Neutral Citation Number: [2023] EAT 146

Case No: EA-2022-000300-AS

EA-2022-000302-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 November 2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE
MR NICK AZIZ
MR ANDREW MORRIS

- -

Between :

(1) RYANAIR DAC
(2) STORM GLOBAL LIMITED

Appellants

- and –

JASON LUTZ **Respondent**

- -
- -

John Bowers KC and Matthew Sheridan (instructed by Eversheds Sutherland (International) LLP) for the **Appellant, Ryanair DAC**
Edward Brown KC and **Tim Welch** (instructed by Constantine Law) for the **Appellant, Storm Global Limited**
Michael Ford KC and **Stuart Brittenden** (instructed by Farrer & Co) for the **Respondent**

Hearing dates: 23 – 24 October 2023

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JUDGMENT

SUMMARY

Agency workers

The Employment Appeal Tribunal ("EAT") dismissed Ryanair DAC's and Storm Global Limited's appeals from the decision of the London (East) Employment Tribunal (the "ET") relating to the status of the claimant, Mr Lutz.

Mr Lutz was one of a pool of "contracted" pilots who flew Ryanair's aircraft. He was supplied to Ryanair by MCG Aviation Limited (now Storm Global Limited). Mr Lutz brought claims: (i) against MCG alone for unpaid accrued annual leave pursuant to regulation 3 of the **Civil Aviation (Working Time) Regulations 2004** SI 2004/ 756 ("**CAWR**") on the basis that he was a "crew member" "employed" by MCG as a member of flight crew within the meaning of regulation 3; and/or within the parent **Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation**; and/or a "worker" pursuant to Articles 31 and 47 of the **Charter of Fundamental Rights of the EU** (the "**EU Charter**"); and (ii) against both MCG and Ryanair seeking the same employment conditions as would have applied if he had been directly recruited by Ryanair, pursuant to the **Agency Worker Regulations 2010** SI 2010/93 ("**AWR**") on the basis that he was an "agency worker" within the meaning of regulation 3(1).

Following a preliminary hearing the ET accepted that Mr Lutz had the alleged statuses. It was common ground that he had a contract with MCG and that he was "supplied" to Ryanair to work as a pilot under its direction within the meaning of regulation 3(1)(a), **AWR**. Unchallenged findings made by the ET included: that Mr Lutz was not in business in his own account and Ryanair and MCG were not his clients; that there was a complete imbalance of power and Mr Lutz was not able to alter anything about the arrangements; that the service company he was required to use was a fiction; that the substitution clause in the written agreement was a sham; and that the dominant purpose of the arrangement was for Mr Lutz to provide personal service as pilot to Ryanair.

As regards the **CAWR** claim, the parties accepted that "employed" was to be understood in the EU law sense of an "employment relationship". In **Allonby v Accrington and Rossendale College** [2004] ICR 1328, the Court of Justice of the European Communities had accepted that a tripartite arrangement involving an individual who was supplied by an agency to provide services to and under the direction of an end user, could give rise to a worker relationship between the individual and the agency. The EAT held that Lord Leggatt JSC's analysis in **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657 ("**Uber**") had not narrowed that position and that the ET's findings were sufficient to support the conclusion that Mr Lutz was employed by MCG for the purposes of **CAWR**.

As regards the **AWR** claims, the EAT found that the ET was entitled to conclude that Mr Lutz's contract was to perform work or services personally within the meaning of regulation 3(1)(b)(ii) **AWR** and no material error of law was disclosed by its reasoning. In so far as a right to substitute existed, the ET was correct in taking into account fetters arising from airline safety regulatory requirements; there was no distinction of principle between these circumstances and the regulatory requirements in **Uber** and in **Sejpal v Rodericks Dental Ltd** [2022] EAT 91, [2022] ICR 1339.

The EAT also determined that the ET had not erred in concluding that the supply of Mr Lutz pursuant to a five year fixed term was to work "temporarily" within the meaning of regulation 3(1)(a) **AWR**. There was no basis for departing from the earlier EAT authorities that had considered the meaning of this concept (**Moran v Ideal Cleaning Services Ltd** [2014] ICR 442; **Brooknight Guarding Limited v Matei** (EAT/0309/17/LA); and **Angard Staffing Solutions Ltd v Kocur** [2020] ICR 1541), which, in any event, were correctly decided. Accordingly, the ET was correct in deciding that the supply of Mr Lutz was terminable on a condition being satisfied, rather than an open-ended indefinite arrangement and, as such, was temporary. In this instance, the ET's findings of fact indicated that the agreed five year term represented the basis of the supply in practice; and the nature of any successive assignment was to be considered at the point of that supply.

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. This is the unanimous judgment of all three members of the appeal tribunal, to which the lay members have made a valuable contribution.

2. Ryanair DAC and Storm Global Limited both appeal the decision of the London (East) Employment Tribunal ("the ET"), Employment Judge Housego ("the EJ") sent to the parties on 5 April 2022 following a preliminary hearing to determine the status of the claimant, Mr Lutz.

3. Mr Lutz was one of a pool of "contracted pilots" who flew Ryanair's aircraft. The EJ indicated that there were many pilots in the same position as him (paragraph 1, ET's Reasons). Mr Lutz was supplied to Ryanair by a company known as MCG Aviation Limited. That company is now called Storm Global Limited. To avoid any confusion, in this judgment we will refer to the parties as follows: "Ryanair", "MCG" and Mr Lutz. This corresponds to the way they are referred to in the ET's decision.

4. Mr Lutz has brought two claims:

   i) Against MCG alone for unpaid accrued annual leave pursuant to regulation 3 of the **Civil Aviation (Working Time) Regulations 2004** SI 2004/ 756 ("**CAWR**") on the basis that he was a "crew member" within the meaning of regulation 3; and/or under the parent **Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation** (the "**AVD**" and the "**Aviation Agreement**" respectively); and/or pursuant to Articles 31 and 47 of the **Charter of Fundamental Rights of the EU** (the "**EU Charter**");

   ii) Against both MCG and Ryanair for the same working and employment conditions as would have applied if he had been directly recruited by Ryanair, particularly in relation to pay and/or annual leave, pursuant to the **Agency Worker Regulations 2010** SI

2010/93 ("**AWR**") on the basis that he was an "agency worker" within the meaning of regulation 3(1).

5. As set out in the ET's Judgment, the EJ determined:

i) Mr Lutz was a "crew member" employed by MCG within the meaning of regulation 3, **CAWR**;

ii) Mr Lutz was a "crew member" on board civil aircraft employed by MCG within the meaning of the **Aviation Agreement**;

iii) Mr Lutz was a "worker" for the purposes of Article 31 of the **EU Charter**;

iv) Mr Lutz was an "agency worker" within the meaning of regulation 3(1) **AWR**, as he was supplied by MCG to work temporarily for and under the supervision and direction of Ryanair and he had a contract with MCG to perform work or services personally;

v) Mr Lutz was not excluded from this definition of "agency worker" by regulation 3(2) **AWR** as he did not carry on a profession or business in which either MCG or Ryanair was a client or customer within the meaning of that regulation.

6. Ryanair appeal against the fourth of these conclusions, taking issue with the findings that Mr Lutz was supplied to work "temporarily" (Grounds 1 and 2 of their grounds of appeal) and that his contract with MCG was to perform work or services personally (Grounds 3 – 5).

7. In their original grounds of appeal, MCG also appealed against the finding that Mr Lutz was supplied to Ryanair to work "temporarily" (Ground 3); the ET's failure to find that the regulation 4(2) **AWR** exception applied, so that it was not a "temporary work agency" (Ground 2); and the finding that he was employed by MCG as a "crew member" for the purposes of **CAWR** (Ground 1). MCG did not appeal the conclusion that Mr Lutz was a worker for the purposes of the **EU Charter**, nor the finding that he had a contract with MCG to perform work and services personally within the meaning of regulation 3(1)(b) **AWR**. During the hearing, after the latter was raised in the course of oral submissions, MCG sought permission to amend its grounds of appeal to include a challenge to the

finding that Mr Lutz's contract with MCG was to perform work or services personally ("the amendment application"). There was no challenge to the ET's finding that Mr Lutz did not carry out a profession or business in which MCG and/or Ryanair was a client or customer.

8. Draft amended grounds of appeal were supplied by Mr Brown KC at the start of Day 2 of the hearing. The other parties raised no objection to the amendment application. As it relied upon the same arguments as those already raised in respect of MCG's Crew Member Ground, we accept that no prejudice would be occasioned to Mr Lutz by the grant of the amendment. We heard the substantive submission on a provisional basis, indicating that we would address the amendment application in our reserved decision. Given the circumstances, we grant MCG permission to amend their grounds of appeal in the terms sought.

9. At this stage we will briefly identify each of the grounds of appeal, in order to give an indication of the issues that we need to decide. (For further detail see paragraphs 121 – 130 below.) We begin with the one ground relating to the **CAWR** claim and then set out the **AWR** grounds (in the order in which we will consider these grounds in due course):

i) The ET erred in finding that Mr Lutz was a "crew member" who was "employed by" MCG. Although there was a contract between Mr Lutz and MCG, the ET failed to address the nature of the contract and specifically whether there was a sufficient contractual nexus between these parties, particularly given it was a tripartite contract with Mr Lutz's service company. Furthermore, the ET erred in finding that the relationship was "employment" in the EU law sense identified in **Allonby v Accrington and Rossendale College** [2004] ICR 1328 ("**Allonby**") and **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657 ("**Uber**") ("MCG's Crew Member Ground");

ii) The ET erred in failing to conclude that MCG was not a "temporary work agency" for the purposes of the **AWR** as a result of the exception in regulation 4(2) ("MCG's TWA Ground");

iii) The ET misdirected itself, misapplied the law and/or arrived at a perverse conclusion in finding that Mr Lutz had no right of substitution and/or that, if there was a right of substitution, it did not negative the conclusion that his contract with MCG was to "perform work or services personally" within the meaning of regulation 3(1)(b)(ii) **AWR** ("Ryanair's Substitution Grounds");

iv) Mr Lutz was not an "agency worker" within the meaning of regulation 3(1)(b)(ii) **AWR** for the same reasons as those relied upon under MCG's Crew Member Ground ("MCG's Additional Ground");

v) The ET misdirected itself in law and/or misapplied the law in concluding that Mr Lutz was "temporarily" supplied to Ryanair within the meaning of regulation 3(1)(a) **AWR**, in particular in circumstances where the ET found that on the expiry of the five years fixed term, contracted pilots were always issued with a new five year contract; and these pilots did not provide cover, but were rostered on the same basis as Ryanair's permanently employed pilots. Alternatively, the existing case law on the meaning of "temporarily" in this provision (**Moran v Ideal Cleaning Services Ltd** [2014] ICR 442 ("**Moran**"); **Brooknight Guarding Limited v Matei** (EAT/0309/17/LA) ("**Brooknight**"); and **Angard Staffing Solutions Ltd v Kocur** [2020] ICR 1541 ("**Angard**")) fails to properly interpret the meaning of "temporarily" ("Ryanair's Temporarily Grounds"); and

vi) The ET erred in finding that Mr Lutz was "temporarily" supplied to Ryanair within the meaning of regulation 3(1)(a) **AWR**, and in particular the ET erred in finding that the five year contract between Mr Lutz and MCG was determinative of the nature of the supply arrangements between MCG and Ryanair ("MCG's Temporarily Ground").

10. Mr Lutz resists the appeal and relies upon the ET's Reasons and also upon his additional grounds for resisting the appeal dated 3 February 2023.

11. By order sealed on 21 December 2022 the appeal was set down for a full hearing by HHJ

Martyn Barklem, with a time estimate of two days. We are grateful to all counsel for their very clear and helpful written and oral submissions, which were of considerable assistance to us.

12. The structure of this judgment is as follows:

(i) The ET's decision: paragraphs 13 – 63;

(ii) The legal framework: paragraphs 64 – 120;

(iii) The grounds of appeal: paragraphs 121 – 130;

(iv) General observations: paragraphs 131- 134;

(v) MCG's Crew Member Ground and Additional Ground: paragraphs 135 – 159;

(vi) MCG's TWA Ground: paragraphs 160 – 163;

(vii) Ryanair's Substitution Grounds: Ground 3: paragraphs 164 – 169;

(viii) Ryanair's Substitution Grounds: Grounds 4 and 5: paragraphs 170 – 191;

(ix) Ryanair's and MCG's Temporarily Grounds: paragraphs 192 – 212;

(x) Outcome: paragraph 213.

The ET's decision

13. There was an agreed list of issues before the EJ. Paragraphs 1 - 5 concerned the status issues that were to be determined at the preliminary hearing. The hearing took place over four days, 29 March – 1 April 2022 and the reserved judgment was promulgated very shortly afterwards on 5 April 2022. As described in paragraph 5 of the Reasons, the ET heard oral evidence from the claimant and from his witness, Ben Morais, a Ryanair captain and Chairman of the Company Council for the British Airline Pilots Association. The ET also heard from Diarmiud Rogers, Head of Flight Operations Base Management, and Grace Crawford, Base Manager, on behalf of Ryanair; and from Robert Scanlon of Scanlon Associates Ltd ("Scanlons") and Elizabeth Hoefsmit, Managing Director of MCG, on behalf of MCG.

Findings of fact

14. As we return to below, the structure of the ET's Reasons is not easy to follow at times. In addition, the findings of fact do not always appear chronologically. For present purposes we have set out the EJ's factual findings in a broadly chronological order. After setting out these findings, we turn to the EJ's reasoning and conclusions. We leave some key findings of fact, as opposed to narrative, to that subsequent section.

15. Ryanair had a five-year agreement with MCG (then called Storm McGinley Support Services Ltd) dated 28 December 2011. Although the agreement was expressed to be for a term of five years, the parties continued to operate under it at all material times thereafter. MCG was referred to therein as "the Supplier" to Ryanair. The written agreement said that MCG agreed to procure Service Companies for Ryanair, who would have "Company Representatives", who would constitute a pool of pilots that MCG would provide to support seasonal fluctuations in Ryanair's level of need for pilots (paragraph 27). The EJ observed that the arrangement was initially envisaged to provide a series of temporary assignments with gaps in between, but by the time that Mr Lutz became involved, the rostering of all pilots, contracted and employed, was done on the same basis (paragraph 27). In due course, "*contracted pilots became even more integrated when Ryanair agreed that for seniority purposes all pilots were in one pool*" (paragraph 27, ET's Reasons).

16. On 10 August 2017, Mr Lutz applied to Ryanair in response to an advertisement for pilots (paragraphs 28 and 29, ET's Reasons). He passed a preliminary assessment in September 2017 (paragraphs 28, 29 and 30). Mr Lutz's first contact with MCG was when Mr Loadwick of MCG emailed him to inform him that he had passed the assessment and that he was to be offered a place as a contracted pilot (paragraphs 32 – 34). In due course Mr Lutz was notified of the training course he was expected to attend. The training was to fly a particular type of aircraft; in Mr Lutz's case, a Boeing 737. This was decided by Ryanair and he had no say in the matter (paragraphs 36 – 37). As a contracted pilot he had to pay for the training (paragraph 37).

17. A subsequent email from Mr Loadwick sent on 2 October 2017 informed Mr Lutz that he needed to set up an Irish limited company. He was given the names of three accountancy firms who could do this for him and who would then manage things. He was told to pick one of the three and he picked ContractingPlus Ltd (paragraph 39). ContractingPlus set Mr Lutz up with a limited company, Sudeley Ltd (paragraph 40) and arranged for him to sign an agreement dated 19 October 2017, which was expressed to be made between MCG (described as "the Contractor"), Sudeley and Mr Lutz, (described as "the Company Representative") (paragraph 51).

18. The EJ summarised the position thus far as follows:

> "43. Accordingly, Mr Lutz having applied to Ryanair and been told that he was successful, was told that he was to be engaged through another company, MGC...and that he would have to set up an Irish limited company (which had doubtless never occurred to him to do), through an Irish adviser picked for him by MGC [sic], when he had no connection with Ireland...He was told that he was to be processed through MGC [sic], which is an English company based in Watford (to whose offices Mr Lutz had never been).
> 44. There is no action taken by Mr Lutz that was not directed by Ryanair and all were non-negotiable. He wanted to be employed by Ryanair. That was what he had applied for. Throughout his time as a contracted pilot with Ryanair he pressed Ryanair to become an employed pilot."

19. The EJ noted that it was common ground that it would not have been possible for Mr Lutz to fly with another commercial airline at the same time as flying planes for Ryanair, given regulatory requirements relating to pilot flight limitations (paragraph 45).

20. In the event, Mr Lutz did not work for Ryanair under the agreement arranged by ContractingPlus. On 28 February 2018 ContractingPlus informed Mr Lutz by email that they were in a formal collaboration with Scanlons (paragraph 67). On 14 March 2018 Scanlons emailed Mr Lutz telling him that "*we installed you into a new company*", the details of which were provided. The new company, based in Dublin, was called Dishford Port Limited ("Dishford") (paragraph 68).

21. The EJ found that Mr Lutz did not know that this was happening; that he had given no instructions for this change; that he was not a director, shareholder or employee of Dishford at the time and he never became one; that the agreement was signed on behalf of Dishford by someone he had never heard of; and *"[f]ar from being a self-employed businessman running his own company, he was being moved from pillar to post as Ryanair dictated*" (paragraph 69).

