# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr John Kendall** | **v** | **TUI Airways Ltd** |

**Heard at**: Watford
**On**: 17,18,19,22,23 and 24 (deliberation) April 2024
**Before:** Employment Judge Alliott
**Members:** Ms B Robinson
Mr D Sutton

**Appearances**
**For the Claimant:** Mr J Jenkins (counsel)
**For the Respondent:** Mr E Williams KC (counsel)

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim for unlawful deduction from wages [To be confirmed].
2. The claimant's direct age discrimination claims are dismissed.
3. The claimant's unfair dismissal claim is dismissed.
4. The claimant's wrongful dismissal claim is dismissed.
5. The claimant's disability discrimination claims are dismissed upon withdrawal.

## REASONS

Introduction

1. The claimant was employed as a Pilot on 28 August 1979 and his contract of employment terminated on 29 December 2023. By a claim form presented on 23 January 2022 (case number 3300432/2022), following a period of early conciliation from 12 November to 23 December 2021, the claimant brings complaints of unauthorised deduction of wages, age and/or disability discrimination and harassment. By a claim form presented on 28 June 2023 (case number 3305346/2023), following a period of early conciliation from 3 March to 14 April 2023, the claimant brings complaints of unfair dismissal, wrongful dismissal and age discrimination. The respondent defends the claims.

## The issues

2. By the start of this hearing the issues had narrowed considerably. In particular, the disability discrimination claims have been withdrawn and consequently, the jurisdiction time point is no longer relevant. Further, the indirect discrimination harassment claims are not proceeded with.

3. The finalised agreed list of issues placed before us is as follows:-

> "1. **Unlawful deduction from wages**
>
> 1.1 Did the claimant have a contractual right pursuant to the terms of the 2015 and 2018 handbook and/or the Settlement Agreement entered into on 13 January 2017:
>
> 1.1.1 To receive 75% of his scheme earnings less the basic allowance and work-related activity component until his state pension age of 66; or
>
> 1.1.2 To receive 100% of his pension contributions of his notional salary to continue to be paid by the respondent into the claimant's benefits.
>
> 1.1.3 Was the claimant entitled to PHI benefits until he reached state pension age? Was the respondent entitled to change the PHI entitlement of the claimant by collective bargaining?
>
> 1.1.4 In the alternative, should the claimant have been treated as a new claimant as opposed to a legacy claimant under the terms of the PIP scheme and as such is entitled to 90% of his scheme earnings from 16 August 2021 to 15 August 2022.
>
> 1.1.5 Did the respondent make an unlawful deduction from the claimant's wages in contravention of section 13(1) of the Employment Rights Act 1996 (ERA)?
>
> 2. **Direct age discrimination**
>
> 2.1 The claimant alleges that the following acts or omissions took place and amounted to less favourable treatment, and that such treatment was on the grounds of his age (he has defined himself as being in an age group of age 60 or above):
>
> 2.1.1 Deciding to transfer then transferring the claimant onto the 2021 PIP scheme from 16 August 2021;
>
> 2.1.2 Deciding to reduce and then reducing the claimant's replacement wages from 16 August 2021;
>
> 2.1.3 Attempting to unilaterally reduce the claimant's entitlement to replacement wages to age 65; and
>
> 2.1.4 Dismissing the claimant on reaching the age of 65.

2.2 Did the respondent discriminate against the claimant on the grounds of his age contrary to section 13 of the Equality Act 2010? In particular:

2.2.1 With reference to the alleged acts or omissions listed to at 2.1, did the respondent carry out such acts or omissions and, if so, did the respondent in so doing treat the claimant less favourably than others?

If the answer to 2.2.1 is yes:

2.2.2 It is accepted that the respondent was aware that the claimant was aged over 60.

2.2.3 Was the reason for the less favourable treatment the protected characteristic as alleged by the claimant in terms of section 4 of the Equality Act?

2.2.4 The claimant alleges the following real comparator whose circumstances are not materially different to the claimant's own is Greg Booth (save for in relation to clause 2.1.4).

2.2.5 Is that real comparator the appropriate comparator? If not, who is the appropriate real or hypothetical comparator?

2.2.6 Was the respondent's less favourable treatment referred to at 2.1 a means of achieving a legitimate aim? For the avoidance of doubt the legitimate aim in respect of moving the claimant to the PIP scheme, with the resulting changes to his replacement wages is as set out at paragraphs 72 and 73 of the respondent's first GOR: That the old PHI scheme was commercially untenable, and changes needed to be made to maintain an incapacity benefit scheme across all ages of the workforce ("intergenerational fairness").

2.2.7 If so, was the respondent's conduct a proportionate means of achieving that legitimate aim?

3. **Unfair dismissal**

3.1 It is accepted that the respondent dismissed the claimant.

3.2 What was the reason, or the principal reason for the claimant's dismissal and was it a potentially fair reason as per section 98(1)(b) ERA? In particular, was the reason or principal reason for the claimant's dismissal contravention of an enactment within the meaning of section 98(2)(d) of the ERA? The respondent avers that the claimant could not continue to work after turning 65 as a result of the limitations applied to commercial air transport pilots as required by the UK Regulations (EU) number 1178/2011 which were taken over from ICAO Annex 1 and have been adopted by the UK Civil Aviation Authority (Regulations).

3.3 In the alternative, if the employment tribunal finds that the duty or restriction relied upon by the respondent did not prevent the claimant from continuing his employment with the respondent, it is the

respondent's position that the reason for the claimant's dismissal was either:

3.3.1 For some other substantial reason of a kind such as to justify the claimant's dismissal within the meaning of section 98(1)(b) of the ERA (having regard to all the circumstances including the legal restrictions placed on commercial pilots who are over the age of 65, the fair and equal treatment for all pilots and the fact that the claimant's entitlement to benefits also ceased on turning 65); or

3.3.2 On the grounds of capability within the meaning of section 98(2)(a) of the ERA (on the basis that the claimant did not have the aptitude to continue to carry out his role as a commercial pilot once he reached the age of 65 and given that his entitlement to benefits had ceased)?

3.4 If the employment tribunal finds that the respondent dismissed the claimant, was the claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the respondent act reasonably in the circumstances (including its size and administrative resources) in treating either (i) The limitation in the regulations, (ii) the legal restrictions placed upon commercial pilots over the age of 65 and the equal treatment of all pilots, or (iii) the claimant's capability to carry out his role as a commercial pilot (noting also that his entitlement to benefits had ceased) as sufficient for dismissing the claimant?

3.5 Did the respondent follow a fair procedure when dismissing the claimant?

4. **Wrongful dismissal**

4.1 Was the claimant entitled to notice of termination of employment, and if so was the claimant's contract of employment terminated on notice in accordance with its terms (or, if applicable, on statutory minimum notice)?

5. **Remedy**

5.1 What financial loss, if any, has the claimant suffered as a result of any alleged unfair or wrongful dismissal, unlawful deduction from wages or unlawful discrimination?

