EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Miss C White (2) Mr S Serrao	v	British Airways plc

Heard at: Reading Employment Tribunal
On: 2 to 6 September and 2 October 2024; 4 October 2024 and 8 November 2024(in chambers)

Before: Employment Judge George
Members: Mr A Kapur and Dr C Whitehouse

Appearances

For the First Claimant: self-representing
For the Second Claimant: self-representing
For the Respondent: Mr R Chaudhry, solicitor advocate

RESERVED JUDGMENT

1. The respondent failed to pay the claimants in accordance with s.169 Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter TULRCA) for reasonable time off they were permitted to take during their working hours for the purpose of carrying out trade union duties in accordance with s.168 TULRCA.

2. The amount due to the claimants for a failure to pay in accordance with s.169 TULRCA shall be assessed at a remedy hearing.

3. The complaints of unauthorised deduction from wages are well founded.

4. The amount payable to the claimants in respect of the unauthorised deduction from wages shall be assessed at a remedy hearing.

5. The complaints of detriment on grounds related to trade union membership or activities are not well founded and are dismissed.

REASONS

Documentary evidence

1. In these reasons we use the page numbers in the Updated Hearing Bundle provided on Day 5 of the final hearing (UHB pages 1 to 435 as the case may be). An Updated Hearing Bundle was needed because all parties applied to put documents into evidence which were not in the original hearing file and, for the most part, that was done by consent (see para.4, 7 and 18 to 26 below for the exceptions). By the end of evidence, there were more than 50 pages of additional documents and the respondent's representative updated the hearing file accordingly. It was slightly unhelpful that, in doing so, the page numbering was amended so that each page number in the Updated Hearing Bundle is two more than the equivalent page in the original hearing file. I explain this because the page numbers in these reasons do not correspond to the page numbers included in witness statements, which refer to the original page numbers. However all parties accommodated the change so it seems sensible that these reasons should be consistent with the submissions.

2. Despite this, some relevant documents are only found attached to the claimants' witness statements. Miss White's statement had 3 appendices with 4 pages and Mr Serrao's statement also had 3 appendices with 4 pages. These are referred to in the reasons as CW App.A or as the case may be.

3. In response to particular arguments in the respondent's submissions, on 2 October 2024 the claimants applied to adduce six additional categories of documents into evidence after oral evidence had concluded. While it is not unprecedented for a party to apply to reopen the evidence they rely on before making their closing submissions, the tribunal is cautious about doing so because that evidence has not been spoken to by a witness on oath (or under affirmation) and because of the risk of unfairness to the other party whose witnesses have not been asked about the document in question. Four documents were relied on by the claimants with the consent of the respondent (see para.11 to 17 below for further explanation of the agreed basis on which this was done and why this unusual course was agreed on in the interests of justice):

    a. An exchange of emails between the Mixed Fleet Coordinator and the first claimant from October 2019;

    b. One of the first claimant's rosters from October 2019;

    c. The HCC Flying Agreement and Roster Guide November 2022;

d. An emailed notification "all things 'leave'" from 26 May 2023.

4. Our reasons for rejecting the claimants' application for the remaining two categories of documents to be adduced in evidence before submissions are set out in para.18 to 26 below.

Oral witness evidence

5. We heard evidence from Miss White and Mr Serrao on their own behalf and in support of each other's claims. Mr Geoffery Ayres, Employee Relations and Strategy Manager, gave evidence for the respondent. All three confirmed the truth of witness statements and were cross-examined upon them.

Preliminary matters

6. On Thursday 29 August 2024 the respondent made an application to postpone the hearing and the claimants objected. That application remained to be determined as at Day 1 of the final hearing. At the start of Day 1, the respondent made an application for Mr Kapur to recuse himself as a member of the tribunal panel; that application was refused for reasons given orally on 2 September 2024. The application to postpone the hearing was refused. Written reasons for both decisions have already been sent to the parties. We do not repeat the procedural history of the claims which appears from those written reasons.

7. Written reasons for our refusal on 5 September 2024 (Day 4) to admit into evidence a late disclosed document which the first claimant wished to rely upon have also been sent to the parties separately. These several preliminary matters which arose during the course of the hearing meant that the timetable had to be adjusted more than once.

8. By the end of Day 5, evidence had been concluded but there had been insufficient time for the parties' submissions on the evidence. When adjourning part-heard on 6 September (Day 5), two non-consecutive days were scheduled for oral submissions, deliberation and judgment writing; the timetable provided for deliberation to start after lunch on Day 6. The panel had decided to reserve our judgment in any event.

9. The parties exchanged written submissions in advance of the date scheduled for oral submissions in response (2 October 2024). Unfortunately, in part because of yet further preliminary matters which arose in the interim, we were unable to conclude our decision making on 4 October 2024 and another date was arranged (8 November 2024). This has led to a delay in the reserved judgment being finalised, for which we apologise.

10. On Day 6 some preliminary matters required case management before the parties gave their oral submissions in reply to the written submissions.

11. The claimants applied to introduce six additional categories of documents into evidence. Miss White explained that she had understood the purpose of the hearing on 2 October to be to respond to the written submissions and that there were passages in the respondent's written submissions which she argued she was prejudiced in responding to unless she could rely upon these additional categories of documents.

12. That was because the respondent had included in their written submissions information which had not been adduced in evidence at the hearing between 2 and 6 September 2024. To say that this was disappointing is an understatement. It was hardly surprising that the claimants should apply to re-open their evidence when submissions were made on the basis of instructions unsupported by primary evidence. Miss White argued that this was incredibly unfair to her and Mr Serrao. There were several places in the respondent's written submissions where it was clear that assertions were made which the respondent could not rely on because there was no primary evidence. The tribunal should not have to go through the written submissions of a professional representative with a fine toothed comb to satisfy itself that those submissions are supported by the evidence in the case. The respondent's explanation for how this had happened appeared to be that the client had included comments on the draft submissions. Regardless of the circumstances in which the final hearing started (by which we mean the refusal of a postponement application) the submissions should not have been used as an opportunity to make good the consequences of having had to complete their witness statement under pressure of time.

13. A pragmatic solution had to be reached to enable the submissions stage to be concluded in a way which was fair to both parties and avoided further delay to the conclusion of the liability hearing. Mr Chaudhry apologised and accepted that there were passages in the written submissions which he could not and would not rely on. Specifically,

    a. On RSUB page 12 within para.9 5 specific types of duty which an In-flight Manager might be allocated to but which did not attract the additional payments were listed which had not been referred to in evidence. Mr Chaudhry agreed that all 5 bullet points should be removed from his submissions;

    b. It was accepted that there was no primary evidence to support the submission in RSUB para.8 on page 11 of the respondent's submissions about the contents of the claimants' pre-2020 rosters or the average number of trips allocated per month to In-flight Managers which attract a short-haul payment; The words from "The pre-2020 rosters … undertaking TU duties." were excised.

14. Neverthess, the tribunal was put in a difficult position. The way in which evidence emerged piecemeal through the hearing meant that it was not easy

immediately to spot if there were other places where the respondent's submissions were not supported by evidence. On the other hand, simply requiring the respondent to make oral submissions seemed likely to disadvantage everyone. The tribunal had read them and the claimants had prepared to respond to them. However, we needed to take extra time to check and double-check that there was evidence to support submissions.

15. Following the discussion about the respondent's written submissions and the clear statement from the tribunal that we would disregard submissions (from either party) which were not supported by evidence, the parties took time to consider the extent to which the claimants pursued their application to rely on additional documents and the extent to which that application was contested. Four categories were admitted by consent. The respondent confirmed that they did not need to apply to recall either claimant or Mr Ayres to deal with those documents.

16. They were admitted into evidence to stand as self-evidently the documents which they appeared to be. The parties agreed that we could take them at face value and that they could make submissions on their relevance to the issues.

17. We rejected the claimants' application to rely upon the two remaining categories of documents which were not in the original hearing file and were not available for cross-examination between 2 and 6 September 2024: Mr Newall's statements and an email exchange Miss White wished to rely on to show that she did work for the HCCU branch during her first secondment. We decided that disputed matter and gave the parties our decision on it before hearing their oral submission in response. Those therefore started at about 13.45 and the hearing on 2 October 2024 finished at about 16.30.

<u>Reasons for refusing to admit documents on Day 6</u>

18. The two documents which the claimants applied to adduce in evidence were Mr Newall's statement prepared in support of his claim against British Airways plc and an exchange of emails.

19. The judgement of the employment tribunal in Mr Newall's consolidated claims is at UHB page 239. The claimants now wish to put his witness statement for that hearing in January 2022 into evidence. The exchange of emails is relied on by Miss White to support her evidence about activities that she undertook during the period May 23 to June 2023 when she was stood down full time for union duties and receiving training from Unite the Union. That period is described as a voluntary secondment in her schedule of loss. The period is specifically challenged by the respondent as not being one during which Miss White was engaged in activities which fall within s.168(1) or (2) TULRCA.

20. We rejected the applications in relation to both categories of documents.

21. Mr Newall's statement: Whenever there is a proposal effectively to reopen evidence when the oral evidence stage is finished and the parties have come prepared to give written submissions and there has to be a very good reason why evidence should be reopened. The tribunal has to take into account whether the documents are relevant and apparently credible but also the explanation for the late application and the potential consequences of admitting the evidence. There is a risk that the fairness of the hearing will be adversely affected. Witnesses may need to be recalled to deal with points that might be made on the basis of documents that have come to light later in the process.