22. Mr Lutz signed a document headed "Terms and Conditions of Contract for Services as a Co-pilot" (paragraph 71; the "Dishford agreement"). The document was dated 1 February 2018 and was signed by Mr Lutz on 26 April 2018. Aside from the name changes, the document was "*in more or less identical terms*" to the earlier ContractingPlus agreement and Mr Lutz had no input into its contents (paragraphs 49 and 50).

23. The first page of the contract said that it was made between MCG as the "Contractor", Dishford, the "Service Company" and Mr Lutz as the "Company Representative". The document stated that the Service Company was engaged as an independent consultant by the Contractor to provide the services of the Company Representative on the terms and conditions set out therein. The EJ observed that this was "*not...an accurate assessment of the situation*" (paragraph 72).

24. The definitions section of the document said that Mr Lutz was the pilot engaged by the Service Company for the purposes of it complying with the contract; that Ryanair was the "Hirer"; and that "Services" meant the carrying out of the duties of a pilot of a 737-800 aircraft.

25. Clause 1(j) stated that the Service Company would make the Company Representative (or an agreed acceptable and qualified nominated substitute) available to perform the Work on behalf of the Contractor for the Hirer from the Commencement Date. The Commencement Date was specified in Schedule 1 as 27 November 2017 and the term was said to be a period of five years. The Work was described as: "*The Company Representative shall perform the duties as pilot as required by the Hirer in accordance with Hirer's Manuals and Safety Management System, as may be amended at the Hirer's sole discretion from time to time*". The Schedule also set out the payments that would be made to the Service Company in respect of the Company Representative's work by the Contractor in pursuance of clause 2 of the document. A "Minimum Hours Commitment" at paragraph 3 of the Schedule said:

> "A. Where the Company Representative has been providing services under this agreement for at least 12 months, and is available to work, then the Contractor will provide a minimum of 450 flying hours per annum during the period from 1st April to 31st March, or a pro-rate of same to allow for periods of unavailability over the course of the flight year...."

26. A substitution clause was set out at clause 1(b) as follows:

> "The Service Company can provide a substitute notified to the hirer four weeks in advance of the work. Such substitute shall perform the Work provided that the substitute shall have the necessary experience and qualification to perform the Work and is acceptable to the Contractor and the Hirer. Should the Service Company not provide an acceptable substitute they are obliged to carry out the work as scheduled."

27. Clause 1(l) provided that the Service Company would ensure that the Company Representative (or an acceptable substitute) was available to perform the Work from the Commencement Date from March through October and three of the remaining four months each calendar year of the contract; and that the Contractor would also consider requests for up to three months free of flying, training or ground standby duties from November to February annually and for 10 "ad hoc" days free of duties during the year April to March.

28. Clause 1(d) recorded that the Service Company was engaged as an independent consultant by the Contractor to provide the services of the Company Representative and that neither the Service Company nor the Company Representative would be deemed to be an officer, agent, employee or servant of the Hirer or the Contractor. Clause 1(o) said it was agreed that the Service Company and the Company Representatives were not employees of the Hirer or the Contractor.

29. On 6 July 2018 Ryanair informed Mr Lutz that he would be based at Stansted with effect from 1 August 2018. He could express a preference as to his work base, but the decision was taken by Ryanair (paragraph 73). The rostering arrangements were undertaken by Ryanair and when Mr Lutz worked he wore a Ryanair uniform (paragraph 10).

30. At paragraph 66 of his findings, the EJ said that his assessment of the relationship between the parties was that it involved "*a complete imbalance of power*". He continued: "*Mr Lutz was very keen on working with Ryanair and invested a lot of time and money to be able to do so. He was not able to alter one single thing about the arrangements...It was take it or leave it*."

31. The EJ also noted that, save for one letter about failing to attend a duty and a mention in the dismissal letter, Dishford "*did not feature at all*" in any correspondence from MCG relating to Mr Lutz's duties (paragraph 58). The EJ cited specifically the 12 December 2018 letter from MCG to Mr

Lutz about a missed shift, which described him as a service provider to MCG and did not refer to Dishford. He was told: "*Jason you need to be clear on your contractual obligations. If you are rostered for a duty you must report on time, unless you are not fit to operate*" (paragraph 61).

32. The EJ described the shift patterns and the opportunity for swapping shifts as follows:

> "74. ...Shift patterns were rostered in detail for four weeks ahead and in outline 8 weeks ahead. The shift pattern for all pilots was regular...It was possible for pilots to predict when they would be working, months in advance. Pilots were expected to work their shifts, for obvious reasons. If they wanted to change a shift they had to find someone to swap with. Then one or the other would use an intranet system called Crew Dock to request the change. Most times there would be no issue, but sometimes there might be operational reasons (these were not specified) or a potential issue with flight hours limitation (or because swapping shifts from one calendar year might interfere with flight hours recording). Shifts could only be swoped [sic] with other Ryanair pilots. These might be employed or contract pilots – that was irrelevant..."

33. When Mr Lutz asked if he could do all early shifts and a colleague do the late shifts, MCG's acceptance was communicated to him in personal terms ("*you have no contractual right to any particular rostering pattern*"). The EJ observed that the: "'*service company' of a group of pilots is a fiction in practice*" (paragraph 75; emphasis added).

34. In terms of what happened at the end of the five year term, the EJ found:

> "77. At the end of a contracted pilots [sic] five-year term [they] are usually – almost invariably – offered a new five year term. No-one is simply allowed to roll on past the five-year point.
>
> 78. In fact, very few pilots stay on as contracted pilots past the five-year mark...Captain Morais giving evidence that it was really quite unusual. I prefer the evidence of Captain Morais. He knows his membership, it was clear...
>
> 79. The reasons very few stay on as contracted pilots are various. Like Mr Lutz they seek security and a pension. They obtain other roles in the industry. It is very much a five-year process of "*up or out*", in practice."

35. There was slightly different phraseology used subsequently at paragraph 115, where the EJ said that at the expiry of five years "*any contracted pilot who remained was, without exception, issued with a new five-year contract*".

36. In December 2018 Mr Lutz objected to a change in his shifts and became agitated when he called the Ryanair rostering team to complain. Ryanair asked MCG to take action. A disciplinary hearing was held by MCG at which a Ryanair representative attended. The EJ observed that Ryanair wanted Mr Lutz to cease flying for them and MCG was never going to do other than Ryanair asked

in this respect. MCG wrote a letter dated 2 January 2020 terminating the arrangement; the letter was "*all about Mr Lutz and not about*" Dishford, save for a reference at the end to it being impossible for the commercial relationship between Dishford and MCG to continue; "*in reality Ryanair was dismissing Mr Lutz*" (paragraph 85).

The ET's analysis and conclusions

37. Before the section headed "Facts found" (which spanned paragraphs 25 – 94), the EJ set out a "Summary of conclusions" at paragraphs 10 – 21. It is necessary to reproduce the majority of this text. Some of it was amplified at a later stage of the judgment, some of it was not.

The CAWR claim: the EJ's summary of his conclusions

38. As regards the status question in respect of the **CAWR** claim, the EJ said that the first two issues identified in the List of Issues (whether he was within regulation 3 **CAWR** and whether he was within the **Aviation Agreement**) must be resolved in Mr Lutz's favour (paragraph 11). In that paragraph he did not make specific reference to issue 3 on the list (whether Mr Lutz was a worker within the meaning of Article 31, **EU Charter)**, but in his summary that followed he concluded that Mr Lutz was a worker. No issue is taken with the conclusion expressed in paragraph 10 that Mr Lutz was part of the flight crew. The rest of this part of the summary was as follows:

> "12. Mr Lutz was employed in the operations of Ryanair. "Employed" is often used, especially in Employment Tribunals, as shorthand for "employed under a contract of employment". The word itself is wider – Counsel in this case employed different arguments, for example. While the word "employee" means someone employed under an employment contract, the word "employed" is not so precise. He was certainly employed as a resource by Ryanair. He had a contract with MCG. That his work was not under a contract of employment with them (or anyone else) does not change that fact.
>
> 13. That is not enough, as CAWR refers to someone "employed under his contract". It does not say what "his contract" means. There must be a contract about the services being provided for the Regulations to apply. If it had to be a contract of employment Parliament would have said so. Mr Lutz had a contract which governed his work with Ryanair. Ryanair called Mr Lutz a contracted pilot – the very name confirms that he had a contract.
>
> 14. More fundamentally it would be extraordinary if the CAWR did not apply to Mr Lutz. This is a health and safety regulation. The need for such regulation for those flying passenger aeroplanes is obvious. It cannot be that a salaried pilot is subject to the CAWR but his/her

> contracted counterpart is not. On occasions a plane is flown by a contracted pilot and a contracted company pilot. It is impossible to contemplate that it is a proper construction of CAWR that these regulations, put in place to make sure that the pilots who fly passenger planes are not impaired by being overtired, apply to neither pilot of a passenger jet carrying hundreds of people. The Regulations apply to Mr Lutz. This issue is resolved in Mr Lutz's favour.
> 15. Mr Lutz worked while flying planes for Ryanair. No one could possibly think otherwise. He was an integral part of the crew of the planes he flew. He was a worker. How, it may be asked, could someone flying a passenger jet aeroplane as his one and only job, and being paid for it, not be working (and so be a worker)? Mr Brown says that he has only to show that Mr Lutz was not a worker for MCG, and so he does not need to, and declined to, suggest who Mr Lutz worked for, saying only that it was not MCG. Of course, it is easier for Mr Brown to succeed if instead of simply saying that it was not MGC it must have been another. The only other actors are Dishport Ltd [sic], Ryanair, or Mr Lutz was working for himself."

The AWR claim: the EJ's summary of his conclusions

39. The EJ then set out a summary of his conclusions in respect of the **AWR** claim. Firstly he explained that he rejected the proposition that Mr Lutz was in business on his own account, so that Ryanair was a customer of his limited company; *"[t]his is patently not so. Mr Lutz was not a self-employed pilot with Ryanair as a customer. Ryanair had no dealings at all with the service company, day to day about individual pilots. MCG had almost no communication with Mr Lutz after he started flying for Ryanair before being dismissed*" (paragraph 16). Paragraphs 20 and 101 were to like effect. We have already explained that this finding is not challenged in the appeals.

40. Secondly, the EJ observed that there could be "*no conclusion other than that MCG supplied Mr Lutz to Ryanair*" (paragraph 16). There is no challenge to this conclusion.

41. The EJ then summarised his conclusion that the supply was on a temporary basis:

> "17. To be an agency worker, the work has to be temporary. I conclude that the circumstances meet that definition (set out below). In essence it was a fixed term of five years. Mr Lutz pressed for employment. That would be permanent: he was temporary. As Mr Ford pointed out, a five-year posting is, in EU law, temporary. I reject the argument that temporary means, only, short term, such as cover for another. The word temporary stems, of course, from the Latin for time. This was a time limited appointment. That in some cases it was replaced by another time limited appointment (as occurred) does not make it cease to be a time limited appointment. And so Mr Lutz was an agency worker for MGC."

42. Next the EJ summarised his finding that Mr Lutz had a contract with MCG to supply his services personally:

> "18. To decide that [Mr Lutz was an agency worker] it is necessary to find that he had a contract to supply his services personally (and not through Dishford Port Ltd). I find that he did have a contract to supply services personally. He could, and on occasion did, ask to change his rostered flights, but that is just to change the days on which he would work. The regulatory

> framework is such that the pilot named on the roster must fly the plane. When Mr Lutz asked to change shifts Ryanair could say yes, or no, and did say no sometimes. Mr Lutz most certainly could not send someone along to fly a plane he was rostered to fly. The "*right to substitute another*" did not exist. The documentation purporting to show otherwise is a sham, with no purpose other than to try to defeat an assertion that he was a worker. Insofar as there may have been a right of substitution, it is so narrow that it cannot be considered "unfettered".
>
> 19. The high level of regulation in the airline industry is the reason why it had to be so fettered, but is not logical to say that the reason it is fettered means that it is not fettered: fettered it was."

43. The finding that the documentation purporting to show a right to substitute was a sham was plainly a reference to clause 1(b) (paragraph 26 above). Mr Bowers KC accepted that this was the case and that he could not challenge the sham finding.

The "Law applied to facts" section

44. The material provisions of the **CAWR**, the **Aviation Agreement**, the **EU Charter** and the **AWR** were set out at paragraphs 4 – 7 of the Reasons. After the "Facts found" section, the EJ addressed his analysis and conclusions under the heading "Law applied to facts". In the opening paragraph he said that much law had been cited to him and he had taken account of it all but that: *"[N]o judge should write a judgment long enough to deal with all the detailed points put before me*" (paragraph 87).

45. The first sub-section of the "Law applied to facts" section appeared under the sub-heading "Worker". This suggests that the EJ was there considering Mr Lutz's status under the **EU Charter**, although aspects of the reasoning that followed also had a wider relevance to issues that were before him in respect of the **CAWR** and **AWR**. He cited from paragraph 76 of Lord Leggatt JSC's judgment in **Uber** (see our paragraph 70 below); and then observed that it was "*important not to let the consideration start with and be guided by the documentation*" (paragraphs 88 – 89). He then referred to the bargaining power being "*all with Ryanair. The reality is as I have described above. The interposition of the limited company serves no purpose for Mr Lutz*" (paragraph 89). The reference here to "*the reality*" must be taken to include his finding in paragraph 66 that there was a complete imbalance of power and his finding in paragraph 75 that the service company was "*a fiction*". These

were findings of fact against which no appeal could be mounted.

46. The EJ's reasoning then continued:

> "90. It is inconceivable that Mr Lutz, when wearing his Ryanair uniform and flying a Ryanair plane filled with Ryanair passengers, and being paid to do so to earn his income was not a worker.
>
> 91. As Ryanair and MCG set up the situation, and as MCG paid Mr Lutz via a service company they set up, he was a worker for them. He was not working for his service company, for the reasons given. No one says he was a worker for Ryanair – that is not the claim.
>
> 92. I am fortified in my conclusions by careful reading of *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514, from which I do not cite extracts. On the facts set out in this judgment, and applying the principles in the cases cited to me, this was a contract for personal service."

47. The EJ observed at paragraph 93 that the purported exclusion clause in the written agreement (paragraph 28 above) did not assist Ryanair or MCG. That proposition is not disputed.

48. Under his next sub-heading "CAWR", the EJ noted that the point he had made about the reality of the situation also applied to the CAWR issue (paragraph 94). He then said that he did not "*expand upon the reasons given at the head of his judgment*", save for observing that there was no opt out provision in **CAWR** (paragraph 94). Turning to the **AVD**, he said that Mr Lutz plainly fell within its terms and that he did not amplify his reasoning because it was a secondary position in terms of the claim (paragraph 95).

49. Under the sub-heading "Purposive interpretation" the EJ observed that the purpose of the **CAWR** and the **AWR** was "*plainly indicative of their application to the situation of Mr Lutz*" (paragraph 97).

50. The next section of the Reasons appeared under the sub-heading "Substitution – unfettered – personal service" and commenced as follows:

> "98. Much time was spent in considering the issue of substitution. My view, expressed in the hearing, is that swapping shifts through the rostering desk is not substitution at all, but a rearrangement of the day and time when personal service is required.
>
> 99. But if that is not so, it is plain that the right to substitute is not unfettered. For the Respondents it has to be an unfettered right in order that the service company is the provider and the individual excluded from worker status. First (as set out above) only another Ryanair pilot could take the shift. Second, permission had to be sought, and was refused on occasion, for operation reasons, for concerns about reaching pilot flight limits in any given time frame, or because they were in different calendar years. I do not see how the facts found in this case can lead to an outcome different to that in Pimlico Plumbers Ltd & Anor v Smith [2018] UKSC 29..."

51. The EJ then set out in full paragraphs 28 – 33 of Lord Wilson JSC's judgment in **Pimlico Plumbers v Smith** [2018] UKSC 29, [2018] ICR 1511 ("**Pimlico Plumbers**"). After each of these paragraphs the EJ added his own observation in square brackets. In paragraph 28 of his judgment, Lord Wilson JSC had made the point that the claimant's opportunity to substitute was not limited to particular reasons such as sickness. The EJ commented: "*Similarly there is no limit on the reasons why Mr Lutz might want to change shifts*". In paragraph 29 Lord Wilson JSC had referred to the tribunal's finding in that case that the arrangements did not negative the claimant's obligation of personal performance, the EJ said: "*Which is what I find this to be*". Viewed in context, "*this*" referred to the finding in **Pimlico Plumbers** that the arrangements were "*a means of work distribution between the operatives and akin to the swapping of shifts within a workforce*". Paragraphs 30 - 31 of Lord Wilson JSC's judgment addressed a submission based on **Halawi v WDFG UK Ltd (t/a World Duty Free)** [2014] EWCA 1387, [2015] IRLR 50 ("**Halawi**"). Lord Wilson JSC noted that there was no contractual right of substitution in that case and that World Duty Free had an "*understandable lack of interest in personal performance on her [the claimant's] part...Its interest was only that someone sufficiently presentable and competent to have secured its approval to work in an outlet*". The EJ commented: "*Ryanair would not (could not) accept this*".

52. We set out paragraph 32 of **Pimlico Plumbers** at paragraph 106 below. After citing this passage, the EJ said: "*As here – Ryanair wants a pool of pilots, to undertake personal service for them*". In other words, the EJ was indicating that he found that the dominant feature of the contract was personal performance. Mr Bowers KC accepted that this was the conclusion the EJ arrived at and that it was not a conclusion that he was able to challenge on appeal.

