of BMIR were improper or deprived the creditors of BMIR of asset value. The administrator has not sought to reduce any of the transactions.

225. However, whether there has been a relevant transfer for the purposes of TUPER is a question of fact for the Tribunal and it is not affected by other
10 areas of law such as company, property or insolvency. The Regulations should be interpreted to give effect to the purpose of the Directive which is to protect employees when there is a change of employer.

226. It is not in dispute that the whole of the business of BMIR is an economic entity capable of being transferred under TUPER. The question for me is whether
15 that relevant transfer has happened as a matter of fact.

227. I have carried out the multifactorial assessment having regard to the factors identified in **Cheeseman**.

The type of business or undertaking

228. The business of BMIR was primarily that of a scheduled airline. It operated
20 within the UK, between UK and Europe and it also operated some intra-European flights. It operated a small number of charter flights for specific customers and PSO routes. It operated mainly out of UK bases although it also had some operational bases in Europe. The specific routes flown changed regularly with new flights being added and some being discontinued.

25 The transfer or otherwise of tangible assets such as buildings and stocks

229. Aircraft (whether owned or leased) are the primary asset of any airline. This was particularly true for BMIR as it had already transferred £2.2 million of equipment and spares to Loganair. The aircraft used by BMIR were not owned by BMIR and were leased from a number of parties but mainly from AIL or

companies owned by the shareholders of AIL. The leases were terminated when BMIR ceased trading and shortly before the formal administration of BMIR. Loganair contends that there was no “transfer” of assets in respect of the aircraft. Leases were simply terminated, and new leases entered into by Loganair. They suggest it was simply the case that AIL needed someone to look after the aircraft and Loganair agreed to do that. Mr Hinkles also suggested that there was an urgency to terminate the leases to ensure that the owners of the aircraft were not subject to any obligations in respect of the debts of BMIR.

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10 230. I accept that there were particular reasons for the speed of the transactions and that there was no obligation on Loganair to use all of the 15 aircraft unless and until this made commercial sense for Loganair. However, I consider it is relevant that this was not an arm’s length transaction. This was not a situation where the owner of the aircraft was looking around in the commercial market
15 for another airline to take on the lease of any or all of the aircraft or, indeed, to warehouse and maintain them until a buyer could be found.

231. The companies that owned the aircraft arranged for Loganair to enter into new leases immediately that BMIR ceased flying. While new leases were technically entered into, there was an overarching arrangement put in place
20 so that when the BMIR leases terminated, Loganair would enter into new leases. These were not truly separate transactions. This was a planned operation by which the right to use the planes moved seamlessly and by arrangement from BMIR to Loganair along with the maintenance obligations.

232. Loganair intended to use 6 of the aircraft immediately for routes and contracts
25 previously flown by BMIR. I accept Mr Hinkles’ evidence that Loganair did not have to pay for the aircraft until it started to use them. That in itself, is an unusual arrangement. Loganair had access at a time of its convenience to all but 2 of the aircraft previously leased by BMIR. Within 4 months, all of the 15 ex-BMIR aircraft were flying for Loganair.

30 233. In addition, Loganair purchased some of the remaining stock from the administrator. This was a relatively small amount and the majority of the

remaining stock was sold to a third party. However, again it is relevant that Loganair had already bought £2.2 million of spares and equipment from BMIR and so there was not much left by way of assets.

5 234. Loganair acquired the iPads from the company that had previously leased the iPads to BMIR.

235. Loganair took over the hangar at Aberdeen airport.

236. Loganair did not take over 2 planes which were leased from Air France.

The value of intangible assets at the date of the transfer

10 237. It is not in dispute that Loganair did not take on any of the scheduled bookings of BMIR nor any of the marketing or intellectual property or other commercial intangible assets of BMIR.

15 238. However they did acquire the slots at the level 3 airports. I accept Mr Hinkles' evidence that this was an arrangement to retain value for the creditors of BMIR as the slots would otherwise be lost. Nonetheless, the ownership passed to Loganair and they could have used them had they chosen to do so. They attempted to sell them including offering to run wet lease arrangements for other airlines.

Whether the majority of the staff are taken over by the new employer

20 239. About 78% of the pilots transferred to Loganair along with a significant number of other staff (35 cabin crew, 28 engineers and 2 administrative staff). 145 employees were taken on in total.

240. Loganair were able to produce a comprehensive recruitment pack for pilots including details of routes and bases on the day after BMIR ceased trading.