22. The relevance and weight to be given to the judgment in Mr Newall's claim has been a matter of contention throughout the interlocutory stages of the proceedings (see UHB page 50 para.14 in the 2 May 2023 hearing). At the preliminary hearing in June 2024 it was agreed by the respondents that the judgement could go into evidence, subject to submissions about the relevance of what was in that document. There was a discussion at the preliminary hearing about whether the claimants intended to call Mr Newall. They explained at that time that they did not intend to call him and they have not done so. The option was open to them before the final liability hearing to try to call Mr Newall by applying for a witness order if necessary. They could have applied for him to produce his witness statement from his own claim at an earlier stage and sought to rely on it at the proper time.

23. There is no overwhelming reason why the claimants should be allowed to put it in evidence now, particularly since the statement itself and the relevance to the present claims of what happened at the hearing in Mr Newall's case is limited. The judgement stands as a record that evidence was given in that hearing to the effect that there was an agreement between Mr Newall and Mr Holmes on 8 August 2019. The tribunal Mr Newall's case apparently accepted that evidence – otherwise they would not have made the finding that is recorded in para.12 of their judgment (UHB page 242). It has always been clear that that is the extent of the relevance of the Newall judgement.

24. We refuse the application because of the risk of disruption to the smooth running of the hearing, the fact that the respondent's position has always been that the parties to this litigation are not bound by the Newall judgement and the lack of sufficient explanation for the application being made at such a late stage.

25. We turn to the exchange of emails from May and June 2023. We bear in mind that some documentation was admitted after late disclosure on both sides during the course of the hearing. Also, the request to rely on this arises because of paragraph 12 of the respondent's submissions, which argues that the claimant has not produced documentary evidence to support her oral evidence that during the secondment between May and June 2023 she was still engaged in administrative work for the branch.

26. We reviewed our notes of cross-examination of Miss White. She gave oral evidence about what she had been engaged in during this period. This is a factual matter that was canvassed in oral evidence. The claimant may only have thought of this documentation after having seen the comments made by the respondent. However, the issue of whether she was engaged on trade union duties that fall within s.168(1) TULRCA is a core element of the claim. She knew or should have realized all along that whether she was doing TU duties during that period was for her to prove. In those circumstances, it was down to Miss White to decide what evidence was needed in order to substantiate her claim. We do not think that it is in accordance with the overriding objective to admit those particular emails at this point when they are likely to lead to an application for Miss White to be recalled to deal with them.

The Issues

27. The issues to be decided remain those in the amended list of issues dated 9 April 2024 (UHB pages 71 to 75). They are appended to this reserved judgment for easy of reference.

28. Judge George apologises for causing confusion during the hearing by asking whether the parties were prepared to deal with remedy. Mr Chaudhry prepared to do so. However, Miss White correctly pointed out during her evidence that in the June 2024 preliminary hearing it had been decided that there would be a separate remedy hearing if necessary. She had not included details supporting her injury to feelings claim in her statement as a result. In those circumstances it would have been unjust to deal with remedy on the detriment claim all in one hearing. The intention when timetabling submissions for 2 October 2024 was to have reserved judgment on all issues for 2 heads of claim (unauthorised deduction from wages and the alleged breach of s.169 TULRCA) at the end of the submissions and a liability judgment on the complaint of detriment on grounds of trade union activities.

29. As will be seen, neither party has addressed us on the correct statutory test for the amount of the payment which should have been paid by the respondent in accordance with s.169(3) TULRCA. The proposed issues for the remedy hearing are set out in para.195 below.

Findings of Fact

30. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment

about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

31. The remaining claimants, Miss White and Mr Serrao, are both members of what is now called the Heathrow Cabin Crew Union or HCCU. Additionally Miss White is and Mr Serrao was previously a trade union representative in that branch of Unite the Union. The branch was previously called the Mixed Fleet Union MFU. In these reasons we refer to the branch as the HCCU, even if for some of the relevant time it was known by its former name.

32. The branch was recognised for bargaining purposes by the respondent in 2013 and that recognition is governed by two collective agreements:

    a. the British Airways plc Mixed Fleet Voluntary Recognition Agreement (UHB page 190) and

    b. The British Airways plc Mixed Fleet Cabin Crew/UNITE Facilities Agreement (UHB page 202)

33. We particularly note the following clauses

    a. The clause 1 definition of “Off-Lined” to be “A colleague being released from their normal duties to undertake another function for or on behalf of a trade union and/or its members”;

    b. The clause 2 statement that the objectives including “to set out the approach for granting time off work for various duties and activities undertaken by union representatives of the trade union.”

    c. The clause 3 statement appropriate adjustments would be made to the cabin crew roster for elected representatives to enable them to carry out both roles effectively. Additionally, at the time of the agreement, a total of five days per week was agreed to be allocated for trade union duties to be split between elected representatives, subject to operational requirements.

    d. Clause 9 (UHB page 206) sets out the principle that the respondent would provide elected Trade Union representatives with reasonable time off paid at basic rate to participate in trade union duties and also set out examples of activities for which reasonable paid time off would be granted. These included five grounded days a week between 9 am and 5 pm (or 8 hours) to undertake trade union duties (covering the duties set out in clause 12) and managing the TU office on a “rolling 3 month look ahead for scheduling and off-lining”.

e. Clause 13 explains the arrangements for off-lining which were that the union representatives requesting time off for trade union duties should provide a minimum of 8 weeks' notice wherever possible to comply with schedule arrangements. A form was specified. When an application to be off-lined was granted, the individual would not be put on the flying roster; this is referred to as being 'de-rostered' and means that they are not allocated to any duty by the schedulers.

f. Clause 16 provides that the facilities agreement can be terminated by mutual consent.

g. Appendix 5 at UHB page 212 sets out 4 internal meeting codes which are set out in the table at para.75 below. Under the agreement, all of the internal codes are agreed to be paid at basic rate apart from TUU (Trade union conferences and meetings) which is to be unpaid. See further para.76 and following for our findings about what was covered by the 4 codes. The practice was for the TU reps to apply to be off-lined for trade union duties providing information about the purpose for which they wished to be off-lined, including by using the internal code. This is therefore evidence of the kind of activity likely to have been carried out on this date.

34. At the time of the Facilities Agreement the first claimant, Miss White, had been employed for just over a year having started work on 14 June 2012. She is currently an In-flight Manager (occasionally abbreviated to IFM). Mr Serrao's employment started on 12 December 2012 and he is also currently an In-flight Manager.

35. Their respective contracts have undergone some variations over the relevant period, not least during the redundancy consultation in 2020 when the organisation was restructured and three fleets were combined into one single fleet.

36. Miss White was elected to positions within the HCCU in June 2018 (CW para.4) and her claim covers the period from that date to the present day. Mr Serrao's claim is limited to the period during which he was an elected representative namely April to December 2022.

37. The first available contract in respect of Miss White is at UHB page 217. It includes the following contractual terms about hours of work. (UHB page 219):

"You may be required to work for up to 2000 hours a year (Working Time), which will include both flying duties and ground duties. Of this working time, up to 900 hours may be block flying time. Block Flying Time has the definition given to it in the Civil Aviation (Working Time) Regulations 2004 (the Regulations), or any

successor to the Regulations. You will be rostered for flying duties in accordance with statutory and Company arrangements in place from time to time."

38. Rostering is covered by Cl.14 and Miss White agreed to work "such rosters as the Company may assign to you from time to time."

39. Mr Serrao points out in his closing submissions (C2SUB page 1) that his contract likewise makes the same requirement (UHB page 229).

40. Mr Sam Newall was an elected HCCU branch representative at the relevant time in 2018 to 2019. He submitted a collective grievance on behalf of the Branch on 2 May 2019 (UHB page 277). The grievance was copied to Michelle Braveboy a regional representative at Unite the Union. Miss White was a signatory and took part in that collective grievance. In it the representatives (and there were 23 signatories to the collective grievance) complained that when the respondent granted them time off during their working hours for the purpose of carrying out trade union duties within s.168 and s.168A TULR(C)A, they did not pay the representatives adequate remuneration within the meaning of s.169. The basis for this allegation was that "should a [HCCU] representative complete a ground day in their ordinary role, they would be remunerated with their daily rate and payment of E.H.R. (Elapsed Hourly Rate) multiplied by the hours worked".

41. The Elapsed Hourly Rate or E.H.R. was non-contractual variable pay or an allowance paid in the circumstances which could be varied from time to time. It had a subsistence element. See, for example, in Mr Serrao's contract at UHB page 228. The payslip at SS App B shows that when Mr Seerao was a customer service trainer performing ground duties from 2107 to 2019 he was paid E.H.R.. He was also paid it while on Flying duties (again see SC App.B).

42. Other different allowances were payable depending upon the duty to which the individual was rostered.

43. It is clear that the fact that HCCU reps were not paid EHR for attending meetings with management in that capacity was a source of concern over a number of years. At UHB page 261 we see the issue being raised by what was then the Mixed Fleet Unite Branch Secretary on 30 November 2017 at a bargaining group meeting at which Mr Newall was present. It is recorded that management were told that Our Voice reps were paid this allowance and were asked why there was the difference in treatment. Mr Ayres apparently stated that they would "take away your request and will respond". The issue was raised again on 27 November 2018 (UHB page 269).

44. On 26 February 2019 there was another bargaining group meeting attended by Mr Holmes and Mr Newall (among others) although Mr Ayres was not present on that occasion. The same concern was raised (UHB page 271) and the HCCU argued that it was a breach of the ACAS code not to pay the

allowances. Management stated that they did not believe they were in breach of the code. The difference in treatment with other representatives attending the same meetings as HCCU reps was noted. A request was made to back date the payment of EHR to the start of the Facilities Agreement.