53. In paragraph 33 of his judgment, Lord Wilson JSC explained that the terms of the claimant's contract were clearly directed to performance by him personally. He noted the vocative terms of the document ("*your skills*", "*you will be competent to perform the work which you agree to carry out*" and so forth), indicating that the words "*clearly show that these requirements are addressed to Mr*

Smith personally". The EJ observed at the end of this paragraph: "*As, I find, here*".

54. We set out paragraph 34 of **Pimlico Plumbers** at our paragraph 106 below. After doing so, the EJ said: "*The substitute had to come from the employed or contracted pilots*".

55. The EJ concluded this part of his judgment with the following:

> "100. Any one of these reasons is sufficient to find, as I do, that there was no unfettered right to substitute another, and that this was a contract for personal service. As I put in the summary, the regulated environment and Ryanair's wish to have only pilots it had approved fly its planes explains why any right to substitute was fettered. That there is very good reason for fettering a right to substitute does not mean that it is unfettered."

56. Paragraphs 102 – 121 of the Reasons appeared under the sub-heading "Temporary work". It is necessary to set out paragraphs 102 – 104 in full. Mr Bowers KC and Mr Brown KC submit that the references to **Allonby** in the first two of these paragraphs indicate that the EJ was confused in his consideration of the regulation 3(1)(a) AWR issue. It is common ground that **Allonby** does not in fact have any bearing on whether Mr Lutz was "temporarily" supplied to Ryanair. Mr Ford KC submits that the substance of paragraphs 102 – 104 should be read as relating to the question of whether Mr Lutz was a "crew member" employed by MCG for the purposes of the **CAWR** claim and a "worker" for the purposes of the **EU Charter**, in particular the contents of paragraph 104 and the conclusion expressed therein that Mr Lutz's independence was "*entirely notional*" and that he was "*plainly a worker*".

57. The EJ said:

> "102. As to temporary work, I have taken careful account of the submissions founded on Allonby v Accrington & Rossendale College (ECJ) C-256-01, reported at [2004] ICR1328 et seq. The central point is that it matters not if there is a permanent contract with the agency, what matters is whether the assignments under it were temporary, or permanent. (A permanent contract to have a series of temporary work assignments does not convert those temporary assignments into one permanent contract.) Here, the contract with MCG was for one period of five years. There is no such divergence. The issue is whether the five years is temporary, or permanent.
>
> 103. I note also paragraph 45: Mr Lutz is in the position of Ms Allonby, who operated under the direction and responsibility of the college where she taught, very much as before she was relocated to an agency, which organised her activities for them, and the college remained liable to students for the quality of her teaching. In Mr Lutz's case, if one substitutes comparison with an employed pilot for comparison with Ms Allonby's past, and substitutes airline, pilot and passenger for college, lecturer and student, there is no difference of substance. The description in Ms Allonby's case that "… the legal arrangements instituted … may also be used to evade the consequences of employment protection legislation … [and] the facts … strongly point in that direction" applies fully to Mr Lutz.

> 104. The limitation on teachers' freedom to choose their timetable or the place and content of their work must be considered, and the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker … if his independence is merely notional. Mr Lutz's independence was entirely notional:
>
> > 104.1. Ryanair had told him he would be a contract pilot not an employee.
> > 104.2. They had told him when and where he would train to fly a plane they selected for him.
> > 104.3. They told him he had to pick one of three firms of accountants.
> > 104.4. They decided that he had to move accountants (ContractPlus to Scanlons).
> > 104.5. Those firms told him he had to have an Irish company. They picked it for him.
> > 104.6. MGC [sic] had the agreement with Mr Lutz signed on behalf of Dishford Port Ltd by someone of whom Mr Lutz had never heard.
> > 104.7. They dictated the terms of the documents he signed.
> > 104.8. Ryanair told him what his base was to be.
> > 104.9. His duties were rostered by them, and he had to do them unless he could find someone to agree to swap with him.
> > 104.10. If he found someone to swap with him they could and did refuse to change his shift.
> > 104.11. He was subject to discipline if he did not attend a shift.
> > 104.12. He was paid the amount they decided and he could not negotiate otherwise.
> > 104.13. He had to apply for holiday.
> > 104.14. He had to wear their uniform.
> >
> > There is nothing independent at all in this arrangement. Mr Lutz was plainly a worker, not a self-employed businessman."

58. The paragraphs that followed were undoubtedly concerned with the temporal nature of the supply. They began with the following:

> "105. I do not find Mr Bower's [sic] submission for Ryanair that an essence of temporary work is flexibility to reconcile working and private life. That may be one reason why work is regarded as temporary work, but that is not to mean that to be temporary work must be flexible.
>
> 106. Mr Lutz's case also depends on the work being "*temporary*". My conclusion summarised, above, is that it was temporary within the meaning of the AWR.
>
> 107. I observe that the fallacy in the arguments of Mr Bowers and of Mr Brown appears to me to be that a temporary assignment does not become permanent by reason of the passage of time spent in it, if it does not end. A person has no job security (which is the whole point of the AWR) if that person has a series of short-term appointments which run one after another without a gap, because they never know when that run of short-term appointments will end."

59. The EJ went on to refer to the three EAT cases that have considered the meaning of "temporarily" in this context: **Moran**, **Brooknight** and **Angard**. At paragraph 112 of his Reasons he referred to paragraphs 41 and 42 of the judgment of Singh J (as he then was) in **Moran** (our paragraph 113 below), noting that the legislative wording meant "*not permanent*" and that there was "*no requirement that an agency worker has to work for a short time to qualify*". He considered this to be "*entirely supportive of Mr Ford KC's argument...Employed pilots were employed permanently,*

contract pilots were not, even if some of them stay a long time. As they are not permanent, they can only be temporary: this is an either/or binary decision" (paragraph 113, ET's Reasons).

60. The EJ then referred to the judgment of HHJ Eady QC (as she then was) in **Brooknight,** noting that she had said that if the work was indefinite then it: "*would not be temporary. It follows that if it was not indefinite (that is if it was for a fixed term) it would be temporary*" (paragraph 114).

61. In light of submissions made to us it is necessary to set out paragraph 115 in full:

> "115. Here, there was a fixed five-year term. It was not indefinite. (It also contained a three month notice period.) At the expiry of five years any contracted pilot who remained was, without exception, issued with a new five-year contract. A succession of fixed terms is not indefinite – by definition it is definite in time. It is, definitively, for five years. It does not have to be short term. It is not permanent. Therefore it is temporary work."

62. Returning to **Brooknight** and citing from paragraph 25 of the judgment, the EJ said that this made clear that the essence of the task was to focus on the reality of the situation. He said: "*The reality is that Mr Lutz was directed by Ryanair to MCG, in order for them to place him with them as a temporary worker. While Mr Brooknight was working as cover for others...there is no requirement that temporary workers have to be working as cover for others: that is just one type of temporary worker*".

63. Next the EJ referred to HHJ Auerbach's judgment in **Angard**, including passages from paragraphs 46 and 64 (our paragraphs 117 - 119 below). He observed that applying the guidance in **Angard** to the facts he had found, could only lead to a result in Mr Lutz's favour; and the fact that the claimant in **Angard** had undergone short term assignments was not a significant difference to Mr Lutz's case "*because temporary does not mean short term*".

The legal framework

The approach of the appeal tribunal

64. It is well-established that the decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation and without being hypercritical: Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR

1016 at paragraph 57, citing Mummery LJ's judgment in **Brent v Fuller** [2011] EWCA Civ 267, [2011] ICR 806 at 813.

65. We also bear in mind Singh LJ's apposite observation in **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, [2022] IRLR 159 (paragraph 42): "*...what is required is adequacy, not perfection. An ET is not sitting an examination*." The question for us is whether the ET "*identified the correct issue, applied the relevant principles to that issue and whether it reached findings it was entitled to reach on the material before it*": **Stuart Delivery v Augustine** [2021] EWCA Civ 1514, [2022] ICR 511 ("**Stuart Delivery**") (paragraph 34). The established position regarding appeals from a determination of the claimant's status was summarised by Lord Leggatt JSC in **Uber** as follows:

> "118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in an extended sense) or an independent contractor is to be regarded as a question of fact to be determinised by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be impugned if it is shown that the tribunal could not reasonably have reached the conclusion under appeal…"

Written contracts and status

66. In **Autoclenz Ltd v Belcher** [2011] ICR 1157 ("**Autoclenz**"), the Supreme Court drew a distinction between the principles applicable to ordinary contracts, particular commercial contracts, and those to be applied to employment contracts. In **Uber**, Lord Leggatt JSC summarised the key aspects of Lord Clarke JSC's judgment in **Autoclenz** as follows:

> "62. ...he drew the conclusion (at para 28) that, in the employment context, it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a 'sham' in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating...Rather, the court or tribunal should consider what was actually agreed between the parties, "either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded" see para 32, again agreeing with observations of Aikens LJ in the Court of Appeal.
>
> 63. After quoting (at para 34) a further statement of Aikens LJ contrasting the circumstances in which contracts relating to work or services are often concluded with 'those in which commercial contracts between parties of equal bargaining power are agreed', Lord Clarke JSC ended his discussion of the law (at para 35) by saying:
>
> > 'So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstance of the case, of which the written agreement is only a part. This may be described as a purposive

approach to the problem. If so, I am content with that description.'" (Emphasis added.)

67. In **Uber** the Supreme Court was concerned with the status of private hire vehicle drivers who provided transport to passengers in London through a smartphone app operated by Uber BV and its London subsidiary. The drivers claimed that they were "workers" within the meaning of section 230(3)(b) **Employment Rights Act 1996** ("**ERA 1996**") (commonly referred to as "limb (b) workers"), section 54(3)(b) **National Minimum Wage Act 1998** and regulation 2(1) **Working Time Regulations 1998**. Uber BV's standard written agreements with the drivers stated that they were independent contractors performing services under contracts made with passengers through the company as their booking agent. The tribunal held that the drivers were workers. A central submission in support of the Uber companies' appeal was that the parties' written documentation could not be departed from if there was no inconsistency between the terms of the written agreement and how the relationship operated in reality (paragraph 65). Lord Leggatt JSC gave the leading speech, with which the other members of the court agreed.

68. At paragraph 68 of his judgment, Lord Leggatt JSC observed that in **Autoclenz** Lord Clarke JSC had not "*fully spelt out...the theoretical justification*" for departing from the ordinary principles of contractual construction in relation to employment contracts. Over the paragraphs that followed, Lord Leggatt JSC identified and explained that rationale:

> "69. Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation not contractual interpretation.
>
> 70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose...
>
> *The purpose of protecting workers*
>
> 71. The general purpose of the employment legislation invoked by the claimants in the *Autoclenz* case...and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from or subjected to other forms of unfair treatment...The purpose of including such individuals [limb (b) workers] within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal

Tribunal in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para 17(4):

> 'the policy behind the inclusion of limb (b)...can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu...The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers; the purpose of the Regulations is to extend protection to works who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's length and independent position to be treated as being able to look after themselves in the relevant respects.'" (Emphasis added.)

69. Lord Leggatt JSC then explained the EU law understanding of the concept of a worker, drawing a parallel with the distinction he had just discussed. We set out the material parts of that passage when we come on to consider the meaning of "employed" in regulation 2 **CAWR**.

70. From paragraph 76 Lord Leggatt JSC addressed the significance of the written contract. He said:

> "76.... it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The effect of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act 1998 were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.
>
> 77. This point can be illustrated by the facts of this case... to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.
>
> 78. This is, as I see it, the relevance of the emphasis placed in the *Autoclenz* case...on the relative bargaining powers of the parties in the employment context...
>
> .....
>
> 85. ...This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore...any terms which purport to clarify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of

> employment or other worker's contract are of no effect and must be disregarded.
>
> .....
>
> 87. In determining whether an individual is a 'worker', there can, as Baroness Hale DPSC said in the *Bates van Winkelhof* case [2014] ICR 730, para 39, 'be no substitute for applying the words of the statute to the facts of the individual case.'
>
> 88. This approach is also consistent with the case law of the CJEU which, as noted at para 72 above, treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship...The wording of the contractual documents, while relevant, is not conclusive." (Emphasis added.)

CAWR

The provisions

71. Regulation 2 **CAWR** states that they apply to "*persons employed to act as crew members on board a civil aircraft flying for the purposes of public transport*".

72. Regulation 3 includes the following definitions:

> " 'crew member' means a person employed to act as a member of the cabin crew or flight crew on board a civil aircraft by an undertaking established in the United Kingdom;
>
> 'employer' means an undertaking established in the United Kingdom by whom a crew member is (or where the employment has ceased, was) employed;
>
> 'employment' in relation to a crew member, means employment under his contact and 'employed' shall be constructed accordingly;
>
> 'flight crew' means a person employed to act as a pilot, flight navigator, flight engineer of flight radiotelephony operator on board a civil aircraft"

73. It is agreed that Mr Lutz acted as a pilot on board a civil aircraft. The question is whether he was "employed" by MCG (an undertaking established in the United Kingdom) to do so. "Employed" is not defined further in the regulations.

74. Regulation 4 provides that a "crew member" is entitled to paid annual leave of at least four weeks (or a proportion of that figure in their first year of employment).

75. The **CAWR** were enacted as a result of the **AVD**, which required Member States to bring into force the laws and regulations necessary to comply with it by 1 December 2003 (Article 3). The purpose of the Directive was to implement the **Aviation Agreement** (Article 1). Member States could introduce more favourable provisions than those laid down in the **AVD** (Article 2.1).

76. The background is referred to in the recitals. Civil aviation was one of the sectors that was

excluded when the Council of Europe adopted **Directive 93/104/EC on Working Time** (Recital (2)). In view of the highly integrated nature of the civil aviation sector and the conditions of competition prevailing, "*the objective of this Directive to protect workers' health and safety*" could not be sufficiently achieved by the Member States without Community action (Recital (11)). Recital (12) notes that the Directive leaves Member States to define the terms used in the **Aviation Agreement** which are not specifically defined within it, provided that such definitions are compatible with it.

77. The material parts of the **Aviation Agreement** are as follows:

> "*Clause 1*
> 1. The Agreement applies to the working time of mobile staff in civil aviation.
>
> *Clause 2*
> 1. 'Working time' means any period during which the worker is working at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.
>
> 2. 'Mobile staff in civil aviation' means crew members on board a civil aircraft, employed by an undertaking established in a Member State.
>
> *Clause 3*
> 1. Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."

78. Accordingly, the concept of a "crew member" in the **CAWR** reflects the concept of "mobile staff in civil aviation" in the **Aviation Agreement**. Mr Brown KC did not take issue with Mr Ford KC's submission that section 5 of the **European Union (Withdrawal) Act 2018** ("**EUWA 2018**") preserved the **Marleasing** duty (**Marleasing SA v La Comercial Internacional de Alimentación SA** [1990] ECR 1-4135) to interpret **CAWR** so as to achieve the result of the **AVD**, as **CAWR** was passed before "IP completion day" (31 December 2020).

The meaning of "employed"

79. Counsel informed us that there is no case law on the meaning of "crew member" in the **CAWR** or "mobile staff in civil aviation" in the **AVD**. Although this was not entirely clear from their written arguments, in oral submissions both Mr Brown KC and Mr Ford KC were agreed that "employed" in this context was to be understood by reference to the EU law concept of an "employment relationship"

between an employer and a worker. Furthermore, Mr Brown KC confirmed during oral submissions that he accepted that Mr Lutz would establish the necessary status for **CAWR** purposes if he was a worker, as the concept is understood in EU law.

80. As Mr Ford KC submitted, given the genesis of the **AVD** and the **CAWR**, it is appropriate to adopt the approach applied, for example, to the **Working Time Directive 2003/88** (the successor to **Directive 93/104/EC**, referred to in the **AVD**) that it is to be given a broad scope and exceptions to that scope interpreted restrictively, see for example: **Fenoll v Centre d'Aide par le Travail "La Jouvene"** [2016] IRLR 67 (paragraph 20).

81. Article 31 **EU Charter** provides:

> "Fair and just working conditions
> 1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
> 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

82. Mr Brown KC did not dispute the summary of the position contained in Mr Ford KC's skeleton argument, that: (i) the right to paid annual leave is directly and horizontally effective against private parties: **Max Plank v Shimizu** [2019] 1 CMLR 35; and (ii) because Mr Lutz's claim was brought before "IP completion day" (31 December 2020), the effect of section 5(4) and paragraph 39, Schedule 8 **EUWA 2018** is that he can continue to rely on the direct effect of the **EU Charter**.