5.2 If the claimant has suffered financial loss, by what percentage should any basic and/or compensatory award be reduced (having regard to those factors set out in section 122 and section 123 of the ERA)? In particular:

5.2.1 If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss the claimant?

5.2.2 To what extent has the claimant mitigated his losses?

5.3 What award, if any, should be made for injury to feelings?

5.4 Should any other remedy be awarded including any declaration?

5.5 Did the claimant and the respondent comply with the Acas Code of Practice on Discipline and Grievance (Code)?

5.6 If not, was such failure to follow the Code reasonable in all the circumstances?

5.7 If not, would it be just and equitable for the tribunal to increase or decrease any award (up to 25%)?

## The law

Unauthorised deduction of wages

4. Section 13 of the Employment Rights Act 1996 provides as follows:-

> "13 Right not to suffer unauthorised deductions.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him …"

5. Wages is defined in s.27 as follows:-

> "27 Meaning of "wages" etc.
>
> (1) In this Part "wages", in relation to a worker, means any sum payable to the worker in connection with his employment, including –
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,"

6. It is common ground that payments made under the PHI plan are within the definition of wages.

7. It is noted that, as per the IDS Employment Law Handbook "Wages" at 2.27:

> "Pension contributions do not fall within the definition of wages. This was confirmed by the EAT in Somerset County Council v Chambers EAT 0417/12, where it held that a tribunal did not have jurisdiction to hear C's claim that the Council was obliged to make contributions into a superannuation scheme on his behalf. The EAT thought it clear from the wording of section 27(1)(a) that it covers sums payable to the worker in connection with the worker's employment, not contributions paid to a pension provider on the worker's behalf."

8. Nevertheless, in this case the evidence before us was that the employer's pension contribution was paid to the claimant and not some third party as the claimant had opted out of the respondent's pension scheme. Consequently, we have treated the employer's pension contribution as within the definition of wages. This is not a point that was taken by Mr

Williams KC although we will hear further submissions if required by either party on the issues:

(i) As to whether employer's pension contributions paid to the employee are within the definition of wages; and

(ii) Given that the claimant has not brought a contractual claim, whether payments made pursuant to the settlement agreement are sums payable to the worker in connection with his employment.

9. Dealing with discretionary payments, as per the IDS Handbook at 2.39:-

> "It had previously been held that non-contractual discretionary payments fell within the section 27(1) ERA definition of wages if there was a reasonable expectation that they would be paid – see, for example, Kent Management Services Ltd v Butterfield [1992] ICR 272, EAT, and Bannerman Co Ltd v (1) Mackenzie (2) Munro, EAT 275/95. However, following the Court of Appeal's decision in New Century Cleaning Co Ltd v Church [2000] IRLR 27, CA, this no longer appears to be so. In that case, the majority of the Court of Appeal held that the s.27(1) definition of wages required some legal, although not necessarily contractual, entitlement to the payment in question. Similarly, in Campbell v Union Carbide Ltd, EAT 0341/01, the EAT held that the expression "payable under the contract or otherwise" in s.27(1) (a) requires a legal obligation to make the payment in question."

10. Further, in so far as wages "properly payable" are concerned, as per the IDS Handbook at 2.57:-

> "Determining what is properly payable.
>
> Deciding whether wages are "properly payable" will require employment tribunals to resolve any disputes as to the meaning of a contract, including questions of interpretation and implication."

And at 2.58:

> The approach tribunals should take in resolving disputes over what the worker is contractually entitled to receive by way of wages is that adopted by the Civil Courts in contractual actions – Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion. Of course, if an employer is contractually entitled to reduce a worker's wages – either because there has been an agreed variation of contract or because there is a flexibility clause giving the employer the right to do so – the wages "properly payable" will be the reduced wages due under the varied contract or under the flexibility clause (and provided this is the amount the worker receives, there will have been no unlawful deduction from wages). If, however, the agreement/flexibility clause in question does not cover the purported variation, the amount properly payable will be the original amount due and any deduction will be unauthorised…"

11. Given that a central issue in this case is the construction of the settlement agreement and, to an extent, the handbook, Mr Williams KC dealt with the legal principles concerning construction in paragraphs 40-45 of his closing

submissions. We do not repeat them here but record that we have taken them into account. Mr Jenkins did not disagree with the propositions advanced.

12. Further, as per the IDS Employment Law Handbook "Contracts of Employment" at 3.18:

> "' Parol evidence rule' and relevant context.
>
> There is a general rule of contract – the 'parol evidence rule' – that extrinsic evidence is not admissible to help interpret a written contract. It is impermissible for a court to depart from the clear wording of a contractual document absent a plea that it contains a mistake that should be rectified – Dean and Dean Solicitors (a firm) v Dionissiou-Moussaoui [2011] EWCA Civ 1331, CA;
>
> …
>
> However, the principles of contractual construction also recognise that contracts in general – and employment contracts in particular – are not formed in a legal vacuum. Rather, their terms are negotiated and agreed against the background of the law (both common law and statute). As a result, the proper interpretation of an agreement is influenced by the legal background against which it is made. To this extent, context may be highly relevant in ascertaining the parties intentions behind the words used to express their contractual bargain."

13. Given that the settlement agreement contains an "entire contract" clause, we note that the purpose of such a clause is to ensure that any oral or written representations, and/or any terms that might otherwise be incorporated from extrinsic sources, do not form part of the contract of employment.

Age discrimination

14. The allegation is of direct age discrimination. S.13 of the Equality Act 2010 provides as follows:-

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

15. As far as comparators are concerned, s.23 of the Equality Act 2010 provides as follows:-

> "23 Comparison by reference to circumstances

> (1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

16. The EHRC Employment Code expressly states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, "What matters is that the circumstances which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator" – Paragraph 3.23.

17. As regards the burden of proof s.136 provides as follows:-

> "136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

18. As per the IDS Employment Law Handbook, Discrimination at Work, at 33.16:-

"The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination. The guidelines can be summarised as follows:

> "• It is for the claimant to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination . If the claimant does not prove such facts, the claim will fail.
>
> • In deciding whether there are such facts, it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that "he or she would not have fitted in".
>
> • The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> • The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn.
>
> …

- Where there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.

- It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

- To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground."

19. And further, at 33.18:

> "Another point made by Mummery LJ, which is now frequently cited by tribunals dealing with section 136 Equality Act, is that 'the bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

20. If there is direct age discrimination it can, nevertheless, be justified. The justification arises if the treatment is a proportionate means of achieving a legitimate aim. Both legitimate aim and proportionality have to be satisfied.

21. As per Baroness Hale in the case of Seldon v Clarkson, Wright and Jakes (A Partnership) [2012] ICR 716, SC. Direct discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation, such as costs reduction or improving competitiveness. Two broad categories of legitimate social policy objectives are 'intergenerational fairness' and 'dignity', the latter of which would cover avoiding to dismiss older workers on the grounds of incapacity or underperformance and avoiding divisive disputes about capacity or underperformance. The supplement to the EHRC Employment Code gives an example:

> "• Cushioning the blow for long serving employees who may find it hard to find new employment if dismissed."

22. In Fries v Lufthansa CityLine GmbH [2017] IRLR 1003, ECJ, it was held that the age limit for commercial pilots was a legitimate aim.

23. In his closing submissions Mr Williams KC cited to us an extract from Heskett v Secretary of State for Justice [2021] ICR 110, CA wherein Underhill LJ commented at paragraph 99:-

> "I can see no principled basis for ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgments on an artificial basis…. almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures… It is also necessary to bear in mind that because age, unlike other protected factors, is not binary it is difficult to put it no higher, for an

employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face."