45. On 13 June 2019 the Head of IFCE responded to Mr Newall apologising for the delay and saying that Mr Chris Holmes, the Fleet Area Manager would be in contact with him (UHB page 279). We can see from UHB page 286 that Mr Newall and Mr Holmes met on 8 August 2019. That page is an email from Mr Newall to the TU representatives relaying some information about the meeting. He told his colleagues:

"I met with Chris today to discuss some of the below and also thought it was useful to pass on some other bits of info. Let me know if there are any queries.

- Rep Offline Pay
- Will pay E.H.R. for offline days.
- Triggered from 1st September subject to Georff Ayers being able to action.
- Will pay for salaried day only, everything but TUU.
- BA suggested to backdate to October 2018.
- Queried that this is not acceptable and needs to be backdated to when recognition was first given. Made it very clear that they have broken the law and need to deal with the consequences."

46. Communications between Mr Newall and Miss White (who sought clarification) include a statement from Mr Newall that he had stated (we think, to Mr Holmes)

"We should be paid for all TU duties/activities that the company permit us to have time off for so this would fall under the grievance as well. It's not specifically for TUO duties."

The response from Mr Holmes is said to have been that "all duties that currently attract salary as listed below will also attract E.H.R. (followed by a list of 18 duties)".

47. Mr Newall concludes his email of 9 August 2019 (UHB page 285) by saying that the meeting had not been minuted and "the main purpose of this was to gage (sic) where we were with their thinking in terms of the issue highlighted, this will then be formally documented as part of the facilities agreement."

48. The claimants also rely on the exchange between Mr Newall and Mr Holmes at UHB pages 289 to 290. In that, Mr Newall states, in respect of Rep Offline Pay, that "you have agreed to pay for this going forwards however we were waiting for confirmation from Geoff's team on when this could be actioned." And that the TU side were waiting to know the management side position on when backpay would be paid from. The response from Mr Holmes to that part of the email was "I am still working through the back pay position and Catherine and

I hope to be able to come back to you on this and impact of unpaid days on bonus in due course."

49. We find this to be evidence of negotiation within a collective grievance covering more than one issue where the TU side negotiator and the management side negotiator appear to have reached agreement between themselves on one part of the dispute but not on others. Mr Newall himself anticipates this to need to be documented within the facilities agreement. It never was. Neither was there ever agreement on the issue of back pay or evidence that implementation was agreed upon.

50. Miss White was elected Branch Secretary of the HCCU in September 2019 (UHB page 291). In that role she has held responsibility for liaising with the respondent's management on all collective bargaining matters on behalf of Branch members including bargaining for pay. From this time, therefore, she was in attendance at meetings and can give direct evidence about what happened at those she was present at. The respondent's witness, Geoff Ayres, has at all relevant times been the Manager IFCE Employee Relations and attended or was invited to bargaining group meetings throughout the relevant period so is also able to give direct evidence about what was discussed from the respondent's perspective.

51. Mr Newall's employment terminated on 18 November 2019. He presented an employment tribunal claim against the present respondent. That ultimately led to a judgement following a hearing in the Watford Employment Tribunal between 5 and 7 January 2022 (UHB page 239). By the judgement the tribunal (Employment Judge Cowen, Mr Wharton and Mr Sutton – the Cowen tribunal) awarded Mr Newall compensation for unfair dismissal and directed the respondent to pay him in respect of outstanding holiday pay. However there was also a declaration that Mr Newall's claim for pay under section 169 TULRCA was successful.

    a. We note from the judgement that the tribunal had a joint bundle of more than 1000 pages and heard oral evidence from five witnesses including Mr Newall, Mr Holmes and Mr Ayres (who alone of those has given evidence before us). They all adopted written statements that had been exchanged in advance and were tendered for cross-examination. The judgement records they gave oral evidence.

    b. The issues to be determined by the Cowen Tribunal included (at paragraph 4 of the judgment) (UHB page 240) whether the respondent had failed to pay Mr Newall adequate remuneration within section 169 TULRCA.

    c. There must have been some evidence before the Cowen Tribunal to support their findings that Mr Newall believed that he should be entitled to both his basic pay and E.H.R. for trade union duties "which

he would be entitled to if he were undertaking flying duties or other relevant duties (including training)" and that Mr Homes on behalf of the respondent agreed at a meeting on 8 August 2019 that E.H.R. would be paid "from now on". However the Cowen Tribunal found that back pay and the date of the system change to facilitate implementation of that agreement were not resolved at the time of Mr Newall's dismissal.

d. That is not a judgment which binds us or the parties before us. Given the wording of paras.10 to 12 of the Cowen Tribunal judgment, it adds little if anything to what we see on the face of the contemporaneous correspondence.

The status of the alleged agreement of 8 August 2019

52. The claimants argue that we should find there was an agreement because of the following matters:

a. They argue that is the only logical interpretation to place upon the emails at UHB pages 284 – 290 quoted in paras.45 – 48 above;

b. They rely in particular on the statement by Mr Newall to Mr Holmes that "you have agreed" and the absence of rebuttal from Mr Holmes.

c. The Trade Union thereafter presented a consistent message which is only consistent with it being their view that there had been an agreement;

d. The finding by the Cowen Tribunal in Mr Newall's case;

e. Evidence by Miss White that Mr Ayres effectively agreed or conceded that there had been such an agreement during a subsequent MSTeams meeting of which she gave evidence before us.

53. The respondent's position is that, in the first place there wasn't an agreement. If there was, in the second place they point to various formalities which were needed to ratify the Facilities Agreement when it was first set up. They argue that equivalent steps would need to be taken in order for any agreement in principle to be ratified at regional level and that it is only by such ratification and authorisation at a senior level in BA plc that any agreement between Mr Holmes and Mr Newall could cause effective changes to the Facilities Agreement.

54. In her closing arguments, Miss White referred to variations which had been made and which did not need signature to be binding and argued that the oral agreement could be binding in the same way. In particular, she pointed to a variation to 8 hour working day evidenced in the facilities meeting on 13 April

2022 UHB pages 401 – 403. She argues that this demonstrates that changes to the time and place of work could be made and implemented without fuss prior to formal agreement being updated. That may be, but the two parties have not, in this instance, acted from 8 August 2019 onwards as though a binding agreement was reached on that date.

55. Our view of this evidence and the claimants' arguments is:

    a. The emails suggest that there was some meeting of minds when the situation was discussed between Mr Newall and Mr Holmes. However it does not amount to more than some common ground on an aspect of what was in dispute. The evidence of the emails is insufficient as the basis for a finding that the respondent intended to create a legal obligation to pay E.H.R. for time spent on Trade Union duties. Miss White argued that it was clear that, in the meeting on 8 August 2019, Mr Newall and Mr Holmes were acting respectively in official capacities in discussions relevant to the facilities agreement and points to discussions at a corporate level and awareness of the issue at a corporate level as evidenced by the minutes referred to in para.43 above. An awareness that the Trade Union were consistently of the view that the pay agreed to be paid by the Facilities Agreement did not satisfy the terms of s.169 TULRCA is only the background to the discussion on 8 August 2019. Any agreement was in respect of one element only of the dispute as a whole, was subject to other elements being agreed and to the Facilities Agreement being amended (see also the note of Mr Holmes's comments on 16 December 2020 at UHB page 310).

    b. The highest the argument based on the Newall judgment can reasonably be made is to say that, at a contested hearing at which both Mr Holmes and Mr Newall testified, evidence was accepted by the Cowen Tribunal that an agreement had been reach. It is reasonable to infer that direct oral evidence was given at that hearing which was the basis of the Cowen panel decision. For our purposes, however, not only is the judgment not binding upon us, we have not heard the direct evidence so the scant details in the judgment are, at best, second hand evidence.

    c. There are no minutes of the MSTeams meeting on 12 August 2022 at which Mr Ayres is alleged to accepted that there had been an agreement. The exact words used would be material to the meaning they had. We think it unlikely that he actually said in so many words that he knew there had been an agreement at a meeting he had not been present at; that would be inconsistent with his words and behaviour on other occasions. Where there are minutes he is recorded as taking the stance that he needed time to discuss details with management. We think it very unlikely that he would commit to

saying something the direct opposite of what he is recorded as saying in the other minutes. Miss White may well be doing her best to recollect what was said and may believe what she says she heard. However we think it far more likely that Mr Ayres said something vague that included the word agreement.

56. In addition, as we explain below, we have concluded that the Facilities Agreement did not create legal relations directly between the employer and the individual employees. We consider that what was said between Mr Newall and Mr Holmes was something said in the course of negotiations and was not intended to lead to a concluded position creating legal rights for all TU representatives both then and in the future – which is what the claimants argue.

The second collective grievance

57. In March 2020 a national lockdown was announced in response to the coronavirus pandemic. Miss White (CW paras.24 to 27) remained active in her Trade Union role and was permanently stood off-line to deal with all the issues arising for Unite members as a result of lockdown and furlough. In accordance with clause 1 of the Facilities Agreement, that meant she was released from her normal duties to undertake another function for or on behalf of a trade union and/or its members (UHB page 203). She explains in CW para.21 the impact that being offlined from flying duties had on her income comparing her earnings in the months before she was off-lined permanently. Other labour relations issues arose out of the pandemic involving voluntary and compulsory redundancies so she remained permanently stood down for a considerable time.