83. As we noted earlier, in **Uber** Lord Leggatt JSC referred to the EU concepts of a "worker" and an "employment relationship", summarising their characteristics at paragraph 72. As both Mr Brown KC and Mr Ford KC relied upon this passage as supporting their submissions, we set it out in full. We resolve the competing submissions when we address MCG's Crew Member Ground. The context for paragraph 72 is apparent from our earlier citation from Lord Leggatt JSC's judgment; immediately prior to this he had referred to the judgment of Mr Recorder Underhill QC (as he then was) in **Byrne Bros (Formwork) Ltd v Baird** [2002] ICR 667 identifying the reason for the inclusion of limb (b) workers within domestic statutory protection (our paragraph 68 above). Lord Leggatt JSC then continued:

> "72. ...and a similar explanation for the concept of a worker has been given in EU law. Although there is no single definition of the term "worker", which appears in a number of different contexts in the Treaties and EU legislation, there has been a degree of convergence in the approach adopted. In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR1328; [2004] ECRI-873 the European Court of Justice held, at para 67, that in the Treaty provision which guarantees male and female workers equal pay for equal work (at that time, article 141 of the EC Treaty): 'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. The court added (at para 68) that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not in a relationship of subordination with the person who receives the services". In the EU case law which is specifically concerned with the meaning of the term "worker" in the Working Time Directive, the essential feature of the relationship between employer and worker is identified in the same terms as in para 67 of the *Allonby* judgment: *Union syndicale Solidaires Isère v Premier ministre* (Case C-428/09) [2010] ECRI-9961, para 28; *Fenoll v Centre d'Aide par le Travail "La Jouvene"* (Case C-316/13) [2016] IRLR67, para 29; and *Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* (Case C-147/17) [2019] ICR211, para 41. As stated by the Court of Justice of the European Union (CJEU) in the latter case, 'It follows that an employment relationship'—i.e. between employer and worker—'implies the existence of a hierarchical relationship between the worker and his employer' (para 42).
>
> 73. In *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004 the Supreme Court followed this approach...Lord Clarke JSC, with whom the other members of the court agreed, identified (at para 34) the essential questions underlying the distinction between workers and independent contractors outside the scope of the legislation as being:
>
> > 'whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.'" (Emphasis added.)

84. We were told by counsel that **Allonby** is the only case in which the Court of Justice of the European Communities ("CJEU") has considered a tripartite arrangement involving an agency supplying the alleged worker to an end user. It is therefore necessary to consider this case in some detail. The circumstances were succinctly summarised by Mr Advocate General Geelhoed in paragraph 1 of his opinion as follows:

> "A college of further education terminates the employment of its part-time, mostly female, lecturers. It subsequently buys in their services again through the intermediary of an agency with which those lectures are registered as self-employed persons. Through these arrangements the college seeks to achieve savings in operating costs. For the lecturers concerned the arrangements entail a diminution in emoluments in relation to those which they received under the original employment relationship with the college. In that context the following questions have arisen: whether the female lecturers may compare themselves, in regard to their remuneration, including the conditions governing access to a pension scheme, with a male lecturer remaining in the service of the college, and whether the lecturers concerned may demand admission to the pension scheme where conditions restricting access to that scheme to lecturers who are employees of the college results in an objectively unjustified difference in treatment."

85. We are only concerned with the court's analysis in respect of the second of these questions. By this stage, a settlement had been arrived at with the college (paragraph 56). The arrangements in

respect of the agency, ELS, were summarised at paragraph 10 of the Advocate General's opinion. After the applicant's employment with the college was terminated, she could offer her lecturing services by registering with ELS, who held a database of available lecturers upon which colleges could call. The lecturers' pay was a proportion of the fee agreed between ELS and the college.

86. In answering the second question, the court considered whether the requirement of being employed under a contract of employment as a precondition of the teachers' pension scheme, set up by state legislation, should be disapplied. The court explained that to answer this question it was first necessary to interpret the concept of "worker" with the meaning of the equal pay provision, then article 141(1) of the EC Treaty. In this regard the court stated:

(i) There is no single definition of "worker" in Community law (paragraph 63);

(ii) The term "worker" was not defined in the EC Treaty and it was therefore necessary to apply the generally recognised principle of interpretation, having regard to its context and the objectives of the Treaty (paragraph 64);

(iii) "Worker" used in article 141(1) could not be defined by reference to the legislation of the Member States (paragraph 66);

(iv) Article 141 constitutes specific expression of the fundamental principle of equality for men and women and cannot be interpreted restrictively (paragraphs 65 – 66);

(v) For the purposes of this provision "*there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another in return for which he receives remuneration*" (paragraph 67);

(v) Pursuant to article 141(2) "pay" means the ordinary basic or minimum wage or salary and other considerations which the worker receives directly or indirectly in respect of his employment, from his employer. It was clear from this definition that the authors of the Treaty did not intend that a "worker" would include independent providers of services who "*are not in a relationship of subordination with the person who receives the services*" (paragraph 68);

(vi) The question whether such a relationship exists must be answered having regard to all the factors and circumstances of the particular case by which the relationship between the parties is characterised (paragraph 69); and

(vii) "*Provided that a person is a worker within the meaning of article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of the article*" (paragraph 70).

87. The court's judgment then continued:

> "71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article." (Emphasis added.)

88. Whilst we will address the significance of **Allonby** when we consider MCG's Crew Member Ground, we note in passing that the phrase used by the CJEU in this paragraph is reflected in paragraph 104 of the EJ's judgment where he found that Mr Lutz's independence was "*entirely notional*" (our paragraph 57 above).

89. The CJEU then referred to the circumstances of the lecturers who were "*vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college*", saying it was necessary to consider the extent of any limitation on their freedom to choose their timetable and the place and content of their work; and the "*fact that no obligation is imposed on them to accept an assignment is of no consequence in that context*" (paragraph 72).

90. The court answered the first part of the second question as follows:

> "79. ... in the absence of any objective justification, the requirement, imposed by state legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme is not applicable where it is shown that, among teachers who are workers within the meaning of article 141(1) EC and fulfil all the other conditions for membership, a much lower percentage of women than of men is able to fulfil that condition. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional." (Emphasis added.)

91. On the one hand, Mr Brown KC pointed out that the CJEU did not decide that the lecturers were workers – an assessment that was for the referring court – it only accepted the possibility that they were. On the other hand, Mr Ford KC emphasised that the fact that the lecturers performed

services for the college, who exercised control in respect of those services, did not preclude them from being workers of the agency, who paid their remuneration for the provision of these services.

AWR

The provisions

92. Pursuant to regulation 5 **AWR**, an "agency worker" is entitled to the same "basic working and employment conditions" (as defined in regulation 5(2)) as he or she would be entitled to for doing the same job had they been recruited by the hirer. For present purposes it is unnecessary to detail exceptions to that entitlement or the qualifying period. A "hirer" is defined in regulation 2 as "*a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied to work temporarily for and under the supervision and direction of that person*".

93. Regulations 3 and 4 address who is an "agency worker" and regulation 4 a "temporary work agency" as follows (with emphasis added):

> "3. **The meaning of agency worker**
>
> (1) In these Regulations "agency worker" means an individual who—
>
> (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
>
> (b) has a contract with the temporary work agency which is—
>
> (i) a contract of employment with the agency, or
>
> (ii) any other contract with the agency to perform work or services personally.
>
> (2) But an individual is not an agency worker if—
>
> (a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or
>
> (b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

(3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if—

(a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and

(b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.

(4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency, shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.

(5) An individual is not prevented from being an agency worker—

(a) because the temporary work agency supplies the individual through one or more intermediaries;

(b) because one or more intermediaries supply that individual;

(c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;

(d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or

(e) because the individual is employed by or otherwise has a contract with one or more intermediaries.

(6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).

4 **The meaning of temporary work agency**

(1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—

(a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or

(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.

(2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers."

94. Regulation 3(1)(b)(ii) **AWR** was amended by the **Agency Workers (Amendment) Regulations 2011 SI 2011/1941**. The original wording of this provision was: "*any other contract to*

perform work and services personally for the agency" (emphasis added). The Explanatory Memorandum to the 2011 Regulations said that their general purpose was to "*correct drafting errors in*" the **AWR**. The amendment to regulation 3(1)(b)(ii) was made "*to avoid any unintended narrow construction of part of the wording for the definition of 'agency worker'*".

95. The **AWR** implemented the **AWD**. The scope of the Directive is set out in Article 1.1:

> "This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction."

96. The aim of the **AWD** is addressed in Article 2:

> "The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, whilst taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively in the creation of jobs and to the development of flexible forms of working."

97. Article 3.1 contains a number of definitions. As relevant, this includes:

> "(b) 'temporary work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;
>
> (c) 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;
>
> (d) 'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
>
> (e) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;"

98. Article 3.2 includes the following:

> "Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary work agency."

99. Article 5 contains the core principle of the **AWD**, namely that the "*basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*".

100. Recital (1) **AWD** states that it is designed to ensure "*full compliance with Article 31 of the Charter*". Recital (5) refers to the fact that the signatories to the earlier framework agreement on fixed-term work indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include such work in the Directive on fixed-term work.

101. The recitals illuminate the objectives of the **AWD**. Recital (9) indicates that the European Commission considered that "*new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability*" and refers to the European Council's endorsement of "*the common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers seize the opportunity offered for globalisation*". Recital (11) refers to temporary agency work meeting undertakings' "*need for flexibility*" and the need of employees to "*reconcile their working and private lives*", and contributing to "*job creation and to participation and integration in the labour market*". Recital (13) notes that **Council Directive 91/383/EEC** of 25 June 1991 establishes the safety and health provisions applicable to temporary agency workers. Recital (14) states that the "*basic working and employment conditions applicable to temporary agency workers should be at least those that would apply to such workers if they were recruited by the user undertaking to occupy the same job*".

102. We will return to the significance of recital (15) when we address the Temporarily Grounds. It states:

> "Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable to the user undertaking."

A contract to perform work or services personally

103. It is accepted (and clear from the ET's findings) that Mr Lutz had a contract with MCG. In relation to regulation 3(1)(b)(ii) the question is whether the ET erred in finding that this was a contract

to "*perform work or services personally*". For these purposes, it is accepted that the focus is on the work or services performed for the hirer (here, Ryanair). The amendment to regulation 3(1)(b)(ii) (paragraph 94 above) confirms that this is the position.

104. The question of personal performance has received extensive consideration in the domestic authorities, primarily, although not exclusively, in relation to contracts of service and limb (b) workers under section 230(3) **ERA 1996**. This body of authority is of direct assistance, along with the EU law case law and cases decided in respect of the **Equality Act 2010** ("**EQA 2010**"). In **Pimlico Plumbers**, Lord Wilson JSC observed that the distinction in terminology between the definition of "employment" in section 83(2)(a) **EQA 2010**, (which is, in turn, based on EU law), and the definition of a limb (b) worker in section 230(3) **ERA 1996** was a "*distinction...held to be one without a difference*" (paragraph 14). He referred to the CJEU's description of a "worker" in what is now article 157(1) of the **Treaty on the Functioning of the European Union** and the Supreme Court's application of the concepts of direction and subordination identified in **Allonby** to its interpretation of a "*contract personally to do...work*" in the predecessor to section 83(2)(a) **EQA 2010** in **Jivraj v Hashwani** [2011] UKSC 40, [2011] ICR 1004 (para 14). Lord Wilson JSC also indicated that the domestic authorities examining the obligation of personal performance in relation to contracts of services "*can legitimately be mined for guidance*" as to the requirements of personal performance (paragraph 20). In that regard he referred to Mackenna J's classic exposition of the ingredients of a contract of service in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497 at 515: "*Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be...*".

105. The issues before the Supreme Court in **Pimlico Plumbers** concerned whether the tribunal had erred in finding that the claimant was a limb (b) worker. He had carried out plumbing work for the appellant company for a number of years. The tribunal found that he had a limited facility to

substitute, in that if he had quoted for work, but another more lucrative job subsequently arose, he could arrange for the original work to be done by another Pimlico operative (paragraph 25). The tribunal concluded that this was a means of work distribution between the operatives, akin to the swapping of shifts within a workforce, which did not negative the claimant's obligation of personal performance (paragraphs 25 and 29). Lord Wilson JSC assumed, without deciding, that the opportunity to arrange for another Pimlico operative to cover the work was the product of a contractual right (paragraph 25). The central question for the court on this aspect of the case was whether this right to substitute another operative was inconsistent with an obligation of personal performance (paragraph 28).

106. For present purposes, the key parts of Lord Wilson's judgment are as follows:

> "32. *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145 concerned the right to distribute that company's Sunday newspaper around Sheffield. Mrs Gunning's father had held the distribution but, on his retirement, the company refused to renew it in her favour. She alleged that its refusal was discriminatory and to that end she needed to establish that her father's contract had required personal performance of it on his part. In allowing the company's appeal the Court of Appeal held at pp 151 and 156, that Mrs Gunning had failed to show that the dominant purpose of her father's contract had been that he should perform it personally; instead the purpose had been that the company's Sunday newspapers should be efficiently distributed around Sheffield. But in *James v Redcats (Brands) Ltd* [2007] ICR 1006, paras 65-67, Elias J, as President of the Employment Appeal Tribunal convincingly suggested that an inquiry into the dominant purpose of a contract had its difficulties; that, even when a company was insistent on personal performance, its dominant *purpose* in entering into the contract was probably to advance its business; and that the better search might be for the dominant *feature* of the contract. In the *Hashwani* case...Lord Clarke of Stone-cum-Ebony JSC, at paras 37-39, referred to the suggestions of Elias J in the *James* case with approval but stressed that, although it might be relevant to identify the dominant feature of a contract, it could not be the sole test. The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smtih's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.
>
> .....
>
> 34. The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitution had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker – unless the status of Pimlico by virtue of the contract was that of a client or customer of his." (Emphasis added by underlining.)

107. In **Stuart Delivery** the Court of Appeal addressed the much cited passage from paragraph 84

of the judgment of Sir Terence Etherton MR at the Court of Appeal stage of the Pimlico litigation: **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51, [2017] ICR 657. After reviewing the case law relating to the obligation of personal performance, Sir Terence Etherton MR had said:

> "...I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

108. In **Stuart Delivery**, Lewis LJ (with whom the other members of the court agreed) addressed this passage, emphasising that it was important to bear in mind that:

> "40. ...First, the actual issue for a tribunal is whether a claimant is under an obligation personally to perform the work or provide the services. Secondly, Sir Terence Etherton ME was seeking to summarise the principles to be drawn from existing case law; he was not seeking to establish a rigid classification or lay down strict rules as to what did or did not amount to personal performance nor when a right of substitution did or did not negate the existence of an obligation to do work personally. Thirdly, on analysis of para 84, there are only two principles summarised. The first is that if the claimant has what is described as an unfettered right to substitute another person to do the work or perform the services that is inconsistent with an undertaking to do so personally. The second principle is that a conditional right 'may or may not be inconsistent' with personal performance depending on the precise contractual arrangements and, in particular 'the nature and degree of any fetter on a right of substitution'. The third to fifth points made in para 84 are provided, expressly, 'by way of example' of situations where a contractual right on the part of the claimant may be one indicator that the obligation is or is not one to do the work or perform the services personally...
>
> 41. Against that background, it would be wrong to seek to treat those five points as setting out definitive categories of what situations, do or do not, involve a right for a claimant to substitute another person to carry out the work sufficient to displace any contractual obligation to perform the work personally..." (Emphasis added.)

109. In a similar vein, Lewis LJ emphasised at paragraph 55 that the real issue for the tribunal had been whether the nature and degree of any fetter on the right or ability of the claimant courier to appoint a substitute was inconsistent with any obligation of personal performance (paragraph 55). He noted that the tribunal considered that the system set up by the respondent was intended to ensure that the claimant did carry out the work and that he did turn up for the delivery slots he had signed up to do. Further, that the tribunal had been entitled to conclude that the limited right of the claimant to

notify other couriers via an app that he wished to release the slot for their take up was not a sufficient right of substitution to remove the obligation to perform his work personally (paragraphs 56 and 58). Accordingly, the appeal in that case failed.

110. Mr Bowers KC relied upon paragraph 57 of **Stuart Delivery** (which we return to when we consider Ryanair's Substitution Grounds) where Lewis LJ indicated *"[f]or completeness*" that the court's conclusion was consistent with the Supreme Court's decision in **Pimlico Plumbers**. He referred to Lord Wilson JSC's discussion of the substitution arrangements in that case and the fact that in the present case as well any substitute had to come from the ranks of the company's couriers, observing:

> "...That is not to say that there is necessarily a 'rule' that the right, or ability, to appoint substitutes only from the respondent's pool of operatives is always inconsistent with an obligation of personal performance. It is simply to recognise that the conclusion reached by the employment tribunal here is one that, in broadly similar circumstances, the courts have accepted is a conclusion that employment tribunals can reasonably reach."

Supplied to work "temporarily"

111. The word "temporarily" is not defined in the **AWR** or **AWD**. As we have already noted, three Employment Appeal Tribunal cases ("EAT"), **Moran**, **Brooknight** and **Angard** have considered when an agency worker is supplied by a temporary work agency to work "temporarily" for the hirer. Given the grounds of appeal advanced by Mr Bowers KC and Mr Brown KC, it is necessary to describe these three decisions in some detail.

112. The claimants in **Moran** were employed by the first respondent, who was an agency providing contract cleaning services. The documentation described their place of work as the premises of the second respondent, with whom they were placed for a number of years. The first claimant worked at the second respondent's offices from November 1987 until late 2012. The tribunal found that the claimants were not agency workers within the meaning of regulation 3(1) **AWR** as they had been placed to work on a permanent basis for the second respondent and had not been supplied "temporarily". The EAT dismissed the appeal, finding that the EJ had applied the correct approach.