Unfair dismissal

24. Section 98 of the Employment Rights Act 1996 provides as follows:-

> "98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) The reason (or if more than one, the principal reason) for the dismissal, and,
>
> (b) That it is either a reason falling within sub section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> …
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> …
>
> (4) Where the employer has fulfilled the requirements of sub section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) Shall be determined in accordance with equity and the substantial merits of the case."

Statutory ban

25. Since section 98(2)(d) of the ERA is mentioned in the list of issues, so the following is relevant:-

26. As per the IDS Handbook on "Unfair dismissal" at 8.1:-

> "It is for the employer to show that there is a statutory prohibition which makes it impossible for the employee to carry on in the same job. If successful, the employer will have established a potentially fair reason for the dismissal but that alone will not be conclusive of the issue of fairness. The tribunal will still have to consider whether the employer acted reasonably in dismissing under section

> 98(4): If the employer could, for example, easily have changed the employee's job so that he or she could do it legally, dismissal is likely to be unfair.

And at 8.9

> "Automatic termination by statute
>
> Certain statutory provisions may have the affect of automatically terminating employment contracts. There is a general principle that when further performance of a contract becomes impossible because of legislation… then the contract is discharged – see Reilly v The King [1934} AC176, Privy Council (Canada).

Some other substantial reason

27. As per the IDS Handbook at 9.78:-

> "SOSR as potentially fair reason for compulsory retirement
>
> An employer is likely to rely on SOSR as the reason for dismissal where the dismissal is in accordance with a compulsory retirement policy. As a first step, the employer would need to show that the compulsory retirement age is objectively justified as a proportionate means of achieving a legitimate aim and therefore not discriminatory".

And at 9.80

> "Reasonableness
>
> Establishing that a retirement dismissal is for a legitimate aim that can be categorised as SOSR is only the first step in establishing a fair dismissal, however. Once the reason has been established, the tribunal must decide whether the employer acted reasonably under section 98(4) ERA in dismissing for that reason by considering whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

Wrongful dismissal

28. Given the contractual retirement age, was the claimant entitled to notice of termination of his employment and did he receive notice?

**The evidence**

29. We had witness statements and heard evidence from the following:

    29.1 The claimant.
    29.2 Ms Kirsty Lawrence, HR Director at the respondent
    29.3 Ms Claire Macan-Lind, Senior HR Advisor at the respondent
    29.4 Mr Nicholas Dunk, Group Pension Management at the respondent
    29.5 Mr Kartic Hari, Head of Financial Planning and Analysis for the Northern Region Airline at the respondent
    29.6 Mr Benedict Coker, Pilot and member of BALPA Company Council
    29.7 Mr Christopher Godsar, Captain and member of the BALPA Company Council

29.8 Mr Nicholas Mercer, Regional Pilot Manager at the respondent
29.9 Ms Kathryn Cleaver, Pilot Manager at the respondent.

30 We had seven lever arch files of documents running to 2,572 pages.

31 Mr Williams KC provided us with written closing submissions.

**The facts**

32 There was precious little dispute between the parties as to the facts.

33 The claimant was employed by Britannia Airways on 28 August 1979 as a Trainee Commercial Pilot. Following a series of "TUPE" transfers, by December 2014 the claimant was working for the respondent and he had reached the rank of Captain, the highest rank of Pilot.

34 The claimant's 1979 contact of employment has not been located.

35 The British Airline Pilots' Association ("BALPA") represents pilots in collective bargaining and other trade union activity with the respondent.

36 During the course of the claimant's career, the mandatory retirement age for commercial pilots changed. It was 55 when the claimant began and changed to 60. In November 2006 the International Civil Aviation Organisation ("ICAO") amended the rule so that in multi-crew operations one pilot could be over the age of 60 provided he or she had not reached the age of 65 and the other pilot was under 60. It appears that there was an intermediate age threshold of 62 or 63 prior to that.

37 Consequently, as set out in paragraph 3.2 of the list of issues, the claimant could not continue to work as a commercial airline pilot after the age of 65 as a result of the limitations applied to commercial air transport pilots as required by the UK Regulations (EU) number 1178/2011 which were taken over from ICAO Annex 1 and have been adopted by the UK's Civil Aviation Authority.

38 It is clear to us and we find that the claimant, at all times, was fully aware of the 65 age limit on working as a commercial pilot. Indeed, in his witness statement he says:

> "I enjoyed my job and I planned to remain as a commercial pilot until my planned retirement at age 65 (the mandatory retirement age for pilots)"

39 Whilst we do not have a copy of the claimant's 1979 contract of employment, we have been shown a template of the 1988 Britannia contract of employment for pilots. There is no reference to a permanent health insurance scheme within that contract although it does reference a Memorandum of Agreement between BALPA and the employer. We do not have that Memorandum of Agreement.

40 The respondent has a Permanent Health Insurance policy (Memorandum of Agreement) or plan (Handbook) ("PHI").

41 We have not been told when the PHI scheme came into existence but we have been shown a Thomson Fly Pilot's PHI scheme explanatory booklet dated January 2008. This recites:-

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

42 The booklet defines "normal retirement age" as meaning age 65.

43 In addition, we have a Memorandum of Agreement dated 1 May 2008 between Britannia Airways Limited and BALPA. This recites:-

> "The Company maintain a PHI policy for pilots. Details are available from the Pensions Administrator".

44 Thomson Fly and Britannia Airways merged with and/or were acquired by the respondent.

45 It is common ground that there was a contractual obligation on the respondent to have a PHI policy and that the claimant had a contractual right to be part of it.

46 The claimant has not sought to advance the pleaded contention that the 2015 PHI plan Handbook formed a contractual agreement between the claimant and the respondent. Further, it is understood that the claimant is not asserting that the 2015 PHI plan was incorporated into the settlement agreement but forms part of the surrounding circumstances that would assist the court in constructing parts of the settlement agreement which he contends are ambiguous.

47 In compliance with the contractual obligation to have a PHI policy, the respondent duly had a "TUI Travel Permanent Health Insurance Plan". This was managed by a subsidiary "TUI Healthcare Ltd", and the plan was administered and insured on behalf of the Plan Manager by a leading insurer, which was Legal & General at the material time.

48 The respondent produced a handbook to provide membership information about the PHI plan. We have seen several versions of it from 2009 onwards.

49 It is common ground that the handbook is not contractual.

50 The PHI scheme as described to us worked as follows: If a pilot was unable to work as a pilot then benefit would be calculated as 75% of his or her pre incapacity earnings less a sum reflecting employment support allowance. Under the 'Own Occupation' scheme, the pilot would receive the 75% for the first 12 months on the scheme.

51 After 12 months the pilot would move on to the 'Suited Occupation' scheme. The pilot would be assessed as to whether he /she could undertake some work. If the pilot was totally unable to work then benefit would carry on being paid at 75%. If the pilot was assessed as being capable of some work then he/she would receive 50% of 75%, ie 37.5%.