58. The respondent makes the valid point that, once the national lockdown was announced on 23 March and certainly from the time of the furlough agreement on 3 or 4 April 2020 when cabin crew were placed on furlough, it becomes harder for Miss White to say with confidence that, had she not been released for trade union duties she would have been allocated to flying duties. What the comparison does do is provide a sense of the level of flying duties and other duties attracting E.H.R. undertaken by Miss White even as an active trade union representative and show that she was not paid at a level equivalent to what was normal for her when she was off-lined permanently.

59. A second collective grievance was presented on 29 June 2020 (CW para 29 and UHB page 296). In that the following complaints were raised on behalf of 18 representatives, including Miss White:

    a. The failure to pay E.H.R. and commission based payments for time spent conducting Union related duties was an unauthorised deduction from wages;

b. The failure to pay salary for activities coded TUU, the failure to pay E.H.R. and a number of other alleged detriments (UHB page 297) were detriments on grounds of trade union activities contrary to s.146 TULRCA;

c. BA plc's conduct in relation to those matters was breach of the implied term of mutual trust and confidence;

d. The failure to deal with the collective grievance was a breach of the Facilities Agreement.

60. The resolution sought included payment of E.H.R. backdated from July 2013, payment for all TUU rostered duties from that date. It also included payment of other allowances (NIA and DOA) which had been introduced in October 2017.

61. It is argued on behalf of the respondent that it can be inferred from the fact of the second collective grievance that no agreement had been reached between the trade union and the employer about payment of EHR for time offer for trade union duties. We understand that argument to mean that the fact the employer had not paid that allowance to trade union representatives undertaking trade union duties is evidence that they did not consider they had a legal obligation to do so. There is ample evidence that from the trade union side they considered there to have been an agreement on this issue throughout – which is no doubt one of the reasons the second collective grievance was brought. The evidence suggests that there was a continuing dispute and the parties' respective positions did not change. There is no need for such an inference as that is clear from the contemporaneous correspondence and minutes.

Contractual variable pay

62. It is understandable that during the period of the coronavirus pandemic there was a lot of uncertainty in general. The individuals concerned (both on the management side and TU representative side) were responding to and dealing with a very quickly changing factual situation which affected more fundamental matters than whether the Facilities Agreement complied with s.169 TULRCA or not – important though that undoubtedly is. The business was attempting to adapt to the impact on flying activities of a global pandemic. Negotiations were entered into which led to some harmonisation of terms and the combination of the three fleets into one with effect on 1 November 2020. This involved redundancies and changes to roles. An example of the changes is Mr Serrao's situation; he avoided redundancy by accepting a less senior position and then when a vacancy arose he was promoted back to his original level. What had been the Customer Service Manager role was replaced by the In-flight Manager role. We have been referred to the Redundancy Mitigation and Transition Agreement between BA plc and Unite the Union

dated 21 September 2020 (UHB page 182). In November 2020 (according to paragraph 10 of the grounds of claim) EHR was discontinued and a series of different allowances were put into place.

63. We accept that part of the driver for this change was that there was an element of EHR that provided a subsistence payment to represent the cost to the cabin crew of subsistence when away from home. HM Revenue and Customs rules mean that subsistence payments are taxable and therefore EHR was part taxable and part not. The replacement allowances differentiate between allowances which are in the nature of subsistence payments and those which are not thus simplifying the tax situation.

64. The allowances which replaced EHR are referred to as contractual variable pay. For illustration, we refer to Mr Serrao's contract revision of 16 November 2023 (UHB page 378):

    a. Duty Pay which is payable for flying duties from report time to clear time, for airport standby and for applicable ground duties;

    b. Short Day Payment for shorthaul duties without a night stop.

    c. Nightly Incidental Allowance and Daily Overseas Allowance;

    d. Subsistence Allowance (also referred to as per diems). Based on HMRC tax-free worldwide subsistence rates.

65. As Miss White explains in her paras.31 onwards, progress on the second collective grievance was initially paused. It appears that there was to have been a meeting on 23 July (UHB page 302) but other matters took priority. However, it is clear that by 15 October 2020 Miss White asked for progress on the outstanding grievance, particular since there would be the above changes to the allowances structure. Miss White raised the outstanding collective grievance again in a local meeting of 10 December 2020 (UHB page 307) and a grievance meeting was held on 16 December 2020 (UHB page 310). It appears that Mr Ayres was tasked with hearing the grievance (see final entry on UHB page 312) and said that he would need to re-read everything and then "talk to colleagues in the legal space" and that he would not allow this to take six months (UHB page 313). When asked about that statement (given that no outcome has ever been given for the second collective grievance) Mr Ayres said that he thought that everybody's priorities changed as Covid his and the priority was about saving the business and colleagues jobs.

66. In that meeting Miss White sought to clarify whether there was an agreement to pay what had been EHR for time off-lined for TU duties and Mr Ayres responded that his understanding was that there hadn't been any drawn up

agreement. As explained above, the second collective grievance included arguments that other allowances should also be included in addition to E.H.R.. She also raised the understanding that other work groups, such as BASSA, were paid allowances when the HCCU reps were not (see UHB pages 311 – 312).

67. There was therefore six months between the second collective grievance being submitted and this grievance meeting which is only partly explained by the common consent that other issues affecting the business and cabin crew as a whole should take priority. Miss White gives further details of the chronology of the grievance in CW statement para.46 approx. to CW para.81.

68. A chronology of the grievances is as follows:

2.05.2019	First collective grievance	UHB p.277
8.08.2019	Meeting to discuss that grievance. Alleged agreement Newall-Holmes	
5.09.2019	Emails between Holmes and Newall about grievance issues	UHB p.289
18.11.2019	Newall's employment ends	
09.2019 to 06.2020	No formal correspondence on the issues within the grievance in part due to the then branch chair's request to focus on the E.H.R. review and the Covid-19 pandemic	CW para.22.
29.06.2020	2nd collective grievance	UHB page 296
10.12.2020	Cs chase progress in collective grievance	UHB page 307
16.12.2020	Grievance meeting. GA is to decide the grievance and will "talk to colleagues in the legal space"	UHB page 310
8 & 12.01.2021	Miss White and Ms Braveboy chase progress	CW paras.46 & 49.
25.02.2021	Mr Ayres mails Miss White seeking clarification about the grievance	UHB p.320.
08.03.2021	Miss White asks for time to respond.	CW para.51
13.04.2022	HCCU Facilities meeting at which the outstanding grievance mentioned	CW para.58 and App.B
17.06.2022	Miss White provides a substantive response. She explains the union's changing priorities at this time in CW para.57.	UHB page 329
09.09.2022	Mr Ayres agrees to meet the union side	CW para.68 and UHB p.352.
12.08.2022	Teams meeting. He accepted that he had told Miss White and Ms Braveboy that internal discussions	UHB p.353

	were ongoing and when they were complete he would respond.	

69. Miss White asked Mr Ayres what he had done to progress the grievance between the grievance meeting in December 2020 and his mail to her in February 2021. His answer was that he had talked to the legal team about the claim the claimants had made to take advice on how to proceed. However, "overall I didn't believe and still don't believe that the Facilities Agreement wasn't fit for purpose. The position of your claim was invalid."

70. It is hard to see why Mr Ayres could not give an outcome simply saying that if that was the case. His actual recollection of the events was poor.

71. On the other hand, he had been informed by Unite that the HCCU branch would no longer exist from November 2022. That is still 3 months after the last meeting. The decision was reversed. He referred to the claimant having been permanently stood down from December 2022. But we do not see why that excuses a failure to provide any answer to the grievance as at the date of the final hearing. There appears to have been no progress since August 2022.

Drawing up rosters

72. There was common ground on what the arrangements for drawing up rosters and for applying to be released for trade union duties were. The HCCU would apply months in advance of time for certain individuals to be released to run the branch office (as a resource for members), to be available to represent members in meetings (such as those with a statutory right for a companion) or to carry out other duties within the scope of the recognition agreement. An example is the claimant's email exchange with someone in Mr Ayres' office dated 17 October 2019 for offlines for December 2019 to 10 January 2020. There would be a period of negotiation and clarification with Mr Ayres's office before the agreed position was passed forward to Scheduling (who organise the rosters). They then took those allocated Trade Union duties into account as fixed points when allocating flying duties, ground duties and the other duties which cabin crew could be listed to carry out. An example of how a completed roster appears in an individual's calendar is at UHB page 133 (for Miss White) which shows her roster for December 2023. Her explanation of how rosters were drawn up is at UHB page 132 and she was not challenged upon it..

73. There are obvious advantages for scheduling for the HCCU to apply for certain individuals to have protected facilities time and for that to be negotiated where necessary before the schedulers populate the rosters. We understand that something similar happens with requests for annual leave – although requests for leave once a roster has been published are also

possible. Additionally, cabin crew bid for particular routes; some routes or duties may be particularly desirable and crew do not always get allocated the routes they bid for.

74. By applying in advance the claimants were exercising their s.168 TULRCA rights at a time when they did not know what duties in their substantive role for the respondent they might be rostered to do. For the respondent's convenience and operational expediency, the requests to be released were not done when the rosters were already in place. By definition, therefore, they were released for trade union duties on a day when they *might* otherwise have been scheduled for flying or other duties but they *might* have been on leave or on a non-working day. The way it was agreed that the Facilities Agreement should be implemented meant that they did not know which of those would have occurred. Another way of looking at it might be that once Miss White or Mr Serrao had been rostered by the respondent to be at work between 8 am and 4 pm on Trade Union duties, those were the hours that they had agreed to work in accordance with clause 14 of their contract (see para.38 above).