113. After considering the **AWR** and the **AWD**, including the legislative history of the Directive,

Singh J (as he then was) explained the concept of "temporarily" as follows:

> "41. ...The word 'temporarily' can mean something that is not permanent or it can mean something that is short-term, fleeting etc. The two are not necessarily the same: for example, a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration, whereas a temporary contact will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project.
>
> .....
>
> 50. In my judgment the concept of 'temporary' in the 2010 Regulations and Directive 2008/104 means not permanent." (Emphasis added.)

114. The claimant in **Brooknight** was employed by the respondent security company on a 'zero-hours' contract for some 21 months. His contract included a flexibility clause enabling the respondent to assign him to different sites as required. The claimant was generally, although not exclusively, supplied to Mitie Security Ltd, to provide security services at one of its London sites. The tribunal rejected the respondent's submission that the claimant had worked permanently for Mitie, noting that under the terms of his contract he could be placed at any of the sites for which the respondent had contracts, as it considered appropriate. The tribunal found that the claimant was being used as a "*cover security guard*" and concluded that he was an agency worker for the purposes of regulation 3(1) **AWR**. The respondent appealed, reiterating its position that the claimant was a permanent worker for the end user Mitie. We note that: (i) the claimant's contract with the respondent was open-ended and not for a fixed period; (ii) evaluation of the contention that the claimant was in fact working permanently for Mitie inevitably involved consideration of what had happened in reality, as this was not the arrangement described in the respondent's documentation issued to the claimant.

115. Between paragraphs 20 – 22 HHJ Eady QC (as she then was) cited the earlier **Moran** decision and the distinction identified by Singh J. There is nothing in her judgment that suggests any unease with that distinction; to the contrary, she went on to follow and apply it. In what is the key part of her judgment for present purposes, HHJ Eady QC said:

> "25. On the whole, I agree with the Respondent that the terms of the contract will not necessarily be determinative of agency worker status. The focus under reg 3(1)(a) is on the

> purpose and nature of the work for which the worker is supplied: is it temporary or permanent? The underlying contract – as will necessarily have been found to exist for the purposes of reg 3(1)(b) – may state that there is no obligation to provide or undertake work, and may allow that the worker can be moved from site to site but if, in fact, that individual is supplied to carry out work on an indefinite basis (the continuing cleaning jobs in issue in **Moran**, for example), it would not be temporary in nature. Although in **Murray v Foyle Meats Ltd** [[1999] IRLR 562,] [2000] 1 AC 51, the House of Lords was concerned with the statutory definition of redundancy ("work of a particular kind", see s 139 of the **Employment Rights Act 1996**), I agree that the same kind of factual analysis is required for present purposes. That said, the terms of the contract may not be irrelevant: the contract provides evidence as to what the parties understood and intended in terms of the work that the worker might carry out, and the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract.
>
> 26. In the present case, the ET was entitled to have regard to the complete flexibility afforded to the Respondent under the zero-hour contracts it offered to its security guards. It was relevant, in particular, that the contract gave it the flexibility to move individuals from job to job. Of course, if that power was never exercised, its relevance might be diminished, but the ET was entitled to have regard to the fact that it had been utilised in the Claimant's case. More particularly, however, the ET accepted the Claimant's evidence that, as a matter of practice, he worked as "cover": this was not, on the ET's findings, a case where the Claimant was assigned on an indefinite basis to carry out particular ongoing work; he was, rather, used as a 'cover security guard' (as the ET described his position).
>
> 27. That finding was, in my judgment, fatal to the Respondent's case. The ET found that the Claimant was being supplied to work to provide specific cover for Mitie, as and when required, and would thus be temporarily working for the fixed duration of the absence being covered. That finding by the ET was, moreover, not solely derived from the Claimant's evidence but was also corroborated by Mitie's characterisation of the services supplied by the Respondent as being on a "*required only basis*" and usually "*connected to additional cover that our customer base has requested*". Although the ET had regard to the zero-hours nature of the Claimant's contract and the relatively short duration of his employment with the Respondent, I do not read its conclusion as being dependent upon those matters. They were relevant parts of the background, but I cannot see that the ET saw these as determinative of the question of the Claimant's status. It is also right that the ET had regard to the contractual flexibility clause allowing the Respondent to assign the Claimant to different sites and customers as it saw fit but again I do not read its Judgment as stating that was determinative, rather, it found it was a relevant factor because it reflected the reality of the relationship in practice. These were all, therefore, matters to which the ET was entitled to have regard but the most significant part of its reasoning was based upon its finding as to the nature of the work done for clients such as Mitie and, specifically, as to the nature of the Claimant's role as a cover security guard.
>
> 28. ...The ET's findings of fact were specific to the Claimant's case. The work done by others employed by agencies such as the Respondent might be found to fall on the **Moran** side of the line – work properly described as of an indefinite or permanent nature – each case will necessary be fact sensitive. The question for me, on this appeal, is whether the ET applied the correct test in reaching its conclusion in this case. Having considered the objections taken, I am satisfied that it did and I therefore dismiss the appeal." (Emphasis added.)

116. The claimants in the third case, **Angard**, were employed by the first respondent agency which supplied staff exclusively to the second respondent, Royal Mail. The terms of employment for the lead claimant stated that he was seconded to the second respondent during any agreed period of engagement to carry out sorting mail and parcels as requested by the latter. The terms of his

employment with Angard were open-ended. On average he worked two shifts a week, but there was no guarantee of work. The tribunal found that the agency staff were used to cover Royal Mail's unforeseeable fluctuations in levels of work and that this was in the nature of temporary work. It found that the lead claimant's work was time-limited, rather than open-ended; each engagement being for a finite period of time, so that he was an agency worker within the meaning of regulation 3 **AWR**.

117. At paragraphs 11 – 15 of his judgment HHJ Auerbach cited the principles identified in **Moran** and in **Brooknight**. He then applied the distinction they had identified. He explained the tribunal's task as follows:

> "44. ...Regulation 3(1)(a)...requires the tribunal...to make a finding of fact about the basis on which the worker is supplied to work for the hirer, and then to decide whether the supply to work on that factual basis amounts to a supply to work temporarily, applying the guidance in the authorities.
>
> 45. The natural meaning of the words of regulation 3(1)(a) is that it directs attention to the basis on which the worker is actually placed, designated, directed or sent to go and do work for a hirer, on one or more specific occasions. In common parlance, it refers to the basis on which the worker is to work pursuant to a particular assignment or engagement on a particular occasion. That is the natural meaning of 'supplied' and particularly of being 'supplied...to *work* temporarily' (my italics) for and under the supervision of the hirer.
>
> 46. The focus of the Tribunal's enquiry should therefore be on the basis on which the worker is supplied to work, on each such occasion. In particular, it should ascertain, applying the guidance in *Moran*..., whether that supply is made on the basis that, having embarked on the assignment, the worker will continue to work for the hirer indefinitely (whether full or part-time), or on the basis that the work will cease at the end of a fixed period, on the completion of a particular task, or on the occurrence of some other event. If it is the latter, it may be followed by another supply to work for the same hirer temporarily, and then another, and another." (Emphasis added.)

118. HHJ Auerbach went on to address: *"[w]here, or how, do the terms of the contract between the agency and the worker fit into this exercise?*", noting that this "*forms part of the evidential and factual matrix upon which the tribunal may draw*" (paragraph 48). He elaborated on this point as follows:

> "50. Against that background, the communication or documentation between the agency and the worker, issued or created when the relationship is formed, should, ordinarily, be considered by the tribunal as they may well cast significant evidential light on the basis on which the subsequent supply or supplies are made; but they will not necessarily or automatically do so, nor be determinative in that regard.
>
> 51. First, to repeat, the issue for the tribunal is not whether the overarching relationship between the agency and the worker is temporary or permanent. Terms or provisions, which go to that question, will therefore not, as such, provide the answer to the question with which the

> tribunal is concerned. Secondly, what light the initial documentation casts on the question with which the tribunal is concerned...will be fact sensitive, and vary from cases to case.
>
> 52. In some cases the documentation created when the relationship is first formed will contain all the particulars of the supply or supplies which are contemplated, including sufficient terms to enable the tribunal to identify, from that documentation alone, whether that supply or supplies will, if carried out accordingly, be to work temporarily or not. In other cases, however, the terms of that documentation will provide the framework or umbrella under which a supply or supplies are to be made, but with the details of each supply to be made...being left to be determined in future communications.
>
> 54. ...Further, even if, in the given case, the initial documentation indicates that an assignment or assignments, of a particular type was intended or contemplated, it is always possible that the parties may later agree to do something different. Ultimately, the question for the tribunal is what was, in fact, the basis on which the given supply or supplies were made; and the contractual documentation and communications between the agency and worker...should all be considered for the evidential contribution that they make to its overall determination of that factual question.
>
> .....
>
> 58. Further, I suspect that, in most cases, the parties will start as they mean to go on. There will either be a single supply, whether to work temporarily or not, or a number of supplies, all to work temporarily."

119. The EAT dismissed the appeal: the tribunal had accurately summarised the legal principles; rightly noted that it was not the agency worker's contract with the agency that had to be temporary; and correctly found that on each occasion the supply of the lead claimant was time limited (paragraphs 63 – 65). Further, the tribunal had had regard to the fact that each supply was pursuant to the open-ended contract of employment, but had properly asked itself whether the supply was temporary having regard to the evidence of what was contemplated and the evidence of what had actually happened (paragraph 68).

120. Drawing the strands together, so far as is material for present purposes, the correct approach can be summarised as follows:

(i) The question is whether the individual was supplied by the agency to work "temporarily" under the supervision and direction of the hirer: regulation 3(1)(a);

(ii) A temporary supply is one that is terminable upon some other condition being satisfied, for example, the expiry of a fixed period or the completion of a particular event. It does not mean short term. The contrast is with an indefinite supply, which is to say one that is open-ended in duration: **Moran** paragraph 41; **Brooknight** paragraphs 25 and 28; and

Angard paragraph 46;

(iii) Accordingly, the distinction between a temporary supply and an indefinite one is binary; there is no intermediate form of supply for these purposes;

(iv) The focus is on the purpose and nature of the work for which the worker was supplied; to determine whether it is temporary or permanent: **Brooknight** paragraph 25;

(v) In this regard, the focus is upon the basis on which the individual was supplied to the hirer, rather than on the overarching arrangement between the agency and the hirer: **Angard** paragraphs 46, 50 and 51;

(vi) A finding of fact will need to be made about the basis on which the worker is supplied to work for the hirer and then a decision made as to whether that basis amounts to a supply to work temporarily: **Angard** paragraphs 44 - 45;

(vii) The terms of the contract between the individual and the agency will not necessarily be determinative of this question, but may provide evidence as to what the parties intended: **Brooknight** paragraph 25, **Angard** paragraphs 48 and 50;

(viii) In some cases the documentation created when the relationship between the individual and the agency was formed will contain all the particulars of the supply which are contemplated, including sufficient terms to enable the tribunal to identify the basis of the supply from the documentation alone. Whereas in other cases, the documents may simply provide the framework for the supply or may not reflect what was done in practice. The question is what was in fact the basis in practice on which the supply was made: **Brooknight**, paragraphs 25 – 26 and **Angard** 52 – 54; and

(ix) If the individual is supplied to the hirer on successive occasions, then the question is the basis upon which s/he was supplied on each such occasion. There can be a number of temporary supplies of a worker to the same hirer: **Angard** paragraphs 46, 64 and 66.

The grounds of appeal

MCG's Crew Member Ground

121. MCG contend that the ET erred in finding that Mr Lutz was "employed" by MCG for the purposes of the definition of "crew member" in regulation 2 **CAWR**. A number of points are advanced in the grounds of appeal, which we summarise as follows:

(i) the EJ formed the view that it would be "extraordinary" if Mr Lutz were not within the protection of the **CAWR** and then reasoned backwards from this to his conclusion that he was "employed" by MCG;

(ii) the ET failed to address the nature of the contract between Mr Lutz and MCG. The operative obligations under the written agreement were owed by Dishford and Mr Lutz owed "*virtually no direct contractual obligations to MCG at all*". The ET erred in finding that there was a sufficient contractual nexus between Mr Lutz and MCG, when he should have concluded, as in **Hewlett Packard Ltd v O'Murphy** [2002] IRLR 7 ("**Hewlett Packard**"), that "*the relevant contractual obligations were lacking*";

(iii) In any event, the EJ's factual findings did not permit the conclusion that Mr Lutz was "employed" by MCG, rather his findings emphasised Ryanair's control over Mr Lutz;

(iv) The ET failed to apply paragraph 72 of **Uber** in not asking how and to what extent Mr Lutz "*for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration*" by reference to MCG. MCG does not use any pilot services at all. The EJ failed to distinguish between the respondents, as shown by his conclusion at paragraph 91 that Mr Lutz was working for "them". Furthermore, he failed to analyse the factors that led him to this conclusion.

MCG's TWA Ground

122. The ET erred in failing to address whether MCG's services were outside of the scope of the

AWR in light of the exception in regulation 4(2), despite receiving written and oral argument on this point.

Ryanair's Substitution Grounds

123. Ground 3 focuses on the EJ's conclusion in paragraph 98 of his Reasons that there was no right of substitution. In so far as this ground challenged the finding that clause 1(b) was a sham, Mr Bowers KC indicated at the hearing that it was not pursued. He maintained that the EJ's conclusion that there was no right of substitution was perverse, given: (i) it was not in dispute that contracted pilots could swap duties with other pilots in respect of both rostered duties and periods when they were not rostered to work ("off periods"); (ii) the latter form of swap would entail the contracted pilot not flying his or her rostered duty *at all* and would not entail deferring the duty to a later date; and (iii) therefore, contrary to the ET's finding, swapping did not merely entail the rearrangement of the time when personal service was required.

124. Ground 4 contends that the ET misdirected itself and/or misapplied the law in concluding that Mr Lutz had a contract with MCG to perform work or service "personally". Three contentions are advanced. Firstly, that the EJ proceeded on the erroneous basis that if the right of substitution was to any extent fettered, this necessarily meant that there was a requirement for personal service, when case law indicates that this depends upon the nature and degree of the fetter. Allied to this, the EJ failed to assess the nature and degree of the fetters on Mr Lutz's right of substitution. Secondly, that the EJ erred in failing to direct himself that there was no rule that the right to appoint substitutes only from the respondent's pool of operatives must lead to the conclusion that the putative worker was obliged to perform work personally. Thirdly, that the EJ was wrong not to consider the nature and degree of the fetter in this case in the context of the undisputed fact that it arose from the regulatory framework under which only Ryanair's pilots are suitably qualified and experienced to fly its aircraft.

125. Ground 5 challenges the same conclusion on the basis that it was perverse and/or resulted

from a misapplication of the law. There is an overlap between these two grounds. The first part of Ground 5 contends that it was perverse for the EJ to find that "operational reasons" was a basis upon which a proposed substitution would be refused by Ryanair (in addition to it leading to a breach of the regulatory flight time limitations). The second part of the ground contends that the EJ's indication that each of the reasons identified in paragraphs 28 – 33 of **Pimlico Plumbers** supported his conclusion that there was a requirement of personal service in the present case was perverse and/or a misapplication of the law.

MCG's Additional Ground

126. MCG relies on the contentions raised under its Crew Member Ground in support of the proposition that the ET erred in finding that Mr Lutz was within the terms of regulation 3(1)(b)(ii) **AWR**.

Ryanair's Temporarily Grounds

127. Ryanair's case under Ground 1 is that the ET misdirected itself as to the law and/or misapplied the law as to the meaning of "temporarily" in regulation 3(1)(a) **AWR**. A number of supporting contentions are raised:

(i) The EJ misconstrued "temporarily" by putting weight on the fact that the word temporary derives from the Latin word meaning time;

(ii) The EJ found that the supply was on a temporary basis, despite concluding that at the expiry of the five year term, contractor pilots were always issued with a new contract by MCG; and that contractor pilots did not provide cover for pilots employed by Ryanair, but were rostered for duties on the same basis as permanent pilots;

(iii) The EJ erred in treating the fact that the contract between Mr Lutz and MCG was for five years as determinative;

(iv) The EJ failed to direct himself that the focus of the inquiry was on the "*purpose and nature of the work*" for which the putative worker is supplied. The purpose and nature of the work done by the contractor pilots was not temporary in any proper sense of the word. Their work was identical to that of pilots employed by Ryanair on permanent contracts;

(v) The EJ was bound to conclude on his findings of fact that contractor pilots were in reality assigned to work for Ryanair on an indefinite basis.

128. Ground 2 contends in the alternative that **Moran**, **Brooknight** and **Angard** are wrongly decided and should not be followed if and insofar as they interpret regulation 3(1)(a) as meaning that a putative agency worker is supplied "temporarily" when his contract is for a fixed term with the agency, regardless of: (a) the fact that the purpose and nature of the work done by that individual is indefinite; (b) the fixed term contract would inevitably be replaced with a new contract on its expiry; and (c) the length of the fixed term.

MCG's Temporarily Ground

129. MCG contends that it was "unreal" for the ET to conclude that Mr Lutz was "temporarily" supplied to Ryanair in circumstances where the ongoing contact between MCG and Ryanair had been in place since December 2011 and numerous pilots had been supplied thereunder. In addition, and in common with Ryanair, MCG says that the EJ erred in treating the existence of the five year fixed term contract between Mr Lutz and MCG as determinative of whether the supply from MCG to Ryanair under a separate ongoing contract was temporary. MCG also emphasises that the supply was not for the purposes of providing cover; it was a supply directly into Ryanair's permanent workforce.