52 The scheme also had provision for the payment of "Proportionate Benefit" ("PB"). The PB was fairly complex and was explained as follows by Ms Kirsty Lawrence:-

> "It [PB] was calculated by taking the pilot's basic annual salary plus any management and training pay as at the date of first absence (the "pre-incapacity salary"), subtracting the alternative employment salary, and dividing this figure by the pre-incapacity salary. This represented the percentage loss between the pilot's alternative employment salary and their pre-incapacity salary. This figure was then multiplied by 75% of their pre-incapacity salary. The proportionate benefit was capped at the lesser of either (i) the full PHI benefit (ie 75% of basic salary, less a deduction for employment support allowance), or (ii) the proportionate benefit calculation."

53 The stated aim of the PB was to support pilots who could not fulfil their role as a commercial pilots but could work in some capacity, whether for the respondent or otherwise, when they returned to work. As set out in the "Guide to the calculation of proportionate benefits under the TUI Group Permanent Health Insurance Plan ("the Plan 2015") for pilot members":-

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

54 The respondent's experience was that pilots who were unable to continue working as commercial pilots often retrained or started their own companies and had alternative careers.

55 However, the somewhat surprising, to our eyes, aspect of the scheme as explained to us is that a pilot assessed as able to work only had to earn £1 in order to take his benefit back up from 37.5% to 75%. We had no evidence that the extent to which a pilot was able to undertake some work could vary the 37.5% uplift and, indeed, the worked example is based on £5,000 p.a. earnings which does not suggest full-time employment.

56 In the claimant's case, on 20 July 2017, he was assessed by the insurers as having a functional capability to undertake sedentary to light demand level work on a full-time basis. The claimant applied for PB having declared earnings of £3,000 p.a. The reason for our surprise is that having done so and been accepted for PB, his benefit rose by £45,891.48 and he kept the £3,000 earnings.

57 In the claimant's case and applying the formula according to Ms Kirsty Lawrence, the figures work as follows:

57.1 £129,460.80 - £3,000 = £126, 460.80

57.2 £126,460.80 ÷ £129,460.80 = 0.97682696

57.3 0.97682696 x £97,095.60 (75% of £129,460.80) = £94,845.60

58 PHI calculation: £97,095.60 (75% of £129,460.80) - £5,311.80 (employment support allowance) = £91,783.80.

59 We were told that it was only when the alternative earnings reached about £10,000 that the PHI benefit would start to reduce. By our calculation, a pilot would have to have alternative earnings of over £68,000 to reduce the benefit paid back down to the 37.5% rate.

60 Both Ms Kirsty Lawrence and Claire Macan-Lind gave evidence that the PB scheme acted as a disincentive to some pilots to take on more or better paid work as their benefit would decrease. We accept that evidence and it is obvious why.

61 Although it has been conceded that the PHI handbook is not a contractual document, it was referred to extensively during this hearing. The relevant parts are as follows (from the 2015 version):-

61.1 In clause 1.2:

> "Every effort has been made to ensure the accuracy of the information detailed, however the legal documents governing the plan will prevail in the case of dispute."

61.2 Section 2.1:

> "Your eligibility is determined by your contract of employment.
>
> …
>
> Please note that if you are a pilot, whilst you will be eligible to be covered under the plan until you reach age 65 (or, if higher, your state pension age), on reaching age 60, your cover or any benefit in payment or which may become payable, will be provided in accordance with the plan terms by your company, rather than the insurer.
>
> If you leave the company, you will also cease to be eligible for inclusion in the plan. Please also note that on reaching age 65, if you remain employed by your

company (in a "non-pilot" capacity) and you are able to satisfy the insurer's "actively at work" requirement, you would be eligible for continued PHI cover which would then be insured in line with the standard stance for non-pilot members."

61.3 Clause 2.4 - What happens if I leave my company?:

"Your membership of the plan ceases if you leave your company."

61.4 Clause 3.1:

"The plan aims to provide you with a regular income benefit while you remain in your company's service. This benefit is designed to act as a replacement salary. It is payable until the earlier of the following:

- You return to work;
- Your incapacity ceasing;
- Reaching your 65th birthday or, if higher your state pension age;
- Or your death.

…

The benefit provided may be subject to special conditions imposed by the insurer and you will be notified if any such restrictions apply.

…

If you do receive benefit from the plan, evidence of your continued incapacity and continued eligibility for benefit is likely to be required by the insurer periodically, and continued benefit payment would be affected if you failed to provide this, do not support the claim assessment process, or if the evidence obtained by the insurer no longer supports the claim."

61.5 Section 4.1: The flow chart:

"The insurer will review the claim at regular intervals to be satisfied that you continue to meet the insured definition of incapacity. If, in the insurer's opinion, the medical evidence suggests you no longer meet the insured definition, the insurer will notify the plan manager, you will be notified by your company, the claim will be ceased and no further benefit will be paid."

And

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

61.6 Section 4.5:

"If your incapacity is such that you are able to return to your previous occupation but only in a reduced capacity (such as for reduced hours or with lesser duties), or

> you take up a less well paid position either on a full-time or part-time basis due to your incapacity, the insurer will usually consider paying a proportionate benefit in proportion to your loss of income, to help you with your return to work. Such cases would need to be agreed with the insurer."

61.7 Clause 5.1: Can the plan be altered or discontinued?

> "Your company and the Plan Manager hope to continue the plan indefinitely, but must necessarily reserve the right to modify, suspend or discontinue the plan if future conditions, in their opinion, warrant such action, subject to employee consultation as appropriate. Benefit already being paid at the date of any change will continue and will therefore not be affected by any such change."

62 The last sentence of section 5.1 has been concentrated on, namely "Benefit already being paid at the date of any change will continue and will therefore not be affected by any such change." The respondent seeks to draw a distinction between the guaranteed benefit, namely 75% and 37.5%, as opposed to the PB which is discretionary. We disagree. Within the document the 75% and 37.5% payments are both referred to as benefit and the PB is referred to as benefit. Further, the 75%/37.5% benefit is not guaranteed in that it would reduce or cease in the event of a partial or complete recovery. In our judgment, the clause says what it says. Benefit already being paid at the date when the plan was modified, suspended or discontinued, would continue and would not be affected by any such modification, suspension or discontinuance of the plan. We find that benefit paid under the plan, including the discretionary PB, could potentially be changed on review at any time in accordance with the Handbook statements and that that would be unrelated to any modification, suspension or discontinuance of the plan.

63 It has been conceded that that statement is not contractual. As such, the respondent could simply withdraw it and say it had changed its mind. Absent any actionable misrepresentation/estoppel/collateral warranty arguments (which are not raised before us in this claim) that is just bad luck, albeit unattractive for those who may have relied upon the statement. As it is, the existing scheme, including this last sentence, was discontinued by agreement reached in collective bargaining. Even if it had formed part of the claimant's contract of employment, we find that under ordinary contractual principles it was open to the parties to vary the contract of employment and that that could be done by collective bargaining.

64 In order to operate as a captain, a pilot is required to hold an Airline Transport Pilot Licence ("ATPL"). Included in the criteria that must be satisfied before an ATPL can be issued is the requirement that the holder must have a Class 1 medical certificate. In order to obtain a medical certificate, a pilot is required to undergo a Class 1 medical assessment. Once the medical assessment is passed, a medical certificate can be issued and it lasts for a period of 12 months. Over the age of 60, pilots are required to undergo assessments biannually.