Duty Codes and which duties they covered

75. Appendix 5 of the Facilities Agreement (UHB page 212) sets out the following Duty Codes.

Meeting Code	TUO	BAU	TUB	TUU
Description	Trade union office cover	Trade union British Airways related duties	Monthly Unite Aviation Council ("UAC") meeting	Trade union conferences and meetings
Payment	Paid – Basic rate	Paid – Basic rate	Paid – Basic rate	Unpaid

76. The claimants' evidence was that the document at UHB page 362 explained in detail what the headline duties covered by those codes entailed from time to time. They have not prepared evidence pinpointing exactly which meetings or activities were carried out on every date within their Schedules of Loss; in Miss White's case there are 5 years' of duty so the task would be labour intensive if not impossible. The claimants' rely upon indicative duties on the document headed "Overview of the Roster Codes for Trade Union Duty/Activity Allocation" which became part of their evidence.

77. Examples of the kinds of duties covered by the different codes from the claimants' overview and the particular subsection of s.168(1) they are said to fall into are:

    a. TUO is described in the Facilities Agreement as office cover. These are said to include working in the office (either in Heathrow Terminal 5 or remotely) to respond to, escalate or resolve member issues and emergencies by email, phone call or in face to face meetings. There is an account of indicative activities at the top of UHB page 362. Mr Serrao explained that this was an 8 hour day but the Trade Union covered the operation with shifts because the operation was 24 hours. Clause 9 of the Facilities Agreement states that the company will grant reasonable time off to manage the TU office. It appears that the amount of time permitted for this has varied from time to time.

    b. TUO was also said to cover time off, in effect, to run the branch and carry out the administration connected with running the branch, applying for representatives to be off-lined, preparing accounts and preparing for meetings (UHB page 363).

    c. TUB would cover attendance at a Trade Union branch meeting to update members of the branch on matters relating to their employment and the work of HCCU (UHB page 364).

    d. BAU was used to cover meetings between BA plc and the union and meetings at which both would be present as set out in UHB page 364. That included the Cabin Crew Bargaining Group and training which, by the description on UHB page 364, related to the representatives activities as a Trade Union Representative.

    e. BAU was also used by representatives with a Committee position attending committee meetings supporting the general running of the branch or in advance of a company meeting to discuss issues raised by members which are to be raised with management at future meetings.

    f. TUU was used to cover meetings and training for Unite TU branches representing cabin crew at all airlines or fora at regional and national levels (see UHB page 365).

78. According to the Facilities Agreement, there was collective bargaining in relation to negotiations relating to pay, hours and holiday (UHB page 203). See also the extent of voluntary recognition in Clause 3 of the voluntary recognition agreement (UHB page 190).

79. Mr Serrao gave credible evidence about the activities he carried out when he was running the branch office. He referred to his schedule of loss and pointed out that although he always claimed for an 8 hour shift, the times of those

shifts varied: 20 to 25 July 2022 3 days from 7 am to 3 pm and then 3 days on from 1pm to 9 pm. He had taken those times from his roster and they had been worked to cover access to Union advice and support for cabin crew throughout their working time wherever they might be. He argues, with justification, that had the respondent believed at the time that he not carried out the duties which he applied to carry out (for example failed to attend internal meetings with members) then it would have been open to the respondent to discipline him and he said that had not happened.

80. The application for a postponement by the respondent was on the basis that they had not analysed line by line the dates claimed in a way that would enable them to say whether or not they accepted that those hours had been worked on trade union duties falling within s.168(1). Nevertheless, Mr Ayres challenged the times (GA para 48 and following). These challenges come down to querying whether the times have been overstated by 15 minutes and are not a challenge to the activities that Miss White states she was likely to be carrying out at that time. Nor was there a challenge to whether the indicative duties in the Overview at UHB page 362 fall within s.168(1)(a) to (e) TULRCA. The respondent's challenge is this: they argue that the claimants have not shown in respect of each date for which a claim is made specifically what task they were doing and that that task fell within s.168(1)(a) to (e) TULRCA.

81. In fact, s.168(1)(d) and (e) are inapplicable because they both relate to a relevant transfer or prospective transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and there was no such relevant transfer during the period of time we are concerned with. The claimants' submissions on which subsections apply to which duty codes are in C1SUB para.69:

    a. TUO: s.168(1)(b);
    b. TUB: s.168(1)(b);
    c. BAU: s.168(1)(a)(c) & (e) and s.168(2)(a).

82. The claimants rely on the data in the respondent's document HCC TU Rep Days in Office (document 76 of the UHB but entered in evidence as a separate MS Excel document for accessibility). They ask us to accept that the allocation by the respondent in that document, for example, of the code TUO to a particular date should be taken as evidence that when an application was made for them to be off-lined on that date, information about the reason for the proposed TU duty day was enough to satisfy the respondent that the purpose was one within the TUO code (UHB page 362 – 363). In other words, they argue that the respondent's document shows that they contemporaneously accepted this to be the purpose of the time off. Therefore, they state, on that date they must have been engaged in office administration, manning the advice line, in representing members at formal and informal internal meetings (such as managing absence meetings,

conduct and performance meetings and grievance meetings) or attending bargaining group meetings and rostering and scheduling meetings.

83. We consider it relevant that the applications for offline duty time were made on a monthly basis and went through some negotiation and correction with Mr Ayres' team before they were passed and referred to Scheduling. They did not go through on the nod. We think it a fair inference from that process that the purposes declared in advance were accepted at the time to be genuine and to be properly within codes in the Facilities Agreement. The purposes of the Facilities Agreement included to codify what the parties had agreed to be a reasonable amount of time off and how to record the activity or activities carried out. Mr Chaudhry on behalf of the respondent didn't argue that the duty codes that his client had agreed to pay for fell outside s.168(1) or (2) TULRCA.

84. We accept that the duties intended to be covered by those duty codes fell within s.168(1) or (2). We think, contrary to Miss White's submissions, that s.168(1)(e) TULRCA is inapplicable because we have not heard evidence that suggests that the business reorganisation would fall within TUPE. The duty codes categorise activities for internal purposes and they do not in all cases align precisely with the subsections in TULRCA. However the TUU code, when properly applied, does appear to cover activities for which unpaid time off under s.170 should be given rather than paid time off under s.168. The kinds of activities covered by BAU set out in para.77.d. above fall within s.168(1)(a) as negotiations with the employer within the scope of the recognition agreement. Some, no doubt in particular when reorganisation and redundancies were negotiated during Miss White's permanent off-line in 2020-2021, would fall within s.168(1)(c) as involving redundancy consultation.

85. The category within s.168(1)(b) TULRCA of activities concerned with the performance on behalf of employees of functions "related to or connect with matters falling within that provision which the employer has agreed may be so performed by the trade union" covers a wide range of matters which, under the Facilities Agreement, BA plc agreed should be carried out by the HCCU. Office cover, running the branch, updating members about matters failing within s.168(1)(a) and (c) and attendance at workplace meetings for managing attendance, disciplinary matters and grievances would all fall within s.168(1)(b) TULRCA. Those duties cut across the duty codes TUO and TUB. Training in respect of any matters covered by s.168(1) falls within s.168(2) and is also coded as BAU.

86. The only remaining question is whether there is reason to think that the claimants didn't in fact carry out the duties that they had told the respondent they were going to do when offline time was applied for. With the exception of the period of Miss White's secondment, her furlough leave and the dates coded TUU on her Schedule of Loss, the respondent has not put forward

evidence that either claimant did not carry out the asserted duties on any of the particular dates.

Miss White's training May and June 2023

87. A specific period of time which was challenged was between May 2023 and June 2023 when Miss White was released full time. The respondent argues that during this period she was not engaged in activities within s.168(1) or (2) TULRCA.

88. An exchange of correspondence at UHB pages 380 – 385 evidences that, by early 2023 there had been a significant reduction in the numbers of employees who were members of HCCU. Apparently, there had been a plan for the HCCU branch to cease to function as a separate branch and Miss White had been given time off "to complete any outstanding work for the branch and its members". Her last BA trade union duty was to be 15 December 2022 whereupon she was to transition back to her normal contractual role. Mr Ayres wrote:

> "We are happy to continue to support Charlene whilst she undertakes further general (i.e. non BA specific) training courses that are being delivered by Unite. That said, we will extend this until the end of March 2023 …" and then details are given.

89. Mr Ayres stated that that kind of time would normally be unpaid but the respondent would continue to pay Miss White's basic salary until the end of March 2023. In the event, the branch did not close and Miss White retained her role as branch secretary. In his 1 March 2023 email Mr Ayres stated that if that happened "we will facilitate reasonable time off to carry-out Trade Union Duties and activities but on the understanding that she flies regularly … each month." (UHB page 380)

90. Miss White was then granted a period of further training/placement up to 9 June 2023. Mr Ayres again stated the respondent's position that this kind of training would normally be unpaid (UHB page 383). What Miss White replies should not be taken as acceptance that to be paid basic pay only during this period was lawful. These are the last duties Miss White has included within the claim; she accepts that a permanent secondment thereafter does not fall within s.168 TULRCA. The code TUB was allocated to these duties internally (see UHB page 364 for the claimants' definition). Neither that nor the description in Appendix 5 of the Facilities Agreement seem applicable to this sort of training.