The Respondent's answer

130. The Respondent's answer took issue with each of these grounds. It is unnecessary to set out its contents separately. We summarise Mr Lutz's contentions when we come on to address each of

the individual grounds.

General observations

131. Before we turn to the individual grounds, we recap some important factual findings that were made by the EJ, which are not challenged in this appeal and which we bear in mind when considering these grounds:

(i) Mr Lutz was not in business in his own account; and MCG and Ryanair were not his customers or clients (paragraph 39 above);

(ii) Mr Lutz was supplied by MCG to work for the hirer, Ryanair, under its supervision and direction (paragraph 40 above). This was in pursuance of the agreement between MCG and Ryanair referred to at our paragraph 27 above;

(iii) There was a complete imbalance of power, Mr Lutz was not able to alter anything about the arrangements; the bargaining power was all with Ryanair (paragraphs 30 and 45 above);

(iv) Mr Lutz was informed that his purported service company was to be changed to Dishford without any knowledge or indication of agreement on his part; Dishford served no useful purpose and was a fiction (paragraphs 20 – 21 and 45 above);

(v) The dominant purpose of the arrangements was for Mr Lutz to provide personal service as a pilot to Ryanair (paragraph 52 above); and

(vi) The substitution clause in the Dishford agreement was a sham (paragraph 42 above).

132. As will be apparent from our earlier account of the ET's Reasons, the document has some structural difficulties. We do not wish to labour this point; a few examples will suffice:

(i) The text that appeared under the sub-heading "Temporary work" included material and analysis in paragraphs 102 – 105 that, on any view, could not relate to that criterion in

regulation 3(1)(a) **AWR**;

(ii) In paragraph 8 the EJ introduced the summary part of his Reasons saying that he set out the facts found and "*the reasons for reaching these conclusions subsequently*". A summary of the conclusion reached as to Mr Lutz's status under **CAWR** then appeared at paragraphs 10 – 15, but in the "Law applied to facts" section, the EJ indicated that he did not expand upon the summary of his conclusion, save in one respect (paragraph 94). Nonetheless, he later made a point about the purposive interpretation of **CAWR** (paragraph 97) and when we address MCG's Crew Member Ground we consider whether in fact he amplified his reasoning in other respects too;

(iii) It is not immediately clear which claim or claims the "Worker" section comprising paragraphs 88 – 93 was intended to relate to; and

(iv) The EJ suggested that it would make his judgment too long to identify the law that had been cited to him and which he had considered (paragraph 44 above). In some instances he did identify the principles he abstracted from the authorities (for example at paragraphs 111 – 119 in relation to the "temporarily" issue), but in other respects he did not, for example saying in relation to **Stuart Delivery** that he would not cite passages, but he had read it carefully and it fortified his conclusions (paragraph 92). When it came to the substitution issue, he set out a significant part of his analysis in short, fragmented comments in parentheses after citing long extracts from **Pimlico Plumbers**, as we have described.

133. When we come to particular grounds of appeal we address the extent to which any of these features support the specific errors of law that are alleged. However, more generally too, the existence of these difficulties has caused us to approach all aspects of the EJ's reasoning with a significant degree of caution.

134. We are mindful of and sensitive to the pressures that Employment Judges operate under. We note that there is no reasons challenge in this case; and, as we have already noted, we are not marking

an examination (paragraph 65 above). Nonetheless, we add the following three brief observations. Firstly, an initial "summary of conclusions" may be very helpful, if it is just that. However, if that course is adopted, care should be taken to avoid any disconnect in terms of the content of the summary section and the subsequent reasoning and findings; and the relationship between the two should be readily apparent. Secondly, it is immensely helpful to both the parties and the EAT if the tribunal's decision is clearly structured. Equally the absence of such a structure is likely to lead to confusion in the minds of the parties, and an increase in the number of points taken on an appeal and the time it takes to resolve them. Thirdly, whilst it should generally be unnecessary for tribunals to set out lengthy citations from the relevant case law, it is highly desirable for the Reasons to refer to the cases that have been considered, for the principle/s that the tribunal has abstracted from that material to be identified and for the tribunal to then show how these have been applied to the facts found.

MCG's Crew Member Ground and Additional Ground

MCG's submissions

135. We have already summarised the alleged errors of law that are relied on in the grounds of appeal (paragraph 121 above). Mr Brown KC submitted that the EJ's flawed "*reasoning back*" approach was apparent from paragraphs 14, 15 and 91 of the ET's Reasons in particular (paragraphs 38 and 46 above). He said it was clear that the EJ thought that Mr Lutz should be regarded as employed by someone for the purposes of **CAWR**, and, as Ryanair was not an option (since this was not alleged by Mr Lutz), the EJ decided that it had to be MCG, without identifying any proper support for this conclusion. It was, he said, "*a back to front analysis*".

136. In support of the "*insufficient contractual nexus*" point, Mr Brown KC said in his skeleton argument that the ET has failed to focus on the limited contractual obligations between Mr Lutz and MCG and failed to have regard to the fact that under the Dishford agreement, it was the service company, not Mr Lutz, who had the operative obligations. However, during his oral submissions, Mr

Brown KC rightly accepted that he could not go behind the EJ's findings that Dishford was "a fiction" in terms of the relations between the parties (paragraph 45 above).

137. Mr Brown KC's oral submissions were focused on the proposition that the EJ's factual findings did not support his conclusion that there was an employment relationship between MCG and Mr Lutz. In particular he relied upon paragraphs 72 – 73 of Lord Leggatt JSC's judgment in **Uber** (paragraph 83 above), submitting that this contained a definitive and binding statement as to the constituents of the EU law concept of an employment relationship; and that as Mr Lutz did not provide services for and under the direction of MCG which were received by MCG and nor was there a hierarchical relationship of subordination with MCG (as opposed to Ryanair), he did not satisfy the definition which the EJ should have applied.

138. Mr Brown KC emphasised the absence of factual findings relating to MCG, as opposed to Ryanair, in the EJ's summary of his conclusions at paragraphs 13 – 15, ET's Reasons. He also emphasised various findings made by the EJ that indicated it was Ryanair, rather than MCG, who had control over Mr Lutz. In particular, he highlighted the following: in paragraph 16 that MCG had almost no communication with Mr Lutz after he started flying (paragraph 39 above); in paragraph 27 that he was integrated with the Ryanair employed pilots (paragraph 15 above); in paragraph 28 that it was Ryanair, rather than MCG, who procured Mr Lutz (paragraph 16 above); in paragraph 31 that Ryanair decided that he had passed the assessment (paragraph 16 above); in paragraph 44 that there was no action taken by Mr Lutz that was not directed by Ryanair (paragraph 18 above); in paragraph 61 that the "*reality is that Mr Lutz was simply a pilot whose skills Ryanair utilised as an individual rather than as an employee*"; in paragraph 74 that the shift patterns were organised by Ryanair and Ryanair could refuse a request to change the rostered arrangement (paragraph 32 above); in paragraph 90 that Mr Lutz wore a Ryanair uniform; and the findings in paragraph 104, including that Ryanair decided that Mr Lutz would be a contracted pilot and not an employee, that Ryanair told him when and where to train and selected the type of plane he would fly, and Ryanair told him where his base

would be (paragraph 57 above).

Mr Lutz's submissions

139. Mr Ford KC emphasised that the EJ had found that Mr Lutz was a "worker" within the meaning of Article 31 **EU Charter** and that this finding had not been challenged. He said it was "unthinkable" that someone who was a "worker" for those purposes would not be regarded as within the EU law concept of "employed" in the **CAWR**. He explained that the **CAWR** claim had not been brought against Ryanair as Mr Lutz did not have a contract with the airline. He also observed that it would be a surprising outcome if Mr Lutz was within regulation 3(1)(b)(ii) **AWR**, where the amended provision made clear that the services did not have to be provided to the agency, but not within the protection of the **CAWR.**

140. Mr Ford KC indicated that **Allonby** was the only EU law case that had considered a tripartite relationship between the putative worker, agency and end user. He said that the CJEU's decision in that case showed that an individual could be a worker in respect of the agency who paid their remuneration even though the services in question were performed for the end user under the latter's direction and control. Furthermore, **Allonby** underscored what was a binary distinction between a worker and an independent provider of services and identified the importance of determining whether any apparent independence was "merely notional". He emphasised the EJ's findings that we have already drawn attention to, including that Mr Lutz was not in business in his own account, that there was a complete imbalance of power and that his independence was notional.

141. Mr Ford KC noted that under the Dishford agreement, MCG was to use reasonable endeavours to locate or offer the Work (clause 1(e)); MCG had rights to terminate the agreement (clause 1(h)); work was to be performed by Mr Lutz "*on behalf of the Contractor*" (MCG) for the hirer (clause 1(j)); MCG was to procure that the hirer had professional liability insurance covering Mr Lutz (clause 1(q)); and pursuant to clause 2, it was MCG who was responsible for paying the remuneration for the

provision of Mr Lutz's services. Further, the entitlement under **CAWR** was to paid annual leave, which reinforced the appropriateness of liability resting with the party who paid the putative crew member's remuneration.

142. Mr Ford KC also denied that there was an additional requirement that there be a "*sufficient contractual nexus*" between the individual and the alleged employer. He pointed out that this was not what the regulations said.

Discussion and conclusions

143. For the avoidance of doubt, we express no view as to whether someone in Mr Lutz's position might ever be able to show that a hirer in Ryanair's position was their "employer" for the purposes of **CAWR** despite the absence of any express contract between the individual and the airline. This was not part of Mr Lutz's case and we did not hear full argument in relation to this. We focus on the issue that was before the ET and the conclusion reached in relation to it, namely that Mr Lutz was a "crew member" who was employed by MCG. In order to address MCG's contentions we consider firstly the correct approach in law to the concept of a "*crew member employed to act as a member of the cabin crew or flight crew*" and, secondly, whether the EJ erred in law in the conclusion he reached.

The correct approach in law to "employed" in regulation 2

144. As we have already indicated, the parties are agreed that whether Mr Lutz was "employed" for these purposes must be determined by reference to the EU law concept of an employment relationship.

145. We do not accept Mr Brown KC's submission regarding the need to show a "*sufficient contractual nexus*". The definitions in regulation 3 (paragraph 72 above) require that there is "*employment under his contract*". Accordingly, it needed to be shown that there was a contract between Mr Lutz and the agency, MCG (which it is accepted there was), and that Mr Lutz was

"employed" under this contract. We turn to the meaning of "employed" immediately below, but on this point we conclude that there is no warrant for reading an additional requirement into regulation 2 that is not spelt out expressly and for which there is no support to be found in the **AVD**. We consider that if this was a requirement, the regulation would have said so. Either the putative crew member is "employed" under his or her contract or they are not; and we are satisfied that no basis has been shown for implying this additional requirement. It is not the case, as Mr Brown submitted, that absent such a requirement, any contractual obligation of any nature would bring flight crew or cabin crew personnel within the scope of **CAWR**, as the relationship pursuant to the contract must be one of employment. **Hewlett Packard** does not support Mr Brown KC's submission; it concerned a situation where the EAT determined that there was no contractual nexus between the claimant (who had a contract with the agency) and the end user (paragraphs 44 – 46 and 50). No other authorities were cited to us as supporting this proposition and Mr Brown KC was right not to press this argument in his oral submissions. We indicate for completeness, that even if there was a requirement of the kind that Mr Brown KC contends, in this instance the reality was that the operative obligations under the contract with MCG lay with Mr Lutz as Dishford's role was found to be a fiction (paragraph 45 above).

146. Turning to what is meant by "employed" in this context, we are not persuaded by Mr Brown KC's central proposition that in paragraphs 72 – 73 of **Uber** Lord Leggatt JSC determined that an employment relationship could only exist for the purposes of EU law if the putative worker provided the services in question for the other party to the contract, rather than for a third party under a tripartite agency arrangement. We arrive at this conclusion for the following reasons:

(i) The position in EU law regarding tripartite arrangements between an individual, an agency who supplied their services, and an end user was not before the Supreme Court in **Uber**. The facts and circumstances in the **Uber** case did not concern such an arrangement and it was not one of the issues raised by the appeal;

(ii) As will be apparent from our earlier citations, in the material parts of Lord Leggatt JSC's judgment he was explaining the rationale for why employment contracts are not subject to the usual principles of contractual construction. In the course of this exposition, Lord Leggatt JSC explained that under domestic law, employees and workers are thought to require statutory protection because of their subordinate and dependent position vis-à-vis their employers. At paragraphs 72 – 73 he explained that EU law had also drawn a similar distinction between independent providers of services (who are not protected) and those in a relationship of subordination (who are protected). Given this context and the absence of any express indication that he was so doing, it is far-fetched to suggest that in these passages Lord Leggatt JSC was addressing tripartite arrangements and intending to indicate that EU law did not allow for worker status to arise in respect of an arrangement where the contract was with the agency but the services were received by the end user;

(iii) We have already explained that in **Allonby** the CJEU accepted that on the facts before it the referring court could find that the lecturers were workers of the agency, despite the fact that the services were provided to and directed by the end user college. If Lord Leggatt JSC was intending to limit the circumstances in which an individual could be a worker so as to exclude circumstances where the services were received by the end user, he would have addressed why he disagreed with the CJEU's analysis in **Allonby** (even though we understand that there has been no later CJEU case that has thrown any doubt upon it). However, rather than giving any such indication, he cited **Allonby** with apparent approval;

(iv) The Supreme Court in **Hashwani** (to which Lord Leggatt JSC also referred), was not concerned with a tripartite arrangement and the court did not question the CJEU's reasoning in **Allonby**;

(v) The contents of paragraphs 72 and 73 and their place within the paragraphs that preceded and followed, indicate that Lord Leggatt JSC was emphasising the essential

distinction between a worker and an independent contractor, rather than laying down an exhaustive account of when worker status might arise;

(vi) It is a surprising proposition, to say the least, that in the course of his detailed and compelling explanation as to why legislation afforded particular protections to those in the employment field who were in a relationship of dependency and subordination and, accordingly, why putative employers should not be able to determine the individual's status for the purposes of accessing those statutory entitlements by the way they chose to organise and characterise the relationship, Lord Leggatt JSC in fact laid down a restrictive approach to when worker status could arise if individuals provided their services to an end user via a contractual arrangement with an agency.

147. Accordingly, we see no reason to do other than apply the approach of the CJEU in **Allonby**. Thus, for an employment relationship to exist the person must for a certain period of time perform services for and under the direction of another for which he receives remuneration (paragraph 67 of **Allonby** at paragraph 86(v) above). As indicated by the CJEU's decision in **Allonby**, an employment relationship with the other contracting party who pays the individual's remuneration is not precluded simply because the services are received by a third party who directs the way in which those services are performed. However, an employment relationship will not exist if the individual is an independent provider of services, rather than in a relationship of subordination. Further, the fact that the individual is formally classed as self-employed as a matter of national law does not preclude the existence of an employment relationship if their independence is merely notional (paragraphs 84 - 90 above).

148. This position is reinforced by the wording of the definition in regulation 2 **CAWR**. This does not require in terms that the individual performs work or services personally for the other party to the contract, as it could have done. Rather, the wording directs attention to whether the individual is "employed" to act as a member of the cabin crew or flight crew under their contract.

149. Additional support for our understanding of the EU law position is to be found in the

provisions concerning agency workers, namely the amendment made to regulation 3(1)(b)(ii) **AWR**. No objection was taken to our considering the Explanatory Memorandum and its indication that the requirement that work and services were performed "*for the agency*" was removed to avoid an unintended narrowing of the applicable definition (derived from the **AWD**) (paragraph 94 above).

150. Furthermore, if the position were as Mr Brown KC submitted, then, as he accepted when the point was put to him, the consequence would be that a measure introduced to protect workers' health and safety in the civil aviation industry (paragraphs 76 above) would potentially have no application at all to those who are not in business in their own account, but who work as members of cabin crew or flight crew pursuant to a tripartite arrangement under which an agency supplies their services to the end user airline. For the reasons that we have explained, we do not consider that the legislative wording or the case law leads to this conclusion.

Did the ET err in law?

151. We have already indicated at paragraph 145 above why we reject the sub-ground that asserts that there was a failure to address whether there was a sufficient contractual nexus, and we need say no more about that.

152. If paragraphs 12 – 13 of the ET's Reasons are considered alone there is some force in the suggestion that the EJ did not grapple with the meaning of "employed" in regulation 2, **CAWR**. The EJ does not refer, as such, to the EU law concept of an employment relationship in setting out his conclusions; and his reference to Mr Lutz being "*employed as a resource by Ryanair*", if looked at in isolation, might suggest he concluded that it was sufficient that Mr Lutz was utilised by Ryanair as flight crew. However, his decision must be read as a whole and in particular account taken of the aspects that we highlight in the next paragraph.