65 On 16 December 2014 there was an incident involving the claimant and his flight crew during a stop over in Mexico. Allegations were made that the

claimant had acted inappropriately unzipping the dress of a female cabin crew member and exposing her underwear (potentially a sexual assault or harassment), causing injury to a male cabin crew member (potentially common assault), swearing and making a homophobic remark (potentially sexual orientation harassment). The claimant disputes the allegations and the investigation/disciplinary process was never completed. During the course of the incident the claimant sustained a hand and wrist injury.

66 On 19 December 2014 the male cabin crew member raised a grievance against the claimant.

67 On 29 December 2014 the claimant was suspended on full pay.

68 On 9 January 2015 the claimant was signed off work due to a wrist injury.

69 On 19 January 2015 the claimant raised a grievance against the male cabin crew member.

70 On 3 February 2015 the claimant had his annual medical assessment and did not pass. Accordingly, his ATPL Licence was suspended on 3 February 2015.

71 In April 2016 the claimant and the respondent had a protected conversation agreement in order to settle the various issues between them. As a result, the claimant signed a settlement agreement on 13 January 2017 and the agreement is dated 1 March 2017.

72 The relevant parts of the settlement agreement are as follows:-

> "Background
>
> A. The employee is employed under the terms of the contract of employment. Notwithstanding this agreement, the employee remains employed by the employer.
>
> E. The employee has the benefit of permanent health insurance as part of his contract of employment.
>
> 1. Interpretation.
>
> In this agreement the following words shall, unless the context otherwise requires, have the meanings set out below:
>
> Contract of employment: Means the contract of employment between the employee and the employer dated 28 August 1979.
>
> Permanent health insurance scheme: Means the permanent health insurance to which the employee is entitled to under his contract of employment, a copy of which is attached to this agreement as schedule D.
>
> Permanent Health Insurance scheme provider: Means Legal & General.
>
> 3. Disciplinary settlement

> 3.2 On receipt of this agreement signed by the employee and the advisor, the employer:
>
> 3.2.1 Will use its best endeavours to facilitate and support the employee's application for permanent health insurance, subject to the rules of the Permanent Health Insurance scheme as amended from time to time;
>
> 3.2.5 Agrees that the employee shall remain in receipt of full pay and benefits until his application for permanent Health Insurance has been determined by the insurers;
>
> 3.4 Assuming that the employee's application under the Permanent Health Insurance scheme is accepted:
>
> 3.4.2 The employer confirms that the employee will continue to receive his employer pension contributions based on 100% of his basic salary in the same manner as he currently enjoys.
>
> …
>
> Such payments are in addition to any payments which are made pursuant to the terms of the Permanent Health Insurance scheme.
>
> 8. General
>
> 8.5 This agreement sets out the entire agreement between the parties as to its subject mater and supersedes all prior discussions between them or their advisors and all statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understanding whenever given and whether orally or in writing. For the avoidance of doubt in the event that clause 3.5 becomes relevant neither party shall be prevented from relying on oral discussions and other evidential matters for the purpose of any internal or external proceedings and/or claims."

73 In short, the claimant gave up any employment claims he might have (subject to specified exceptions). The respondent ceased the disciplinary investigation. The claimant accepted a final written warning. The claimant withdrew his grievance and the respondent agreed to use its best endeavours to support the claimant's application for PHI.

74 The claimant in evidence sought to advance an argument that the settlement agreement became his contract of employment and that he was no longer employed by the respondent as a pilot. We find that the claimant's contract of employment as a pilot continued and that, as recited in the background, he remained employed under his original contract of employment and he had the benefit of permanent health insurance as part of his contract of employment.

75 The claimant seeks to rely on the documents annexed to the Agreement at Schedule D and submits that the reference in Clause 3.2.1 to the Permanent Health Insurance scheme as amended from time to time was merely included in order to cover the period between the execution of the

settlement agreement and the claimant's acceptance onto the PHI scheme. He then seeks to advance an argument that he was entitled to the benefits set out in Schedule D, that those benefits could not change and that they should have lasted until he was aged 66, the state retirement age.

76 Absent the reference to schedule D, which we will deal with below, in our judgment, the permanent health insurance which the employee is entitled to under his contract of employment can only refer to the Permanent Health Insurance scheme which is prevailing at the time of his application for it. The application was to be to the Permanent Health Insurance scheme provider, Legal & General, a third party, which would assess it under the prevailing scheme. In our judgment that is the objective meaning of the settlement agreement and what a reasonable person with all the background knowledge would understand the parties to have meant.

77 We go on to consider Schedule D. Schedule D has two documents annexed to it.

78 The first document is a Group Income Protection Policy schedule from Legal & General. It has an effective date of 1 October 2014 and an expiry date of 30 September 2015. The document is 7 pages long. Page 2 deals with those who joined the company before 1 October 2009 (ie the claimant). It deals with benefit payable to the age of 60. The 3 relevant definitions are:

| | | |
|---|---|---|
| (i) | Benefit increase rate: | 5% per annum compounded. |
| (ii) | Benefit termination date: | 60th birthday |
| (iii) | Incapacity definition: | Own occupation switching to suited occupation 12 months after the benefit start date. |
| (iv) | Scheme earnings: | Basic annual salary plus any management and training pay. |

Page 6 deals with all current income protection claimants self-insured by TUI Travel Plc. The 4 relevant definitions are:

| | | |
|---|---|---|
| (i) | Benefit increase rate: | RPI up to a maximum of 5% per annum compound. |
| (ii) | Benefit termination date: | At state pension age. |
| (iii) | Incapacity definition: | Own occupation. |
| (iv) | Scheme earnings: | Basic annual salary plus annualised value of any salary sacrifice. |

All 4 are materially different to the under 60 definitions.

79 The second document is a policy information summary covering the period 1 October 2009 to 30 September 2017. It is 6 pages long. It begins with the following statement:

> "This summary reflects our records as at November 2016 but may not include any alterations that are currently under consideration. In the event of any discrepancy between this summary and the full contractual basis, the latter will prevail."

80 Page 2 deals with 'CAT 01', those who joined the company before 1 October 2009 (ie the claimant). The relevant definitions are the same as page 2 of the policy schedule above. Page 6 deals with 'CAT 05', 'All current income protection claimant's self-insured by TUI Travel Plc'. Again the relevant definitions are the same as page 6 policy schedule above.

81 The Permanent Health Insurance plan is as set out in the Handbook. The plan is administered and insured on behalf of the plan manager by Legal & general. The documents in Schedule D are a policy schedule to and a summary of two insurance contracts between Legal and General and the respondent. The policy schedule and summary must reflect the benefits payable by Legal & General and TUI under the policy of insurance. However, whether or not the benefits are payable to an applicant under the PHI plan can only be determined by reference to the PHI plan and not the insurance policy underwriting it. The MOA refers to a PHI policy, the Handbook is a PHI plan and the settlement agreement refers to a PHI scheme. We find that there is no difference in meaning between plan and scheme. Nevertheless, the settlement agreement seeks to define 'Permanent Health Insurance scheme' by reference to the permanent health insurance he is entitled to under his contract of employment with a copy [actually x 2 copies] in schedule D.

82 We first note that the interpretation meanings in the settlement agreement are qualified by the words 'unless the contract otherwise requires'.