91. Miss White had not received the training as Branch Secretary that she would normally have done in part because the Covid-19 period interrupted normal training schedules and led to intensive representation at meetings with management connected with the changes to terms and conditions and the redundancies which took place. She estimated that in her first year there should have been about 10 days' training and around 5 days' training each

further year. Some of the training was mandatory for branch office holders. She was permitted to do the training back to back. Miss White argues that, since that sort of training would normally fall within s.168(2) TULRCA – as relevant to the activities she carried out which fell within s.168(1) - the training she received during May and June 2023 is covered by the TULRCA right to time off notwithstanding the fact that it took place in a single block of time.

92. Her oral evidence was that she was also carrying out administration for the branch and branch members in this period.

93. The more usual code for training would have been BAU. We accept Miss White's evidence that during May and June 2023 she was carrying out training falling within the last 5 bullet points in the box on UHB pages 364 – 365. We accept that the reason Miss White did not press for a change of code was that the respondent had agreed to pay for this secondment and it therefore did not seem necessary to raise the point. We accept that the training Miss White undertook during this period fell within s.168(2) TULRCA.

Furlough

94. An argument was raised by the respondent that Miss White was furloughed at some point. We accept that she has not included within her schedule of loss for any period when she was on furlough leave (see her Schedule of Loss page 14 for August 2021). For much of the Covid-19 period, unlike many cabin crew, Miss White was at work because she had been offlined permanently for Trade Union duties.

TUU Coded dates: 5 and 15 March 2021

95. Following the preliminary hearing on 25 July 2024, the Schedules of Loss were amended to remove activities covered by the TUU code which did not fall to be paid under the Facilities Agreement. There are two specific dates (5 March 2021 and 15 March 2021 on page 12 of her Schedule of Loss) on which Miss White maintains that the activities carried out fall within s.168(1) TULRCA notwithstanding that they have been coded TUU by the respondent when paid and that the TUU coding is incorrect. Miss White's evidence, which we accept, was that the activities in question had been applied for as TUO (UHB page 433 is a screenshot of the roster for March 2021 showing TUO for both dates). Her oral evidence was that when an off-line day was allocated TUU that would usually be because she had been authorized to attend an equalities meeting. We understand that the schedulers, working at pace, sometimes selected the wrong code and the TU Reps did not invariably follow that up to change the codes. She was confident that she was carrying out TU office duties advising and supporting members or corresponding on key workplace matters in her role as a workplace representative. We accept her evidence that the activities which were done on those dates were Trade Union activities.

LOI 7 and 8: What would the average earnings of the claimants have been for the work they would have been doing during time off under s.168 TULRCA?

96. The claimants' schedules of loss claim that for each day on which they did TU duties from November 2020 onwards, they should have been paid duty pay and should also have been paid a short haul payment. Prior to this date they claim that they should have been paid E.H.R..

97. The respondent argues that to be entitled to duty pay (or E.H.R. as the case may be) for each offline day, the claimant has to show that they would have been scheduled for flying duty or ground duty that attracted duty pay on that day had they not been off-lined. For example, to be entitled to short haul payment and duty pay for an offline day, the respondent says the claimant have to show they would have been on short haul duties without a night stop.

98. Both arguments seem to presume that the question for us is that set out in s.169(2) TULRCA which states that the employee shall be paid "as if he had worked at [his] work for the whole of that time". However that only applies if the employee's remuneration for the work he would ordinarily have been doing during the time off for trade union duties does not vary with the amount of work done. As Mr Ayres agreed in evidence, these claimants remuneration for the work they would ordinarily be doing during the time they were off-lined did vary with the amount of work done. Indeed, that was recognized in the wording of LOI 7.

99. Cabin crew would bid for routes and bid for periods of leave. Schedulers would allocate both leave and duties. Those could be on short haul or long haul flights. There was no guarantee that the cabin crew would be allocated the route they had bid for on a particular day. Page15/49 of the Heathrow Cabin Crew Flying Agreement (admitted by consent on Day 6) sets out four examples of "working blocks". They suggest that it would be unusual to be allocated more than 4 flying days in a row at the time this agreement was operational. Of the four examples, two have 6 working days in a row, one has 5 (including a night stop) and one has 4. However, the working days in these examples do not include 5 short haul days consecutively.

100. There are limits to the reliance we can place on this document. The parties have agreed that it stands on its own merits and that we can consider their submissions on it despite it not having been introduced by a witness through oral evidence. Without that oral evidence to explain what the abbreviations mean and how this worked in practice there is a real risk that we would misunderstand the detail.

101. We look at UHB page 166 which is part of Miss White's schedule of loss from April 2022 to August 2022. She was allocated trade union duties 5 days a week consecutively from 2 to 6 May 2022 and 10 to 15 May 2022. Despite

the caveat we express about the Heathrow Cabin Crew Flying Agreement, we can safely infer that it is unlikely that had a Trade Union Rep not been allocated trade union duties they would instead have been allocated 5 short haul days in a row and unlikely that Miss White would have been allocated 5 short haul days on each of those dates.

102. Mr Serrao explained the nature of the short haul payment in oral evidence and we accept his evidence. BA plc had agreed to pay the short haul day payment for a one-off duty of a there and back trip. He gave as an example a duty on an aircraft travelling to Greece; for that he would be paid his duty payment plus the short haul day payment because it was just a duty for the day. We can ignore the so-called "per diem" payments (applicable from November 2020 onwards) because those were subsistence payments and not remuneration.

103. We can see from the figures in the claimants' schedule of loss that the amount of the short haul payment was £20 in November 2020 (when the basic pay for a day attracting short haul payment was £79.45) and rose to £50 in December 2022 by which time the basic pay for an 8 hour day was £90.16.

104. The impact that the additional allowances have on the cabin crew's remuneration is illustrated by Miss White's schedule of loss. The different rates from time to time are set out in the final two pages. When rostered for a duty which would attract duty pay and a shorthaul day payment then at different times from November 2020 the proportion the basic pay made up of total remuneration was:

Date	Basic	Duty pay	Shorthaul payment	Basic as % of total
November 2020	79.45	32	20	60.4%
January 2022	80.55	32	20	60.7%
April 2022	80.55	33.60	21	59.6%
September 2022	84.57	36.32	22.05	60.0%
November 2022	84.57	36.32	50	49.5%
December 2022	90.16	37.60	50	50.7%

105. This is a snapshot about a single scenario (an In-flight Manager is allocated TU duties instead of a one off there and back duty). If the claimants had not be off-lined for TU duties on a particular day they might have been rostered to fly on that day but might have been rostered for ground duty (with or without duty pay) an off day. On the other hand, if not off-lined for 5 consecutive

days, the working block they were allocated might mean they were working on a different day which was actually an off day in the schedule they did work.

106. We accept that had they been rostered to work on a specific day for which a claim is made, it is quite likely that they would have received Duty Pay which is payable in many situations: flying duties from report time to clear time, airport standby and applicable ground duties. However, it was not certain. We heard that Home Standby – where the colleague is on duty at home standing by to travel to the airport to report for a flight if needed - does not attract Duty Pay but is within the definition of ground duties. That serves to underscore that, in relation to these claimants, the remuneration they would ordinarily have received during the time they were off-lined would vary with the amount (or nature) of the work done. When E.H.R. was the relevant allowance, it is quote likely that, had Miss White been rostered to work on a specific day for which a claim is made, she would have been paid E.H.R. but it is not certain.

107. The respondent attempted during written submissions to reference a number of other types of duty which were said to be ground duty but withdrew those submissions because there was no primary evidence to support them.

108. On the other hand, in the period November 2020 onwards, we do not accept that Mr Serrao and Miss White would probably have been paid the Short Day Payment on each and every day that they were on TU duties. That would depend upon the alternative allocated to them. However some of the ground duties attracted payments which in financial terms was equivalent to the Short Day Payment. For example, SS referred to the trainers allowance. He had been a Customer services trainer (para.1 SS).

109. We think it more likely than not that had they not been granted offline status for trade union duties, they would have been allocated a working block that attracted some Duty Pay (which from November 23 was £4.82 ph). They might not have been allocated a flying duty but, if they were, it might have attracted a higher allowance than the Short Day Payment. The most commonly allocated duties seem to attract a Short Day Payment or an equivalent but the present state of the evidence does not allow us to make findings about what that pattern would be. Furthermore, that is not the task that the statute requires of us in s.169(3) TULRCA.

110. Miss White drew our attention to advertised package for flying duties and pay. HCC Information for colleagues July 2020 (UHB page 386). In the fire and rehire process she was successful in obtaining role as In-flight Manager. The point she made was that Cabin Crew and Lead Cabin Crew were advertised as attracting up to £5,000 per annum duty pay on a basic salary of £17,000 per annum (Cabin Crew) and £20,000 per annum (Lead Cabin Crew). This was relied on as evidence of what she might reasonably expect to earn, were she not off-lined for Trade Union duties and therefore only paid basic pay.

111. The question of what Miss White would have been doing during the Covid-19 period, had she not been off-line, is more uncertain. The respondent challenged her presumption that she would have been allocated to flying duties for each of the days she was off-line during this period. She pointed out that her claim was that she should have been paid E.H.R. prior to November 2020 so it was not a question of whether she would have been allocated a Short Haul flight but whether she would have been allocated a duty which attracted E.H.R.. Her evidence was,

> "I do believe there were some flights being undertaken irrespective of flights being undertaken. Grounds duties were still carried out. … Mandatory cabin crew training – there was a point in time where that was suspended but it was reintroduced to ensure too many crew didn't fall out of check. E.H.R. was being paid for those."