153. Firstly, in paragraphs 12 and 13 the EJ noted that Mr Lutz had a contract with MCG and this contract governed his work with Ryanair as a pilot. Secondly, he found that Mr Lutz was not in

business in his own account and that he worked as an integral part of the crew of the planes that he flew (paragraphs 15 and 16, ET Reasons). Thirdly, he concluded that there was a complete imbalance of power and that the bargaining power was all with Ryanair rather than with Mr Lutz (paragraphs 66 and 89, ET Reasons). Fourthly, he found that Mr Lutz was paid by arrangements that MCG and Ryanair had set up (paragraph 91, ET Reasons). Fifthly, the EJ made a series of important findings at his paragraph 104 (our paragraph 57 above), which, in turn, led him to conclude that "*Mr Lutz's independence was entirely notional*". As we explain in the next paragraph, we have carefully considered the relationship between this passage and Mr Lutz's status under **CAWR**. Sixthly, it was not disputed that MCG had the documented obligations which Mr Ford KC highlighted (paragraph 141 above); that pursuant to Schedule 1 of the agreement, after the first 12 months, MCG undertook to provide Mr Lutz with a specified minimum number of flying hours per annum (paragraph 25 above); and that pursuant to clause 1(l) (subject to the substitution position) Mr Lutz was to make himself available to perform the duties for 11 months of the year.

154. We have carefully considered the impact of the structural difficulty that we highlighted earlier. Taken in isolation, the sub-heading above his paragraph 102 and the text of paragraph 102 itself suggest that the EJ wrongly thought that the CJEU's judgment in **Allonby** was directed to the question of whether the lecturers were supplied on a temporary or permanent basis for the purpose of regulation 3(1)(a) **AWR**. This gives us pause. However, although they appear at the wrong place in the Reasons (in terms of its structure), the findings that are set out at paragraph 104 are clear and unassailable findings of fact that the EJ was entitled to make on the evidence and which can stand unaffected by the observations in paragraph 102. It is, rightly, not suggested that any of these findings were perverse. In the circumstances, we consider that it is appropriate to take these findings into account when determining whether, as MCG contends, the factual findings did not support the existence of an employment relationship.

155. We conclude that the matters we have summarised in paragraph 153 above did sufficiently

support the conclusion that there was an employment relationship between Mr Lutz and MCG, in the sense we have explained. Mr Lutz performed pilot services pursuant to his contract with MCG, and on behalf of MCG, in respect of which MCG paid him an agreed remuneration and undertook the obligations that we have referred to. The recipient of the pilot services was Ryanair, who directed and controlled the way in which Mr Lutz performed those services. Mr Lutz had no say in relation to the arrangements with either MCG or Ryanair, there was a complete imbalance of bargaining power and he was not in business in his own account. Any independence that he purportedly enjoyed was entirely notional.

156. We also reject the proposition that the EJ's conclusion is flawed because it was arrived at by a process of reasoning backwards. This contention partly arises from the structure that the EJ adopted, which foregrounded his observation that it would be "extraordinary" if the **CAWR** did not apply to Mr Lutz. However, this was part of the summary of his conclusions, rather than his starting point. As we have explained, he did consider the factual circumstances in detail and he did make findings that supported the conclusion that Mr Lutz was employed by MCG.

157. There is also a much shorter answer to MCG's Crew Member Ground. Given the detailed submissions we heard and given the absence of any previous authority on the meaning of "crew member" in regulation 2, **CAWR**, we have considered it preferrable to address the substance of the parties' contentions. However, in this case the EJ also held that Mr Lutz was a worker for the purposes of Article 31, **EU Charter** (paragraph 5 above). MCG has not appealed that conclusion and Mr Brown KC accepted during oral submissions that if Mr Lutz was a worker under EU law, he must also come within regulation 2, **CAWR**. When Mr Ford KC raised the absence of an appeal against this conclusion during his oral submissions, Mr Brown KC said in reply that the position under the **EU Charter** was irrelevant as Mr Lutz was not seeking to enforce any rights under it. However, that is inaccurate. His claim form included a claim for unpaid accrued annual leave pursuant to Articles 31 and 47, **EU Charter** and this was confirmed by paragraphs 1(3) and 2 of the agreed list of issues.

Furthermore, the EJ ruled on his status under the **EU Charter** as set out in his judgment. Nonetheless and for the avoidance of doubt, we emphasise that we have arrived at the conclusions that we have already expressed independently of this point.

158. It therefore follows that we reject the appeal against the finding that Mr Lutz was a crew member employed by MCG for the purposes of the **CAWR**. No freestanding issues were raised in respect of the finding as to his status under the **AVD**.

159. MCG's Additional Ground also fails as it was entirely parasitic on the success of its Crew Member Ground.

MCG's TWA Ground

160. We can deal with this ground very briefly (as did Mr Brown KC in his oral submissions). We do not accept that the EJ erred in law in not concluding that MCG fell within the exception provided for in regulation 4(2) **AWR**. We reach this conclusion for three reasons, any one of which is sufficient in itself to dispose of this ground of appeal.

161. Firstly, MCG did not plead reliance on the regulation 4(2) **AWR** exception in its response form. Nor was this raised in the list of issues that was before the EJ. In these circumstances the ET cannot be criticised for not dealing with this (non) issue. The fact that it was raised in submissions before the EJ, with no application made to amend the pleading, does not alter this position.

162. Secondly, we do not accept Mr Brown KC's construction of regulation 4(2). He submitted that the effect of this provision is to exclude agencies whose activities are the provision of payroll and ancillary administrative functions. However, that is not what the provision says. Regulation 4(1) addresses who is a temporary work agency. By virtue of regulation 4(1)(b) this includes those who carry on the activity of "*paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily*" for hirers. It would make no sense for regulation 4(2) to then exclude the very people it had just brought within the scope of a temporary work agency by regulation

4(1)(b). The exception in regulation 4(2) is much narrower than those who come within regulation 4(1)(b); it is plainly limited to those who are engaged in paying for, or receiving or forwarding payments for the services of individuals "*regardless of whether the individuals are supplied to work for hirers*", in other words where the payroll activities are also provided to those who are direct employees. There was no evidence indicating that this was the position with MCG.

163. Thirdly, the exception in regulation 4(2) says in terms that it applies to those who come within the regulation 4(1)(b) criteria. There is no suggestion that regulation 4(2) also provides an exception to those who are a temporary work agency by virtue of regulation 4(1)(a), that is to say because they "*supply individuals to work temporarily for and under the supervision and direction of hirers*". It is accepted that MCG supplied Mr Lutz to Ryanair and that he worked under Ryanair's supervision and direction. As we go on to explain from paragraph 200 below, we uphold the ET's finding that he was supplied "temporarily". Accordingly, on the EJ's findings, MCG was a temporary work agency under regulation 4(1)(a), to which the exception in regulation 4(2) has no application.

Ryanair's Substitution Grounds: Ground 3

Ryanair's submissions

164. We summarised Ground 3 of Ryanair's grounds of appeal at paragraph 123 above. Mr Bowers KC submitted that in light of those matters, the Crew Dock arrangements entailed a genuine right of substitution.

Mr Lutz's submissions

165. Mr Ford KC contended that as there was no contract between Mr Lutz and Ryanair, the Crew Dock arrangements did not confer any contractual right of substitution, and as such, the EJ was quite correct in finding at paragraph 98 of his Reasons that Mr Lutz had no right to substitute. He also emphasised that the evidence indicated no more than occasional re-arranging of shifts via that system.

Discussion and conclusions

166. Ryanair do not dispute that the EJ's conclusion at his paragraph 98 was to the effect that Mr Lutz had no right of substitution and do not rely upon anything less than such a right. The formulation of Ryanair's Ground 3 asserts that: "*the ET's conclusion that C had no right of substitution was perverse and/or constituted a misapplication of the law*".

167. We conclude that the EJ was correct in finding that there was no right of substitution. The purported right in the Dishford agreement was found to be a sham, as we have already indicated. It is difficult to see how Ryanair's Crew Dock arrangements could have given rise to an express or implied contractual right on the part of Mr Lutz to perform his rostered pilot duties by a substitute and it does not appear that the case was put forward that way below – Ryanair did not suggest that it was in a contractual relationship with Mr Lutz.

168. Alternatively and in any event, the EJ's conclusion at paragraph 98 that there was no right of substitution was expressed as an alternative to the analysis which he set out at paragraphs 99 – 100, namely that if there was a right of substitution, it was not an unfettered one that negated the obligation to perform work or services personally. This is quite clear from the opening words of paragraph 99: "*But if that is not so, it is plain that the right to substitute is not unfettered*". Accordingly, Ground 3 would only avail Ryanair if it could also show that this alternative conclusion was flawed by error of law. As we explain when we address Grounds 4 and 5, we do not consider that this is the case.

169. In these circumstances it is unnecessary for us to embark upon an analysis of whether substitution arrangements must be contractual in nature for these purposes, despite the wording of regulation 3(1)(b)(ii) **AWR** which focuses upon whether the "*contract with the agency*" is to perform work or services personally. As we have indicated, Lord Wilson JSC assumed that a contractual right existed in **Pimlico Plumbers** (paragraph 105 above). In **Stuart Delivery** the Court of Appeal queried whether, in light of the decision in **Uber**, a practice of substitution that did not amount to a contractual

entitlement, could be relevant to the question of whether there was an obligation of personal performance (paragraph 58). However, as with the present case, it was unnecessary for the court to reach a conclusion on this point.

Ryanair's Substitution Grounds: Grounds 4 and 5

Ryanair's submissions

170. Given the degree of overlap, we will deal with Grounds 4 and 5 together. The grounds are summarised at paragraphs 124-125 above.

171. As we have noted, the first part of Ground 4 contends that the EJ wrongly believed that any fetter on the right of substitution meant that there was an obligation of personal service. In this regard Mr Bowers KC highlighted the following passage in paragraph 99 of the ET's Reasons: "*...it is plain that the right to substitute is not unfettered. For the Respondents it has to be an unfettered right in order that...the individual [is] excluded from worker status*". He also referred to the EJ's assessment expressed in both paragraphs 100 and 122 that "*there was no unfettered right to substitute another...*". In relation to the second aspect of Ground 4, he submitted that the EJ wrongly thought that a right to appoint a substitute who could only come from a respondent's pool of operatives inevitably meant that there was an obligation to perform the work personally, and, in consequence, he did not analyse the nature and extent of the fetter upon substitution that existed in the present instance.

172. Mr Bowers KC submitted that the EJ's "*key error*" was the failure to take into account the regulatory context, specifically that Ryanair was as indifferent to the identity of the substitute as the applicable regulatory regime permitted and that its discretion to withhold consent was limited to ensuring compliance with the relevant regulations and flight time limitations and ensuring that pilots were suitably qualified to fly its aircraft.

173. Whilst the EJ had found at paragraphs 74 and 99 that proposed substitution arrangements were also refused for "*operational reasons*" this conclusion was perverse, given the evidence from Mr

Rogers that the only circumstances in which a substitute pilot would be considered unacceptable was where, by operating the flight duty in question, they would breach, or risk a future breach of, flight time limitations.

174. As regards the EJ's approach to paragraphs 28 – 34 of Lord Wilson JSC's judgment in **Pimlico Plumbers**, Ryanair contended:

(i) The EJ failed to appreciate that the feature identified in paragraph 28, that Mr Lutz's right to use a substitute was not limited to occasions when he was unable to work, was in fact an aspect in Ryanair's favour, as it was consistent with the absence of a requirement for personal service;

(ii) At his paragraph 29, Lord Wilson JSC was simply describing the tribunal's finding that the right of substitution was akin to switching shifts within a workforce. He did not say that an ability to swaps shifts could never be regarded as a right of substitution;

(iii) The EJ's comment in relation to paragraphs 30 – 31 made no sense and Lord Wilson JSC's discussion of **Halawi** was irrelevant to the present case;

(iv) The EJ's comment in relation to paragraph 32 of **Pimlico Plumbers** was unclear;

(v) Unlike the vocative case used in the written agreement in **Pimlico Plumbers**, the Dishford agreement was not addressed to Mr Lutz;

(vi) The EJ's comment after citing paragraph 34 of Lord Wilson JSC's judgment showed that he had applied the conclusion in **Pimlico Plumbers** without having regard to the present factual context and regulatory framework.

Mr Lutz's submissions

175. Citing paragraph 126 of Lord Leggatt JSC's judgment in **Uber**, Mr Ford KC submitted that the question was not whether Mr Lutz could decline some work by swapping duties via Crew Dock, but whether he was obliged to personally undertake some work. He pointed out that under the

Dishford agreement Mr Lutz was required to be personally available for 11 months of the year and was not permitted to work for another commercial airline (paragraphs 19, 25 and 27 above).

176. Mr Ford KC did not agree that the EJ had proceeded on the basis that any fetter necessarily meant that there was a requirement for personal service; the nature and degree of the substitution arrangements were carefully examined. He also contended that the fact that the fetter arose from a regulatory requirement did not prevent it from being taken into account.

177. In his skeleton argument, Mr Ford KC identified the evidence which was capable of supporting the ET's finding that proposals to re-arrange rostered duties via Crew Dock were refused for "operational reasons". Mr Lutz had given oral evidence to that effect and this had not been challenged in cross examination. In addition, in paragraph 54 of his first witness statement Mr Rogers had said that agreement: "*would depend on operational requirements and ensuring that the Flight Time Limitations...are not breached*"; and Ms Crawford has said at paragraph 14 of her statement that the rostering department would advise if any swap "*would impact operational efficiency or breach FTLs*". He characterised Mr Bowers KC's points regarding the EJ's references to **Pimlico Plumbers** as pernickety over-criticism of the ET's decision.

Discussion and conclusions

178. As we have indicated earlier, Grounds 4 and 5 proceed on the basis that the EJ accepted that there was a (narrow) right of substitution. We remind ourselves that the question for us is whether the ET erred in law and that to answer this we need to consider the tribunal's decision as a whole.

179. We bear in mind the following. The EJ directed himself in accordance with Lord Wilson JSC's judgment in **Pimlico Plumbers**. Looked at in the round, he did consider the particular substitution arrangements in this case, including making findings of fact about their nature and extent. There was no error in him observing that there were parallels with **Pimlico Plumbers** in as much as only another Ryanair pilot could take the shift that Mr Lutz did not want to do and that requests were refused on

occasions (paragraph 18, ET's Reasons). Given that the substitution provision in clause 1(c) was a sham, it appears that Mr Lutz was under an obligation, pursuant to clause 1(l) of the agreement with MCG to make himself available for pilot duties for 11 months of the year, as Mr Ford KC submitted. The evidence did not suggest that re-arrangement of rostered shifts via Crew Dock happened more than infrequently; and Mr Bowers KC accepted in his skeleton argument that there were regulatory requirements that pilots must carry out three take offs, approaches and landings in the preceding 90 days on aircraft of the same type.

180. Whilst the question of substitution did not arise on the facts of **Uber**, we respectfully consider that Lord Leggatt JSC accurately summarised the position at paragraph 126, where he said: "*The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker...the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work*".

181. Furthermore, applying the approach identified at paragraph 32 of **Pimlico Plumbers** (paragraph 106 above), the EJ found that personal service was the dominant feature of the arrangement. Ryanair do not suggest that this was the wrong question to ask; and when it was put to him during submissions, Mr Bowers KC accepted that this was a finding of fact that he could not challenge.

182. Given this position, Mr Bowers KC had something of an uphill struggle in attempting to show that there was an error of law in the conclusion that Mr Lutz had a contract with MCG to perform work or services personally. Nonetheless we will go on to address each of his contentions.

183. We do not accept that the passages he highlighted, read in context, indicate a misunderstanding of the law. As we have explained earlier, the distinction is between an unfettered right to substitute and a conditional right to substitute that may be inconsistent with personal performance, depending upon its nature and degree (paragraphs 107 and 108 above). Accordingly, in concluding that this was not "an unfettered right to substitute" in paragraphs 100 and 122, the EJ was

simply reflecting the language of the appellate authorities. As regards the fetter upon the right, paragraph 99, read as a whole, shows that the EJ was aware that the nature and extent of the fetter was relevant. This is reinforced by the EJ's summary at paragraph 18 where, after referring to the features we have already highlighted, he said: "*Insofar as there may have been a right of substitution, it is so narrow that it cannot be considered 'unfettered'*" (emphasis added).

184. The EJ did make what was a plainly incorrect observation in his paragraph 100 where, having just addressed paragraphs 28 – 33 of **Pimlico Plumbers** he said: "*Any one of these reasons is sufficient to find, as I do, that there was no unfettered right to substitute another*..." (emphasis added). This was erroneous since, as Mr Bowers KC points out, insofar as this included reference to paragraph 28, the matter identified by Lord Wilson JSC at that stage was a point in the respondent's favour. Further, it appears unlikely that use of the vocative mode of address in documentation relating to the substitution right would prove determinative in itself - it would depend upon the facts and circumstances. However, we do not consider that this was a material error, given that, as we have explained, the EJ did not simply rely on those aspects; he also made findings that fully supported the overall conclusion that he drew regarding personal performance. We mention for completeness, that whilst the EJ's reference to **Stuart Delivery** (in a different part of his judgment; our paragraphs 46 and 132(iv) above) was somewhat opaque; we do not consider that anything turns on this.

185. We have already addressed the second part of Ryanair's Ground 4 in explaining that in our view the EJ did assess the nature and extent of the conditionality upon the right to substitute. During the course of Mr Bowers KC's submissions we asked him what material factors the EJ had failed to take account of in his analysis. He identified only two such matters. The first was the regulatory context, which is the subject of the third part of Ground 4 (which we reject below) and the other was that shifts could be re-arranged to accommodate days off as well as swapping duties to different dates. As regards that aspect, if the EJ did fail to take this into account (which cannot necessarily be inferred simply from the absence of its explicit mention), Mr Bowers KC did not dispute Mr Ford KC's

indication that the evidence did not suggest that this occurred more than occasionally. In the circumstances we do not consider that this supports the proposition advanced under Ground 4 that the EJ did not evaluate the nature and extent of the conditionality of the right to substitute.