241. The majority of engineers had already transferred to Loganair under TUPER.

25 The transfer or otherwise of customers

242. As noted above, the scheduled bookings did not transfer. However some other contracts of BMIR (Airbus and Eastern Airways) did transfer. I do not

consider it is significant that the transfer was by novation in one case and by Loganair taking over its primary responsibility as the main contractor in the other. Loganair took over the responsibility for operating these contracts that had previously been with BMIR.

5 243. The Derry route is in a slightly different category. While this might potentially fall under a service provision change (if the requisite facts supported that) , I accept that, although Loganair attempted to take over this route and commence flying on 17th February 2019, that was not agreed to and Loganair acquired this route through an open bidding process after the administration of BMIR.

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244. The Olbia contract was an arm's length transaction entered into after the administration.

The degree of similarity of the activities before and after the transfer.

15 245. This is a critical factor. Mr McLaughlin points to the different routes and the different bases operated by Loganair to those of BMIR.

246. Loganair does not have an operational base in Bristol (which was the largest UK base for BMIR). Loganair does not have any bases in Europe while BMIR had bases in Brussels and Munich. It has maintained bases in Aberdeen, Glasgow, Inverness and Norwich (where BMIR had bases) and opened a base in Derry. It does not have bases in Chester, East Midlands or Newcastle.

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247. Mr McLaughlin points to the fact that Loganair only flew 6 routes that were the same as BMIR (and discontinued 2 of these). In particular, he submits that BMIR's European routes were a significant part of BMIR's business and Loganair did not fly these routes. (That is undoubtedly the case although they did fly a route from Newcastle to Brussels and so it is not correct to say there were no common European flights). Mr McLaughlin argues that there is a significant difference in activities.

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248. At first glance, this seems like a compelling argument. Loganair clearly has a different business model focusing on UK, and particularly flights in and out of Scotland. However, if the activities viewed more broadly (as I have already

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indicated that they should be) then the activities are the same. Both BMIR and Loganair fly scheduled routes with a few contracted services. They fly routes within the United Kingdom and from the United Kingdom to Europe. There is a difference in that Loganair does not have any bases in Europe and does not fly any routes within Europe. Although the activities are not identical, overall, I consider that the activities before and after the transfer are broadly similar.

The duration of any interruption in these activities

249. There was minimal interruption in activities. Flights commenced on the same routes as soon as it was possible to do that. There was no interruption at all to the Airbus and Eastern Airways contracts.

250. Loganair had access to the 13 of the 15 aircraft from the 17 February and the remainder on the 18 February. It had successfully added 6 of them to its AOC by 25 February 2019. The remainder of the aircraft were flying for Loganair within 4 months (although not all on same flights as for BMIR).

251. The Newcastle to Brussels route was delayed in coming into operation until September because of concerns that this might be seen as asset stripping.

Conclusion

252. Having considered all the factors, I am persuaded that there was a relevant transfer of the business of BMIR. Loganair acquired nearly all the planes and a significant majority of the pilots who previously operated BMIR's activities. The planes and pilots continued to fly scheduled and some contract routes. The activity is essentially the same. The fact that they are integrated into the business of Loganair does not prevent this being a relevant transfer.

253. Mr McLaughlin urges me to find that the business was not the same after the alleged transfer. This is based primarily on the difference in the routes that are flown and, to some extent, the different bases used by Loganair. It is not required that the business is identical. The question is the level of similarity. I consider that the activity before and after transfer was broadly similar. Nearly all the planes and a substantial majority of pilots who previously flew short haul routes for BMIR now do that for Loganair. The fact that the flights are not

all the same and that there is less focus on European operations does not, in my view, prevent this being a relevant transfer.

254. The fact that the business of BMIR was integrated into Loganair does not prevent it being a relevant transfer.

5 255. Both parties referred to **Ferreira** in their submissions. It is important to say that while aspects of the case have relevance, I accept Mr McLaughlin's submission that the facts are by no means on all fours with the present case. In **Ferreira**, the business of the transferor was that of a charter flight operator. The parent company started flying those charter flights using some of the
10 planes that had previously been used by the transferor. There was a greater transfer of customers in that case than in the present case. In **Ferreira**, it was also an entirely voluntary reorganization unlike the present case where there was an external factor of the administration of the company.

15 256. I accept that it was not the intention of Loganair (nor of BMIR) to effect a relevant transfer. Mr McLaughlin argues that to construe it as such is to put together a number of disparate and unconnected transactions. If there was no connection between BMIR and Loganair, that would be a fair argument. However the reality is that there was a close connection between BMIR, Loganair and AIL. While I have not been persuaded that there was a
20 choreographed transfer starting in 2018, it is clear that there was some planning and orchestration in the days leading up to the administrator being appointed on 18 February 2019. Mr Hinkles was aware, not least from the meetings with the CAA the previous week, that BMIR was on the brink of collapse. After those meetings he took steps to ensure Loganair was ready to
25 offer employment to the pilots. Before that offer was made, it was agreed that Loganair would have access to the majority of BMIR's aircraft. Steps were taken to transfer airport slots and planes to Loganair and to acquire as many of the pilots as possible. These steps, in my view amount to a series of transactions that together amounted to a transfer.