112. Had she not been rostered for those TU duties, would she have been on flying duties 18 days in April 2020? The rostering agreement suggests that is unlikely – even ignoring the effect of the pandemic on international air travel. None of the indicative rosters have cabin crew working 5 days in a row. However, that is the 2022 agreement and therefore it is not reliable evidence of what the roster patter would have been in 2020.

113. Furthermore, from April 2020 onwards there were a comparatively tiny number of flights because international travel was banned: repatriation was an exception and then later in the pandemic some essential travel resumed. Mr Ayres estimated that BA plc when from operating 600 flights a day to 150 flights a month. Those who volunteered for such flying duties as there were were doing, on his evidence, perhaps 1 flight every 2 weeks. We take the point that some ground duties were available but many Customer Service Managers were furloughed. Furlough pay was calculated with reference to allowances and basic pay but the respondent's argument is that if the claimant was off-lined for Trade Union duties when she would otherwise have been furloughed, then the time off was not granted during "working hours" in the first place.

114. We will need to hear submissions on whether a fair estimate can be made of the average hourly earnings of Miss White for the work she would ordinarily have been doing during the time she was permanently off-lined from April 2020 onwards. If a fair estimate cannot be made on the basis of evidence presently availabe, we will need to hear evidence and submissions on who would be "persons in comparable employment" or "average hourly earnings which [are] reasonable in the circumstances" for that period as required by s.169 TULRCA.

115. Mr Serrao has produced payslips from February 2017 and October 2019 when he was acting as a trainer and receiving E.H.R. for those ground duties.

Again, these are snapshots and the pay varies with the duties. However, in 2017 by February he had earned £21,469.08 gross for the year to date against a basic pay of £13,564 per annum. We are satisfied that in all probability in paying Mr Serrao basic pay only, the respondent was not paying him as much as the average pay he or a comparable person in his role would have received had they not been released for TU duties. It is easier to do this comparison in the case of Mr Serrao because he worked as a representative for a shorter discrete period of time.

116. It is highly likely that the same is true of Miss White – even though we are not satisfied that she would have received duty pay and short day payments for each of the dates on which TU duties were carried out. The allowances are clearly a material part of the remuneration package. A simple way to look at it is that a comparable In-Flight Manager would expect to earn more than their basic pay in a year – probably a quarter more at least to judge by the advertised package. By paying only the basic pay the respondent is highly likely to be paying less than the average pay. The present state of the evidence does not allow us to calculate the average pay either for these claimants or for a comparable employee at each of the relevant periods which are the subject of the claim.

Law applicable to the issues in dispute

117. The following are applicable statutory provisions:

Relevant Sections of the Trade Unions and Labour Relations (Consolidation) Act 1992

146.— Detriment on grounds related to union membership or activities.

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection (1) "an appropriate time" means —

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours" , in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services) , he is required to be at work.

(2A) In this section–

(a) "trade union services" means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) …

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where–

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.

…

147. Time limit for proceedings.

(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—

(a) before the end of the period of three months beginning with the date of the [act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them] , or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

(2) For the purposes of subsection (1)—

(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b) a failure to act shall be treated as done when it was decided on.

(3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—

(a) when he does an act inconsistent with doing the failed act, or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

148.— Consideration of complaint.

(1) On a complaint under section 146 it shall be for the employer to show [what was the sole or main purpose] for which [he acted or failed to act].

(2) …

149.— Remedies.

(1) Where the [employment tribunal][1] finds that a complaint under section 146 is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the [act or failure] complained of.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the [act or failure] which infringed his right.

(3) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the [act or failure] complained of, and

(b) loss of any benefit which he might reasonably be expected to have had but for that [act or failure].

(4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or Scotland.

(5) In determining the amount of compensation to be awarded no account shall be taken of any pressure which was exercised on the employer by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the [act or failure] complained of was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

…

168.— Time off for carrying out trade union duties.

(1) An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with—

(a) negotiations with the employer related to or connected with matters falling within

section 178(2) (collective bargaining) in relation to which the trade union is recognised by the employer, or

(b) the performance on behalf of employees of the employer of functions related to or connected with matters falling within that provision which the employer has agreed may be so performed by the trade union [,or]

[

(c) receipt of information from the employer and consultation by the employer under section 188 (redundancies) or under the [Transfer of Undertakings (Protection of Employment) Regulations 2006] [, or]

(d) negotiations with a view to entering into an agreement under regulation 9 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 that applies to employees of the employer, or

(e) the performance on behalf of employees of the employer of functions related to or connected with the making of an agreement under that regulation.

(2) He shall also permit such an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations—

(a) relevant to the carrying out of such duties as are mentioned in subsection (1), and

(b) approved by the Trades Union Congress or by the independent trade union of which he is an official.

(3) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.

(4) An employee may present a complaint to an [employment tribunal] that his employer has failed to permit him to take time off as required by this section.

169.— Payment for time off under section 168.

(1) An employer who permits an employee to take time off under [section 168 or 168A] shall pay him for the time taken off pursuant to the permission.

(2) Where the employee's remuneration for the work he would ordinarily have been doing during that time does not vary with the amount of work done, he shall be paid as if he had worked at that work for the whole of that time.

(3) Where the employee's remuneration for the work he would ordinarily have been doing during that time varies with the amount of work done, he shall be paid an amount calculated by reference to the average hourly earnings for that work. The average hourly earnings shall be those of the employee concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment with the same employer or, if there are no such persons, a figure

of average hourly earnings which is reasonable in the circumstances.

(4) A right to be paid an amount under this section does not affect any right of an employee in relation to remuneration under his contract of employment, but—

(a) any contractual remuneration paid to an employee in respect of a period of time off to which this section applies shall go towards discharging any liability of the employer under this section in respect of that period, and

(b) any payment under this section in respect of a period shall go towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

(5) An employee may present a complaint to an [employment tribunal] that his employer has failed to pay him in accordance with this section.

…

171. Time limit for proceedings.

(1) An employment tribunal shall not consider a complaint under section 168, 168A, 169 or 170 unless it is presented to the tribunal—

(a) within three months of the date when the failure occurred, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that period, within such further period as the tribunal considers reasonable.

(2) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

Relevant sections of the Employment Rights Act 1996

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section *"relevant provision"* , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question,

or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

…

23.— Complaints to [employment tribunals].

(1) A worker may present a complaint to an employment tribunal —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

(5) No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).

27.— Meaning of "wages" etc.

(1) In this Part *"wages"* , in relation to a worker, means any sums 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,

(b) …

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) …,

but excluding any payments within subsection (2).

(2) Those payments are—

(a) …

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part *"gross amount"* , in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

(5) ...

Law relevant to the unauthorised deduction from wages claim

118. What are “wages”? Section 27 defines wages to include sums payable to the worker in connection with his employment whether “under the contract or otherwise” (s.27(1)(a)) and any payment for time off under s.169 TULRCA (s.27(1)(e)). Section 27(2)(b) ERA excludes from the definition of “wages” any payments in respect of expenses incurred by the worker.

119. There are cases in which it was disputed that discretionary or non-contractual payments were wages payable such that they fell within s.13 ERA. In New Century Cleaning Co Ltd v Church [2000] IRLR 27 examples were given of circumstances in which sums may be payable otherwise than under the contract and specific reference was made to payments required by collective agreements without express provision being made in a contract of employment.

120. The question of whether a payment is payable may require the employment tribunal to resolve any issue as to the meaning of a contract of employment, including questions of interpretation and implication: Agarwal v Cardiff University [2019] ICR 433 CA. The tribunal must decide on the ordinary principles of common law and contract law the total amount of wages that was properly payable to the worker on the occasion and it may involve consideration of all relevant terms including any implied terms.

121. In the present case, the claimant’s argument is that time off for trade union duties was payable at basic rate plus (until November 2020) EHR or (after November 2020) Duty Pay (calculated per hour for the duration of the time off) and the Short Day Payment (an amount payable per day for specific duties). The primary basis for this argument is an alleged agreement that from 1 September 2019 EHR would be payable in addition to basic rate. The tribunal is therefore required to consider whether there was a legal obligation (either under the individual contracts of employment or under the facilities agreement) to pay that such that it can be regarded as wages payable under s.27(1)(a) ERA. This was not set out expressly in writing and involved a variation to the agreed provision of the facilities agreement.

122. When considering whether there has been a variation of contract the first question to consider is whether the variation requires an agreement or whether it is a variation to a non-contractual benefit of provision which can be modified unilaterally by the employer. If not, then an express agreement to vary the contract can be made either orally or in writing. The normal provisions of contract law would apply requiring the term to be certain, to be intended to create or vary legal obligations and to be unconditional.

123. Separate to the question of whether there was a failure to pay wages within the definition of section 27(1)(a), section 27(1)(e) ERA expressly includes payment for time off for carrying out trade union duties under section 169 TULRCA within the definition of 'wages' for the purposes of the right under s.13 ERA not to suffer unauthorised deduction from wages. It is argued by the respondent that the sums claimed by the claimant nevertheless do not represent 'wages' because they are the loss of a chance to earn variable pay in the form of allowances. They rely upon the case of Lucy v British Airways UKEAT/0033/08.

124. The facts of Lucy were that the 78 claimants were cabin crew employed at the respondent's Manchester base. This was closed in October 2006 and thereafter the claimants were not rostered for flying duties and therefore did not become entitled to payment of one or more flying allowances. They claimed to be entitled to the allowances they would, but for the closure, have earned as wages under s.23 ERA.