186. As regards the third part of Ground 4, we conclude that the EJ was correct to say in paragraphs 19 and 100 of his Reasons (our paragraphs 42 and 55 above) that the fact that the fetter on the right to substitute arose from regulatory requirements did not make it any less of a fetter. This position is supported by authority. In **Sejpal v Rodericks Dental Ltd** [2022] EAT 91, [2022] ICR 1339, ("**Sejpal**") HHJ James Tayler said at paragraph 59: "*the fact that elements of the agreement between the parties may result from regulatory requirements does not prevent them from being taken into account in considering whether there is an unfettered right of substitution*". At paragraph 21, he had already observed that the fact that terms of an agreement may be necessary to comply with regulatory requirements "*does not alter the fact that they form part of the agreement, and so are relevant to assessing its nature*". The appeal in **Sejpal** concerned whether the claimant was a limb (b) worker and an employee under section 83(2) **EQA 2010**. She worked as a dentist under an "associate contract" with the respondent dental practice. The EAT allowed the appeal from the tribunal's finding that the claimant was self-employed, substituting it with a finding that that she worked under a contract with the respondent whereby she agreed to provide some work or personal service. Amongst the errors identified by the EAT was the tribunal's conclusion that there was a clear and genuine right for the claimant to use a locum, as the restrictions upon her doing so were the result of regulatory requirements that the locum must meet specified standards of competence and qualification (paragraph 55 and 59).

187. HHJ James Tayler derived support from paragraph 102 of Lord Leggatt JSC's judgment in **Uber**. In this passage Lord Leggatt JSC indicated that he disagreed with Uber's position that certain aspects of the way it operated should be disregarded as they were necessary to comply with the regulatory regime in relation to private hire vehicles.

188. Mr Bowers KC was unable to suggest any distinction of principle between these authorities and the position in the present case, nor did he identify any reason why Lord Leggatt JSC and HHJ James Tayler were incorrect on this point. Although Mr Bowers KC referred to the regulatory framework for aircraft relating to passenger safety, the regulatory regime in **Sejpal** concerned patient safety, and so this affords no material distinction. Furthermore, we cannot see why the subject matter of the regulation should make any difference for these purposes. The fact remains that the right to substitute is subject to limitations, which, in turn, bear on the extent to which personal performance is required.

189. We can address the first part of Ground 5 swiftly. Whilst Mr Bowers KC could point to some evidence suggesting that operational considerations was not a free-standing reason for refusing requests made under the Crew Dock system, Mr Ford KC identified evidence that suggested that it was (paragraph 177 above). What he made of this evidence was a matter for the EJ; as there was some evidence supporting his conclusion, it was not perverse.

190. As regards the **Pimlico Plumbers** points (using the same sub-paragraph numbering for cross referencing as in paragraph 174 above):

(i) In a context where he had just observed that the circumstances were broadly analogous, it appears to us likely that the EJ was simply observing at this stage that, like Mr Smith, there was no limit on the reasons why Mr Lutz might seek to change shifts. In any event, if there was any misunderstanding at this juncture, we do not consider that it was material. At paragraphs 18 and 99, the EJ highlighted the factors that he regarded as particularly significant and this does not suggest that he wrongly regarded the fact that Mr Lutz could initiate a swap for unlimited reasons as in any sense providing a basis for his conclusion that the obligation to provide work or services was a personal one in this case;

(ii) After setting out paragraph 29, the EJ simply reiterated the conclusion he had already expressed; there is nothing to suggest that he thought Lord Wilson JSC was doing other than

citing the tribunal's finding at this point;

(iii) The EJ's comment in respect of Lord Wilson JSC's paragraphs 30 – 31 does make sense. In relation to Lord Wilson JSC's reference to World Duty Free in **Halawi** being disinterested in personal performance, the EJ observed that Ryanair "*would not (could not) accept this*". This observation was consistent with his other findings;

(iv) We have already addressed Lord Wilson's paragraph 32 and the EJ's legitimate finding that personal performance was the dominant feature;

(v) As regards Lord Wilson's paragraph 33, the EJ's findings of fact indicated that Mr Lutz was personally addressed in the correspondence (paragraphs 31 and 39 above). In so far as this was not the case in the Dishford agreement, the same is irrelevant, since the involvement of Dishford was found to be a fiction (paragraph 45 above);

(vi) We have already addressed the points relating to the regulatory context and to the alleged failure to consider the facts and circumstances of the present case.

191. Accordingly, we conclude that Grounds 4 and 5, like Ground 3, are not made out.

Ryanair's and MCG's Temporarily Grounds

Ryanair's submissions

192. Our summary of Ryanair's Grounds 1 and 2 appears at paragraphs 127 and 128 above. The central thrust of Mr Bowers KC's submissions in relation to Ground 1 was that the ET was "beguiled" by the five year fixed term contract between Mr Lutz and MCG and wrongly treated this as determinative, or as a starting point, when in accordance with **Uber** he should have focused upon what happened in practice. As regards the practice, Mr Bowers KC emphasised paragraph 115 of the EJ's Reasons where he said that: "*At the expiry of five years any contracted pilot who remained was, without exception, issued with a new five-year contract*". He also emphasised that the contracted pilots were not used to provide cover and were integrated into Ryanair's pool of pilots and rostered

in the same way (paragraphs 27 and 74, ET's Reasons).

193. Mr Bowers KC submitted that the EJ had failed to apply **Brooknight** in that he had not focused on the "*purpose and nature of the work*" that Mr Lutz was supplied to do, which was identical to the work of the pilots employed by Ryanair. He also drew attention to the EJ's erroneous references to **Allonby** in the context of this issue, which we highlighted at paragraphs 56 and 132(i) above.

194. As regards Ground 2, Mr Bowers KC contended that to describe a five year arrangement as "temporary" offended the natural meaning of the word and that this was all the more so given the ET's finding as to what happened at the end of the first five years. He said that if and in so far as the three EAT authorities compelled that conclusion, they were wrongly decided and should be departed from. He said that the purpose of the **AWD** was to permit flexibility and that fixed-term working was protected by its own Directive.

MCG's submissions

195. We summarised MCG's ground of appeal at paragraph 129 above. Mr Brown KC adopted Mr Bowers KC's submissions in respect of Ryanair's Ground 1, but did not do so in respect of Ground 2, as he accepted that the three EAT authorities were correctly decided. He emphasised that as HHJ Auerbach had made clear in **Angard**, the focus is on the nature of the supply from the agency to the hirer, rather than on the contractual arrangement between the claimant and the agency. Whilst he accepted that this inquiry needed to be focused upon the supply of the particular individual, he also referred to the length of the arrangement between MCG and Ryanair for the supply of pilots, which dated back to 2011 (paragraph 27, ET's Reasons).

196. Mr Brown KC relied on the same factors that Mr Bowers KC had highlighted, submitting that the EJ had failed to have regard to the "*evidential mosaic*".

Mr Lutz's submissions

197. Mr Ford KC submitted that the ET had applied the correct test, as identified in the EAT authorities and no error of law was disclosed; the complaint was simply a disagreement with the EJ's conclusion. Furthermore, the EAT authorities were correctly decided and no basis had been shown for departing from them.

198. Mr Ford KC emphasised that the contract was for a five year term and that there was no evidence adduced that Mr Lutz was ever told anything different to that. In the circumstances, there was no basis for the EJ to find that in practice the basis of the supply of Mr Lutz was for anything other than the five years set out in the written agreement. He noted that the EJ had found that no-one was allowed to simply roll on past the five-year point and that, in practice it was very much a five-year process (paragraphs 77 – 79, Reasons). Furthermore, the fact that a subsequent five-year term would be granted if the parties wanted the relationship to continue, did not mean that the supply was no longer temporary, as the nature of each assignment had to be judged at the point when the individual was supplied to undertake it; a second fixed-term contract was also a temporary contract.

199. Whilst he agreed that the focus was on the basis upon which the individual was supplied by the agent to work for the hirer, Mr Ford KC contended that the purpose and the nature of the work was relevant only insofar as it shed light on the question of whether the supply was temporary or indefinite. The fact that contracted pilots and employed pilots were in the same pool and undertook the same work was irrelevant for these purposes; the **AWD** and the **AWR** were aimed at protecting those agency workers who were doing the same job as direct employees.

Discussion and conclusions

Ryanair's Ground 1 and MCG's ground

200. We have already considered the EAT authorities, **Moran**, **Brooknight** and **Angard** in some detail and summarised principles that we draw from them in so far as is material for the present appeals (paragraphs 112 – 120 above).

201. It is important not to lose sight of the question that the tribunal is required to answer, namely whether the supply of the individual in question by the agency to the hirer was on a non-permanent, terminable upon some other condition being satisfied basis (temporary) or on an open-ended basis (indefinite). References to the tribunal assessing the "basis" of the supply (**Angard,** paragraph 46) and to the "*purpose and nature of the work*" (**Brooknight,** paragraph 25) are, explicitly, for the purposes of answering the binary question whether, at the point of the supply, the arrangement was on a temporary or an indefinite basis. The exercise is not, for example, a broader inquiry into whether the work undertaken by the individual, once supplied, was the same or similar to the work undertaken by permanent employees of the hirer and/or into seeing how much the individual was then integrated into the hirer's workforce. Not only is this apparent from the statutory criterion and from the distinction identified in the earlier authorities, but the nature of the protection afforded by regulation 5, **AWR** and Articles 2 and 5, **AWD** (paragraphs 92, 99 and 101 above) would be severely undermined if similarities in the work then undertaken or the extent to which the person was treated as part of the workforce were taken to tell against a supply being of a temporary nature. The objective is to afford those who are supplied temporarily, the same prescribed basic working and employment conditions that would have applied if they had been recruited directly by the hirer to do the same job. The intention is not that this protection is lost if they are treated as part of the workforce but without having any of the entitlements of the permanent employees. That the recitals to the **AWD** (paragraph 101 above) also recognise the promotion of flexible ways of working (along with the objective we have highlighted) does not detract from this analysis.

202. Furthermore, the EAT authorities do not suggest, still less require, that where the written terms of the arrangement are clear and are reflected in what occurred in practice, that they should be disregarded. As we have observed earlier, **Brooknight** was a case where the written agreement between the individual and the agency was open-ended and the tribunal had to address a contention that nevertheless the worker had been assigned permanently to work for the hirer (paragraph 114

above). In **Angard**, HHJ Auerbach expressly envisaged that there would be cases where the documentation created when the relationship was first formed would contain the relevant details of the supply (paragraph 118 above). Furthermore, there is nothing in Lord Leggatt JSC's analysis in **Uber** that suggests that arrangements in a written agreement that reflect what occurred in practice and which have the effect of conferring statutory protection on the worker, cannot prove decisive.

203. In the present case, the facts found by the ET were consistent with the proposition that Mr Lutz was supplied to Ryanair for five years, as the documentation stated. All of the work under the five year term between Mr Lutz and MCG was specified to be as a pilot for Ryanair (paragraph 51, ET's Reasons) and this was the case in practice (paragraph 45, ET's Reasons). Pilots worked for a five year term and if they wanted to stay beyond the five year point, they were issued with a new contract, no-one was allowed to simply roll on past the five-year point (paragraphs 77 and 79, ET's Reasons). Neither Mr Bowers KC nor Mr Brown KC identified any findings or evidence that pointed in a different direction in respect of the initial five-year period. Moreover, the EJ was conscious of the need to focus on the reality of situation; he referred to this specifically at paragraph 116 of his reasons, where he observed: "*the reality is that Mr Lutz was directed by Ryanair to MCG, in order for them to place him with them as a temporary worker*".

204. Furthermore, as the EJ found, if a pilot wished to remain beyond the five year period, then a new five year fixed term would be granted (paragraphs 77-79). There was no suggestion that an indefinite arrangement was made. Moreover, at the time when Mr Lutz was supplied he had no right to undertake the work he was supplied to do beyond the five year period; as Mr Bowers KC accepted during oral submissions, he could not have insisted on an extension of this period, either on an indefinite basis or on a new five-year contact. In addition, as we have already indicated, where there are successive supplies, the basis on which the individual is supplied is to be assessed on the occasion of each supply (paragraph 120(ix) above).

205. Accordingly, for the reasons identified in the previous paragraphs the EJ was entitled to

proceed on the basis that at the time when Mr Lutz was supplied, it was for a five year fixed-term period (paragraph 110, ET's Reasons). He was also right to focus on the supply of Mr Lutz, rather than on the overarching arrangement, dating back to 2011 between MCG and Ryanair. Furthermore, the EJ was correct to observe: "*This was a time limited appointment. That in some cases it was replaced by another time limited appointment (as occurred) does not make it cease to be a time limited appointment*" (paragraph 17, ET's Reasons). Equally, as the EJ said at his paragraph 107: "*A person has no job security...if that person has a series of short-term appointments which run one after another without a gap, because they never know when that run of short-term appointments will end*".

206. Having rightly characterised this as a supply for five years, the EJ correctly identified and correctly applied the principles from the EAT authorities. At paragraph 112 of his reasons he cited from paragraph 41 of **Moran** and correctly identified that the key question for him was whether the supply was on a temporary or on an indefinite basis in the sense that we have explained and that "temporarily" did not mean short term. At paragraph 113 he correctly recognised that it was a binary distinction. In **Moran** Singh J (as he then was) had specifically identified a fixed-term contract as an example of a temporary supply for these purposes (paragraph 113 above). After referring to **Brooknight**, the EJ correctly observed at paragraph 115 that "*a succession of fixed terms is not indefinite – by definition it is definite in time...It does not have to be short term. It is not permanent*". The EJ then proceeded to cite and apply material passages from **Angard**, as we have set out earlier (paragraph 63 above).

207. Although both Mr Bowers KC and Mr Brown KC emphasised to us that Mr Lutz did not provide cover for Ryanair pilots, this was not material in circumstances where, as we have indicated, the EJ legitimately found that the supply was for a fixed term of five years. The significance of the claimant being supplied to provide cover (as a security guard) in **Brooknight** was that this provided the basis for the tribunal's finding that the supply was temporary, in circumstances where the supply was not limited by a period of time (paragraphs 114 – 115 above). There was, of course, no suggestion

in that case that provision of cover was the only permissible way in which a supply could be characterised as temporary. As the EJ correctly observed at his paragraph 116: "*there is no requirement that temporary workers have to be working as cover for others: that is just one type of temporary worker*".

208. Insofar as Mr Bowers KC relied upon the EJ's reference to temporary stemming from the Latin word for time (paragraph 17, ET's Reasons), the point has no traction: the EJ went on to correctly identify and apply the distinction between an indefinite and a temporary appointment.

209. We have already accepted that the EJ was wrong in suggesting in his paragraph 102 and by the sub-heading above it, that **Allonby** bore on the question of whether Mr Lutz was supplied "temporarily" (paragraph 132(i)). However, it is clear from what followed between his paragraphs 105 – 120 that the EJ asked the right question in relation to whether Mr Lutz was supplied "temporarily" and he cited and applied the pertinent legal principles to the facts that he had found. This reasoning was not infected by those three paragraphs that preceded it. Despite the confused nature of paragraph 102 itself, it is apparent, as we have already discussed, that the findings in paragraph 104 concerned Mr Lutz's worker status under EU law (paragraph 57 above).

Ryanair's Ground 2

210. Mr Bowers KC fairly accepted that the present circumstances did not come within any of categories identified by Singh J at paragraph 75 in **British Gas Trading v Lock** [2016] ICR 503, as exceptions to the general practice that the EAT will follow its own previous decisions. Accordingly, there is no basis for us to depart from the line of EAT authorities that we have discussed.

211. In any event, we respectfully consider that they were correctly decided. The reasoning in each of the judgments is clear, consistent and compelling. The cases are relatively recent and they involved very experienced judges. The later decisions endorsed the reasoning in **Moran**. Furthermore, the key distinction identified by Singh J in **Moran** between a temporary and an indefinite supply is fully

borne out by the parent **AWD** for the reasons that he identified. Article 3.2 says in terms that Member States are not to exclude fixed term workers from the scope of the Directive (paragraph 98 above); and a distinction is explicitly drawn in Recital 15 with employment contracts of an "indefinite duration" (paragraph 102 above). The Directive also records at Recital (3) that protection for temporary agency workers was not included within the Directive on fixed-term work (and contrary to the suggestion made in submissions, agency workers with fixed-term contracts are not catered for by that Directive). Furthermore, once "temporarily" is understood to mean not indefinite, rather than short term, there is no abuse of language involved in characterising a supply for a fixed term of five years as temporary.

212. Accordingly, we are not persuaded by any of the Temporarily Grounds.

Outcome

213. For the reasons that we have set out above: (i) we grant permission to MCG to amend its grounds of appeal to include the Additional Ground; and (ii) we reject all of the grounds of appeal and thus the appeals brought by both MCG and Ryanair will be dismissed.

Afternote

214. The judgment was circulated in draft on the usual terms and typographical errors were identified and corrected as a result. No amendment was considered necessary to the text at lines 8 – 9 of paragraph 157 above, which reflects the oral submission made by Mr Brown KC.