30 257. The most critical of the "disparate" activities was in relation to the planes. That arrangement only came about because of the close connection between the

3 companies and the shareholders of AIL. No other commercial airline would have agreed to take on the various aircraft at such short notice and on that basis.

5 258. Similarly, the arrangement about the level 3 route slots only came about because of that close connection. These arrangements were not commercial or arm's length. Loganair did not pay for the slots, while I accept there was no intention for Loganair to use these slots, nonetheless they did transfer to them and they transferred before BMIR ceased trading.

10 259. Loganair has acquired the vast majority of the planes and pilots that were flown by BMIR and has used them to fly from many (but not all) of the same bases and on a small number of the same routes. As noted in **Spiikers**, the essential question is whether the transferee is put in a position as a result of a legal transfer whereby he can carry on the undertaking or business. In my judgment, Loganair was in this position. It was a decision of Loganair which routes to fly. When they acquired access to the planes and the pilots, they also acquired BMIR's airport slots insofar as these were necessary to level 3 airports. Loganair was in a position to fly all (or nearly all) of BMIR's routes had they chosen to do so.

20 260. In my judgment, the business maintained its identity at the point of transfer. Changes that have occurred in terms of bases and routes have not affected the essential business that is being carried on with the assets.

261. I conclude that there has been a relevant transfer of the business of BMIR to Loganair.

Date of transfer

25 262. I was not addressed on the date of any potential transfer. In **CELTEC Ltd v Astley** [2005] ICR 1409, The European Court of Justice made it clear that, even if the transfer takes place by a series of transactions as in this case, the Tribunal must identify a single date on which the relevant transfer takes place for the purposes of TUPER. This is the date when responsibility as the employer for carrying on the business transfers from transferor to transferee.

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I consider that this happened on 17 February 2019 when the majority of the aircraft were transferred and the offer of employment was made to the pilots.

Alternative case

- 5 263. Mr Brittenden submitted that if the whole of the undertaking was not transferred then various parts of it were These were:
264. Aberdeen: Mr Brittenden submitted that there was a merger of operations between Loganair's existing presence and BMIR's operations. All of the Aberdeen routes transferred.
- 10 265. Newcastle: Loganair acquired a new base and sought to (and did) "*maintain the former bmi routes to Brussels and Stavanger...*" Mr Hinkles confirmed that Newcastle pilots and cabin crew were employed.
- 15 266. East Midlands: Loganair retained BMIR's service to Brussels. This was its only route from that base. Mr Hinkles was unable to confirm whether BMIR pilots were issued with contracts with East Midlands as their designated base. However I is described in the recruitment pack as a "*base airport*" to which Loganair was recruiting (albeit for a fixed period). Mr Brade also confirmed that pilots were based at East Midlands.
- 20 267. Airbus: Chester. The intention was to preserve BMIR's operational make-up. It specifically recruited to Chester as a designated (new) "*base airport*". This is also referred to as Manchester Gateway.
- 25 268. For the respondent, it is submitted the identified elements do not amount to economic entities in their own right. It is accepted by Loganair that the economic entity does not have to be separate in the hands of the transferor (**Fairhurst Ward Abbotts Ltd v Botes Building Ltd and ors [2004] I.C.R 919**). The point at which the economic entity should be assessed is on the occasion of the transfer separating the part from the whole. However, they consider this presents an insurmountable obstacle for the Claimant.
269. I do not have to decide this argument as I have found that there was a transfer of the whole undertaking of BMIR. However, if I had to decide that point, I

would have found that there was insufficient evidence to allow me to find that there was an organised grouping in relation to any or all of these contracts while they were operated by BMIR.

Further procedure

5 270. This does not conclude the claims. There are issues of timebar that will require to be addressed in connection with this claim (and in the individual claims).

271. Further, if the claims proceed to a remedy hearing, it will be necessary to address the payments that have been made by way of protective awards
10 against BMIR and consider how those should be taken into account and whether the Secretary of State should be notified of any judgment.

272. Once the parties have had an opportunity to consider the terms of this judgment, they are requested to contact the Tribunal with proposals of how they suggest the claims should proceed.

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Employment Judge:

S Walker

Date of Judgement:

16 March 2020

Entered in Register,

20 Copied to Parties:

19 March 2020