83 We have considered why Permanent Health Insurance scheme was defined in this way.

84 "Permanent Health Insurance Scheme" is referred to in clause 3.2.1. Clause 3.2.1 obliges the respondent to use its best endeavours to support the claimant's application for permanent health insurance subject to the rules of the Permanent Health Insurance scheme as amended from time to time. On a literal construction applying the interpretation meaning that is saying the claimant will apply for permanent health insurance subject to the rules of the permanent health insurance as amended from time to time. However, the permanent health insurance the claimant is entitled to "under his contract of employment" is the PHI plan/scheme. He cannot apply for PHI under the policy of insurance. Further, the reference to 'rules' points to the PHI plan rather than the policy insurance.

85 Permanent Health Insurance scheme is also referred to in clause 3.4. This states, "Assuming that the Employee's application under the Permanent Health Insurance scheme is accepted:" Again, on a literal construction

applying the interpretation meaning that is referencing an application under the Permanent Health Insurance policy which is a nonsense as the application is under the PHI plan/scheme.

86 A further complication of the definition is that the Permanent Health Insurance scheme provider is Legal & General. On a literal construction that is saying that the permanent health insurance is provided by Legal & General. But from aged 60 the insurance was self-funded by the respondent. Quite why the TUI self-funded category was included in the Legal & General policy was never explained to us. Possibly because TUI merely funded it and Legal & General administered it.

87 We construe the definition of Permanent Health Insurance Scheme to mean the permanent health insurance in a general sense the claimant was entitled to by virtue of the PHI plan/scheme and Schedule D exhibits the insurance policy documentation behind that general permanent health insurance thereby identifying it. We find that that is the objective meaning and what a reasonable person with all the background knowledge would understand the parties to have meant. Further, we find that the context requires this meaning and so overrides the interpretation meaning if necessary.

88 The Group Income Protection Policy in Schedule D is for the year 1 October 2014-30 September 2015. The claimant applied for PHI on 20 July 2017. Consequently, the policy schedule does not relate to the PHI scheme prevailing as of the date of the claimant's application. We have the policy schedule for the correct year 1 October 2016-30 September 2017. It is 6 pages long. The benefits to age 60 are the same as the 14/15 policy. However, it omits any reference to benefits payable to the over 60's. At the time of application and acceptance onto the scheme the claimant was under 60.

89 The policy summary runs to September 2017 and so covered the claimant's application. However, the CAT 05 section was not in the relevant policy and the policy prevails.

90 At the dates of the settlement agreement, the claimant's application for PHI and it being accepted, the claimant was not a current income protection claimant self-funded by TUI Travel Plc. As such, the Schedule D documents relating to over 60's did not apply to the claimant up to acceptance onto the scheme. We find that the Schedule D policy had changed by the date of application to the 2016/17 policy which is silent as to over 60 claimants.

91 The claimant seeks to argue that the inclusion in Schedule D of documents indicating benefits were payable for those over 60 until state retirement age was deliberate. We find that that is improbable but, even if true, the settlement agreement refers to the Permanent Health Insurance scheme as amended from time to time. We construe that as a reference to the PHI plan as the objective meaning that a reasonable person with all background knowledge would understand the parties to have meant. Even if it is to be limited to the insurance policy documents in Schedule D, then by the date of

acceptance onto the scheme, both had been superseded. The new policy did not refer to how over 60's would be treated.

92 As it is, the policy schedule is far from clear in terms of how it should operate as far as the claimant is concerned. As the claimant was under 60 at the time of his application, so the category relating to flight crew members who joined the company before 1 October 2009 is relevant. That gives a benefit termination date of the 60th birthday, a 5% per annum compound benefit increase rate and included management and training pay to the basic annual salary for scheme earnings. The claimant points to the section "All current income protection claimant self-insured by TUI Travel Plc" setting out what he was entitled to when he turned 60 years old. The first point is that at the time of the execution of the settlement agreement he was not a current income protection claimant. Whilst the schedule has a benefit termination date of the state pension age, it was on an 'own occupation' basis not switching to 'suited occupation' after one year, the benefit increase rate was RPI up to a maximum of 5% per annum compound and the scheme earnings were basic pay. It has never been the claimant's case that he should have only been paid on an own occupation basis after the first 12 months and he has always asserted that he is entitled to a 5% annual benefit increase. Hence, on the claimant's case, the "All current income protection claimant's self-insured by TUI Travel Plc" section of that policy does not accurately reflect what he says he was entitled to when he turned 60. However, he wants to pluck out the state retirement age of 66.

93 What is clear to us and we find is that PB is not mentioned in the schedule at all. The 'suited occupation' scheme is as a reference to the reduction from 75% to 37.5%.

94 In our judgment the reference to the permanent health insurance scheme as amended from time to time in clause 3.2.1 reflects the reality that the scheme could be amended at any time. In our judgment, on its true construction, it is not confined to the period between the execution of the settlement agreement and the claimant's acceptance on to the PHI.

95 In any event, even if schedule D did in some way establish a contractual basis on which he should be accepted on to the PHI in the future then it does not provide for the payment of PB. Had a decision been made after the claimant's first year on PHI that he would not be granted PB then, in our judgment, there is nothing contained within the settlement agreement that would have entitled him to assert that he was entitled to PB as a matter of contractual or other legal right. The handbook does not assist in the construction of any clause relating to PB other than to make clear it is discretionary and dealt with on an individual basis.

96 In any event, the policy documents in schedule D set out the maximum age to which benefits could be paid and do not, in our judgment, set out that benefit would be paid to that age. The 2015 handbook does assist in the construction of the refence to benefit termination age being the state pension age as continued eligibility for the payment of benefit was

dependent on being employed. Upon employment ceasing before state retirement age, the benefit would cease upon termination.

97 We find that clause 3.4.2 is clear. The respondent confirmed that the claimant would continue to receive his employer pension contributions based on 100% of his basic salary in the same manner as he currently enjoyed and that such payments would be in addition to any payments which were made pursuant to the terms of the permanent health insurance scheme. In our judgment, the wording of that clause could not be clearer. Mr Williams KC suggests that, because 'continue' does not refer to until when, the clause grants the claimant no more or less than those rights he had as an existing employee. The right to pension contribution arose from his contract of employment and that could be altered by collective bargaining. We reject that argument. It is clear and we find that the claimant has the right to receive those payments pursuant to the settlement agreement and we construe continue to mean until retirement or dismissal. Further, we find that this clause could not be varied by collective consultation. The settlement agreement is separate to the contract of employment.

98 Consequently, if the claimant has not been paid his employer pension contributions based on 100% of his basic salary up until dismissal then his claim succeeds to that extent. (subject to paragraph 8(ii))

99 Pursuant to the settlement agreement the respondent did support the claimant's application for PHI. Prior to the settlement agreement the claimant had been suspended on full pay. The settlement agreement confirmed he would remain in receipt of full pay and benefits until his application for permanent health insurance had been determined.

100 The claimant's application for permanent health insurance was determined on 1 November 2017 and the acceptance was backdated to 20 July 2017. The claimant was deemed to have already had his first year on 75% on an 'own occupation' basis as his first absence from work was on 20 January 2015 and the end of the 26 week deferred period would have been 20 July 2015. As such, that was the date that he should potentially have transferred to PHI. We are not sure that that is correct as the claimant had been suspended on full pay until the determination of his application for PHI. However, be that as it may, no claim arises as , in actual fact, the claimant was paid 75% until 16 August 2021.

101 On acceptance onto the scheme on 1 November 2017 the claimant was assessed as able to work and consequently was initially awarded 50% of 75% (37.5%).

102 However, the claimant applied for PB based on a letter dated 27 November 2017 offering the claimant employment with a company called Fibus Ltd from 1 November 2017 at a rate of £250 per calendar month or £3,000 pa. It was signed by an accountant director of that company. In fact, Fibus Ltd was a property owning company whose shares were 100% owned by the claimant and his wife who were also directors.

103 The claimant also submitted a doctor's statement on an Isle of Man document for social security purposes stating that the claimant should refrain from work for eight months due to a chronic right wrist injury, with the remark "Ok for therapeutic work 6-8 hours per week." In an email dated 28 November the claimant asserts that the recommendation was that he should work 8-10 hours per week due to injuries to his wrist, hip, shoulder and reduced/disturbed sleep.

104 In early 2018 the claimant's application for PB was accepted, his benefit rose from £45,891.48 to £91,783.80 and was backdated to 1 November 2017.

105 An enormous amount of evidence has been placed before us concerning the termination of the existing PHI scheme and its replacement by a new Pilot Income Protection ("PIP") scheme. By early 2018 the respondent was concerned about the ever increasing insurance premiums and projected costs of the self-insured aspect of the scheme. By 2018 only two insurers were prepared to provide quotes. The 2018 quote was £8.6 million. Six years before it had been £1.7 million, an increase therefore of 387%. In addition, the self-funded part of the scheme was costing the respondent £1.2 million p.a. Pilots made up 22% of the respondent's employees but were responsible for 83% of the claims.

106 The respondent entered into negotiations with BALPA. An April 2018 Aon presentation identified that under the existing PB scheme, because a pilot kept additional income from other sources, so income could be at a higher level than the 75% for those totally unable to work. The Aon recommendations included removing pilot proportionate benefit.

107 The evidence of Ms Kirsty Lawrence was as follows:-

> "BALPA were aware of the need to amend the existing PHI scheme…Both TUI and BALPA were focussed on creating a sustainable PHI scheme and in particular we both shared the desire to protect those who were not able to work as pilots. A very important guiding principle through these discussions was the need to protect the most vulnerable… We all agreed that our priority was to ensure that the most vulnerable employees, who were unable to perform any job at all, and who were limited in the ability to deal with the normal demands of life… would be supported for the long term… Both TUI and BALPA understood that this might mean that others, especially those pilots who were technically able to work, would not receive the same level of support as before."

108 Negotiations continued through 2018 and 2019. Throughout the negotiations BALPA kept its membership informed. The first proposal was a Group Income Protection ("GIP") scheme. That scheme retained PB (although it was renamed as Partial Benefit). Under GIP existing PHI claimants would have been unaffected as TUI would continue to fund the over 60s. The claimant enquired as to his position at this stage and was informed that existing claims were not affected.

109 In due course the GIP scheme was put to BALPA members in a ballot in January 2020. Despite being recommended by BALPA, the pilots rejected GIP.

110 Negotiations resumed and the PIP scheme was arrived at. The collective bargaining process started in December 2020 and went out to ballot on 30 July 2021. Option B was voted in and the scheme was adopted on 16 August 2021.

111 The new PIP scheme had no provision for PB. TUI and BALPA had agreed to remove the proportionate benefit element. The scheme also now removed any obligation on the pilot to declare any other income.

112 The position of in-claim pilots was addressed in the new scheme. When a pilot was accepted onto the scheme the annual premium for the year in which they started to claim covered all future benefits to age 60. Thus, all under 60 pilots who were in-claim remained on the PHI scheme with PB as it had already been "paid for" and Legal & General was responsible for funding them. Once in-claim pilots reached the age of 60 they transferred to the new PIP scheme where there was no PB payable. In-claim pilots already over the age of 60, such as the claimant, would move on to the PIP scheme immediately.

113 The PIP scheme had significant differences to the PHI scheme. The PIP scheme was contractual. It was self-funded with the respondent contributing a set percentage (4.52% of total pilot's income) into a provision pot. At the end of the year any shortfall in the provision pot would be made up by deductions made from pilot's salaries but any excess would be paid to them.

114 The benefits payable under the 'own occupation' and 'suited occupation' rose from 75% to 90% and from 37.5% to 45% respectively. The benefits were only payable for seven years though. There were a number of other differences including private medical insurance, long term critical illness cover and retraining/education assistance.

115 As submitted by Mr Williams KC in his closing submissions, "Quite properly there is no challenge by the claimant to TUI's legitimate aim, namely, to maintain a commercially viable PHI scheme for all ages as this is "unquestionably a legitimate aim". We agree and so find.

116 However, being moved onto the PIP scheme had a significant impact on the claimant. By August 2021, with the benefit of the guaranteed 5% compounded increase, his 75% PHI scheme payment had reached £122,999.07 pa. Under PIP he was informed that his benefit payment would be £61,499.54. This represents 50%. Obviously enough, that is a dramatic reduction in the claimant's benefit and would have had a significant affect on him. However, that is what had been negotiated on his behalf by his trade union under the collective bargaining process.

117 We note that the 75% PHI scheme benefit does not appear to have been re-calculated at the new 90% rate. Whether it should have been was not raised before us or argued.

118 The respondent's template pilot contract has an express retirement clause as follows:-

> "Retirement
>
> The company's employer justified retirement age is 65 for pilots in accordance with regulatory licencing requirements; however, pilots can seek to work beyond their 65th birthdays by successfully securing alternative vacant non-pilot roles within the business."

119 The contract provided for three months' notice. We find that these terms formed part of the claimant's contract of employment and that he was fully aware of them. Although the claimant may not have actually had a copy of his contract of employment, the mandatory retirement age for pilots was generally well known and specifically known by the claimant.

120 In any event, we have a number of examples where the claimant was expressly informed.

120.1 On 30 April 2018 the claimant was informed as follows:-

> "You requested confirmation that PHI payments would continue to age 67 [sic: should be 66] as specified in clause 2.1 of the PHI handbook. For clarity and completeness, **You are only eligible for consideration of benefit payments whilst you are employed by the company. As a pilot you have a contractual retirement age of 65 and therefore your employment with the company would cease at this time and you would no longer be eligible for inclusion in the scheme (specified in clause 2.1 and 2.4 of the PHI handbook)**."

120.2 On 23 August 2018 the claimant was informed:-

> "However, the company has an employer justified retirement age of 65 for pilots in accordance with regulatory licencing requirements (Convention on Civil Aviation).
>
> …
>
> For absolute clarity your employment as a pilot would cease at age 65 and your entitlement to any PHI benefit would also cease at that time."

120.3 On 14 October 2021 the claimant was emailed as follows:-

> "We do not have a copy of your original contract of employment, however your terms and conditions of employment are governed by the collective agreement you can find current details of the MOA and relevant schedules which you can access on the crew portal.
>
> In relation to PHI it has always been the case that, in accordance with regulatory licencing requirements, pilots have an employer justified retirement age of 65. This means that employment contracts for pilots cease at age 65 and therefore

> entitlements to benefits (including PHI) would cease at age 65 and would not continue to state retirement age."

121 On 6 June 2022 the respondent sent a letter to the claimant's Isle of Man address setting out the employer justified retirement age of 65 and stating that his employment would automatically terminate on his 65th birthday which was on 30 December 2022. The standard letter was also sent to the claimant's Isle of Man address on 22 June 2022. The Isle of Man address was on the respondent's system. No one could tell us if the system could be accessed remotely on a non-TUI device in order to update details. However, by this time the claimant had moved to Madeira and had not informed the respondent of his change of address. Consequently, the claimant told us that he did not receive those two letters. We find that the non-receipt of the two letters is immaterial. We find that at all material times the claimant knew he had an automatic retirement date of his 65th birthday and that, if and in so far as he needed notice, he had well in excess of three months' notice.

122 The claimant's contract of employment terminated on 29 December 2023.

## Conclusions

123 By reference to the agreed list of issues we make the following findings:

1. Unlawful deduction from wages

124 The claimant had a contractual right pursuant to his contract of employment to the benefit of permanent health insurance. The 2015 and 2018 Handbooks were non-contractual and consequently the claimant's eligibility for PHI and the benefits payable under it were non-contractual.

125 The settlement agreement is a contract. We find that the settlement agreement did not create a contractual or other legal right to PHI either in the terms of the schedule D documents or generally.

126 Consequently, we do not find that the claimant had a contractual right to receive 75% of his scheme earnings less the basic allowance and work-related activity component until his state pension age of 66. Eligibility and benefit amount were non-contractual and, in any event, the payment of benefit was contingent on the claimant remaining employed. His employment ceased on the day before his 65th birthday.

127 We find that the claimant did not have a contractual right pursuant to the terms of the 2015 and 2018 handbook to receive 100% of his pension contributions of his basic salary to continue to be paid by the respondent to him. We find that, pursuant to the settlement agreement entered into on 13 January 2017, the claimant did have a contractual right to continue to receive his employer pension contributions based on 100% of his basic salary in the same manner as he currently enjoyed. Further, we find that that payment was in addition to any payments which were made pursuant to the terms of the permanent health insurance scheme.

128 We find that the claimant was not entitled to PHI (or PIP) benefits until he reached the state pension age. This was because the payment of benefits was contingent on the claimant's continued employment which ceased at 65. We find that the respondent was entitled to change the PHI entitlement of the claimant by collective bargaining. We find that the settlement agreement cannot be construed as entitling the claimant to receive benefits until the age of 66 irrespective of whether he was employed or not.

129 We do not find that the claimant should have been treated as a new claimant as opposed to a legacy claimant under the terms of the PIP scheme which would have entitled him to 90% of his scheme earnings from 16 August 2021 to 15 August 2022. In any event, Mr Jenkins did not pursue this issue.

130 If and in so far as the respondent has failed to pay to the claimant the employer pension contributions based on 100% of his basic salary until his dismissal, then the respondent has made unlawful deductions from the claimant's wages in contravention of s.13(1) of the Employment Rights Act 1996. (Although we will hear submission on this if necessary as per paragraph 8(ii) above)

2. Direct age discrimination

131 We find that the respondent did decide to and then transferred the claimant onto the 2021 PIP scheme from 16 August 2021.

132 We find that the effect of moving the claimant on to the PIP scheme was that the benefit payable to him reduced.

133 We find that the respondent did not unilaterally reduce the claimant's entitlement to replacement wages to age 65. We find that the reduction in the claimant's wages (benefit) to age 65 was a result of the collective bargaining which introduced the new PIP scheme and the contractual retirement age.

134 We find that the claimant was dismissed on reaching the age of 65.

Comparator

135 The claimant contends for a comparator of Mr Greg Booth, an in-claim pilot below the age of 60. On 16 August 2021 he remained on the old PHI scheme in receipt of PB whereas the claimant was moved to the new PIP scheme under which he did not continue to receive PB.

136 We find that Mr Greg Booth is not an appropriate comparator. We find that there is a material difference between Mr Greg Booth and the claimant. The difference is that Mr Booth's benefits to age 60 had already been paid for by previous insurance premiums and the claimant's benefits were self-funded by the respondent and had not already been paid for.

137 We find that the appropriate comparator is a hypothetical comparator being an in-claim pilot below the age of 60 whose benefits had not already been

funded and/or were to be funded by the respondent. We find that such a hypothetical comparator would have been treated in the same way as the claimant, namely put on the PIP scheme as of 16 August 2021. Consequently, we find that there was no less favourable treatment by being moved onto the PIP scheme and having his benefit reduced by the removal of PB.

138 If we are wrong and Mr Greg Booth is an appropriate comparator, then clearly there was different treatment of them in that Mr Booth stayed in the PHI scheme with PB and the claimant was moved onto the PIP scheme. We find that that difference in treatment raises a prima facie case of discrimination on the grounds of age. We find that the burden would then switch to the respondent to justify that difference in treatment and that the treatment was non-discriminatory. We find that the respondent has discharged that burden by demonstrating that the difference in treatment was due to the fact that the under 60s benefits had already been paid for in full as against the over 60 benefits which would be funded by the respondent itself.

139 Further, we do not find that the treatment of the claimant was less favourable treatment on the grounds of his age as the reason for the treatment was due to the fact that Mr Booth's benefits had already been paid for and the claimant was to be self-funded by the respondent.

140 Further, we find that the introduction of the new PIP scheme was a legitimate aim for the reasons already given.

141 We find that it was proportionate treatment. The new PIP scheme has to be seen as a whole and the discontinuance of PB was but one component of it. The range of increased benefits for many potential claimants may well have been reduced had the PB element been retained. We find that any discriminatory effect of the introduction of PIP was proportionate.

142 As regards the dismissal of the claimant on reaching the age of 65, that is clearly an act of age discrimination. Nevertheless, in our judgment, it is well established on authority that for pilots that is a proportionate means of achieving a legitimate aim.

143 Consequently, we find that the claimant's age discrimination claims are dismissed.

<u>Unfair dismissal</u>

144 We find that the reason for the claimant's dismissal was some other substantial reason, namely that he had reached the contractual retirement age of 65. We find that that is a potentially fair reason.

145 We find that the decision to dismiss the claimant was fair in all the circumstances. By virtue of the regulations the claimant could not continue as a commercial pilot. Given that the claimant had provided a doctor's certificate indicating that he was only capable of 8-10 hours of work a week,

we find that it was unrealistic for the respondent to consider any other employment for the claimant. Further, we find that had the claimant wanted alternative employment it was up to him to seek it.

146 Consequently, we find that the claimant was not unfairly dismissed.

Wrongful dismissal

147 The termination of the claimant's contract was in accordance with the contractual retirement age in his contract of employment. We find that the claimant was fully aware of the contractual retirement age. We find that the claimant had in excess of three months' notice of the termination of his contract of employment. We find there has been no breach of contract as regards notice period. Consequently, the wrongful dismissal claim is dismissed.

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Employment Judge Alliott

Date: 24/6/2024

Sent to the parties on: 25/6/2024

N Gotecha

For the Tribunal Office

**Recording and Transcription**
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/