125. The EAT in paras.28 to 39 held that had any flying allowances become payable but been unpaid before the closure of the Manchester base, they would have been claims for wages since, in principle, the definition in s.27 ERA was wide enough to cover such allowances in the same way as it covered commission and holiday pay. However, having considered the case of Coors Brewers Ltd v Adcock [2007] ICR 983 CA, the EAT held that the flying allowances could not be described as a specific sum of money by way of wages which the employee asserts has not been paid to them; they were the loss of a chance. In the Coors case, Chadwick LJ refused a claim because of "the fact that there was no more than a chance that the scheme which the employers, on the employees' case, should have introduced if they had complied with their contractual obligations, would have resulted in receipt by the Claimants of more than they had in fact already received."

126. The EAT rejected an appeal against the first instance ET's judgment that they had no jurisdiction to consider the claim not because the correct calculation of the claim was very difficult (Lucy para.36) but because the claimants had not established that the claim was for wages:

> "There is an obvious and fundamental difference between basic wages or salary payable periodically to an employee who works or is ready, willing and able to work if no work is provided e.g. he is on 'gardening leave' and remuneration which is only earned if specific tasks are carried out, such as commission from

> sales, allowances for flying or allowances for overnight stays (this is by no means an exhaustive list). The latter form or remuneration, in my judgment, can only become payable to the employees if the applicable task is carried out. … after the closure of the Manchester base the Claimants did not carry out flying duties; they did not, therefore earn allowances; … the present claims are … not claims for wages i.e. for payable emoluments but for damages for loss of the opportunity to earn the allowances claimed or of the chance of earning them …"

127. The claimants argue that this principle is inapplicable in the present case because that case was about duties which the claimants had not been rostered to carry out whereas their claim is for actual duties carried out. Their position is that that the respondent had confirmed their duties had been quantified within the list in the schedules of loss and they should fall within s.27(1)(e) ERA.

128. The exclusion from the jurisdiction of the employment tribunal of so much of a complaint as relates to a deduction where the date of payment was made before the period of two years ending with the date of presentation of the complaint (s.23(4A) ERA) does not apply to a deduction from wages falling within s.27(1)(e) ERA – i.e. a payment for time off for trade union duties.

129. The question of when there are a series of deductions has been the subject of guidance in Chief Constable of Northern Ireland v Agnew [2023] UKSC 33. Whether there is a 'series of deductions' is a question of fact that must be determined by taking into account all relevant circumstances, including the similarities and differences between the deductions; their frequency, size and impact; how they came to be made and what links them together. The facts of Agnew were that the deductions were found to be factually linked by holiday pay having been calculated by reference to the police officers' basic pay rather than their normal remuneration.

Failure to pay remuneration for time off for trade union activities

130. The right under s.169 TULRCA is to be paid for the time off granted under s.168 TULCRA. Section 168 directs tribunal to have regard to any relevant provisions of any code of practice issued by ACAS.

131. The presently applicable Code is the ACAS Code of Practice 3: Time off for Trade Union Duties and Activities (including guidance on Time off for Union Learning Representatives) (2010). We drew the Code to the parties attention and consider that the following paragraphs are potentially relevant to the present case:

a. Section 1: Time off for Trade Union Duties paras: 8, 9, 12 and 13 – which set out the principle that employees who are union representatives of an independent trade union recognized by their employer are to be permitted reasonable time off during working hours and give examples of what the duties might be concerned with.

b. Payment for Time off for Trade Union Duties: paras. 18 and 19. These provide as follows:

"**18. An employer who permits union representatives time off for trade union duties must pay them for the time off taken. The employer must pay either the amount that the union representative would have earned had they worked during the time off taken or, where earnings vary with the work done, an amount calculated by reference to the average hourly earnings for the work they are employed to do**.
The calculation of pay for the time taken for trade union duties should be undertaken with due regard to the type of payment system applying to the union representative including, as appropriate, shift premia, performance related pay, bonuses and commission earnings. Where pay is linked to the achievements of performance targets it may be necessary to adjust such targets to take account of the reduced time the representative has to achieve the directed performance.
19. There is not statutory requirement to pay for time off where the duty is carried out at a time when the union representative would not otherwise have been at work unless the union representative works flexible hours, such as night shift, but needs to perform representative duties during normal hours. Staff who work part time will be entitled to be paid if staff who work full time would be entitled to be paid. In all cases the amount of time off must be reasonable."

132. The respondent argues strongly that the claimants have to show that the hours for which they claim are hours when they would normally have been at work and which it was reasonable that they should be allowed to take off in order to enable them to carry out trade union duties or undergo training. They rely upon the case of Hairsine (see RSUB page 4). IDB Brief acknowledges the apparent tension between the wording of the ACAS Code of Conduct para.19 and Hairsine. It is apparent from the judgment that the then applicable ACAS Code of Conduct was differently worded to the present Code. It is also apparent that the statute then in force was identically worded to TULRCA.

133. Mr Hairsine was due to work a shift between 3.00 pm and 11.00 pm. He attended Trade Union training between 9 am and 4 pm, worked from 4.40 pm until 7 pm and said that he should be paid for the whole of his shift. The EAT

held that the permission granted by his employer to attend the training meant that he was required to attend the evening shift and was not entitled to an equivalent number of hours off in substitution for the hours he was contractual liable to work.

134. The EAT said at page 217 A to C:

> "If the issues had been whether the terms of the permission granted were reasonable it might be thought that part of the evening shift might have been excused. He might have been asked to attend until 7 pm for his special course as indeed he did. …. If the industrial tribunal had thus decided that the employee should have been excused the whole of his eight hour shift, he would have been paid for those hours and the present case would not have arisen."

135. However, that was not the way Mr Hairsine's case was argued. The EAT restated the then applicable statutory test at page 219H to 220 C and emphasised that two conditions must be satisfied: that the time off must be part of the working hours – the time when the employee is required to be at work and secondly that the time off should be permitted for the relevant purpose. However, Wood J, given the judgment of the EAT did give an example where it might be necessary to grant time off for the whole of a night shift in order that the employee should be allowed some sleep as well as conduct the trade union activity (see page 220D). This comes within the concept of "reasonable" time off. It may be the source of the caveat in para.19 of the ACAS Code. It seems that Mr Hairsine did not argue that he should have been excused attendance from 7 pm to 11.00 pm as reasonable time off but argued that, having been given time off for the duration of the course (up until 4.00 pm), he should have been paid for that time despite it not being during working time.

Detriment on grounds of TU duties

136. As with the similarly worded provision for automatic unfair dismissal on grounds of protected disclosure, the regime in ss.146 to 149 TULRCA provides that it is for the employer to show the sole or main purpose for which he acted or failed to act.

137. In the well-known protected disclosure case of Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59 the Court of Appeal gave guidance on the approach where the legal burden of proving the principle reason for the dismissal was on the employer and suggested that the claimant may bear an evidential burden:

> "… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …

> **57**
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
> **58**
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
> **59**
> The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

138. In the present case, the act of detriment alleged is failure to pay the TU representatives in accordance with TULRCA. If we are satisfied that there was a failure to pay in accordance with s.169 TULRCA then we must decided what was the reason or principal reason for that failure on the basis that it is for BA plc to show what the reason was. On the basis of Kuzel, if we are not satisfied that it was done for that reason, then it is not correct that we must find the reason to be that asserted by the employees.

Uplift/reduction for unreasonable failure to comply with an applicable ACAS Code of Practice

139. S.207A TULRCA applies to specific jurisdictions set out in Schedule A2. Those include complaints of a breach under s.146 TULRCA (detriment on grounds of union activities) and s.23 ERA (unauthorised deduction rom wages) but not to alleged breaches of s.168 or 169 TULRCA.

140. Mr Chaudhry for the respondent had not expected to address us in submissions on a potential ACAS uplift so we did not hear argument from the parties on these and it will be considered at the remedy hearing.

Conclusions on the Issues

141. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Unauthorised deduction of wages

142. We first need to identify the source of the legal obligation to pay the sums which are alleged to have been deducted without authorization.

143. The claimants argue that the source of that legal obligation is an agreement by the respondent to pay what was then EHR to all HCCU Reps released for Trade Union duty (not just to Mr Newall). In effect, they argue that there was an agreement to amend the Facilities Agreement so that all TU Reps, then and in the future, should be paid basic rate plus EHR. The Facilities Agreement itself says that it is not contractually binding. We do not see how an oral agreement could therefore be intended to be contractually binding; that would amount to an agreement to do something inconsistent with the written terms of a document negotiated at a higher level. The claimants seek to base legal relations between British Airways and all TU Reps – whenever elected to those positions – on that agreement.

144. Mr Newall's email to members shows that he appears to have thought that Mr Holmes said the respondent would pay HER but that other points were outstanding. At its height, this is an agreement to agree, subject to other points of disagreement being resolved. We do not read it as an express agreement to create legally enforceable rights without that being clearly incorporated in the Facilities Agreement. Mr Newall himself recognized that a formal amendment to the facilities agreement was needed (see para.47 above).

145. To the extent that the claimants argue that there is an implied term to pay them the relevant allowances, it is established law that one cannot imply into any contract a term that is contrary to an express term. It would be contrary to the express term of the Facilities Agreement for there to be an implied term that it created legally binding obligations.

146. Our conclusions on LOI 3.a to c. are that, at best, there was an agreement to review the Facilities Agreement with the intention to include the Elapsed Hourly Rate within the sum payable to HCCU representatives, subject to other points of dispute being resolved. However, that was not intended to create legally binding contractual relations between all TU representatives and the respondent. It did not amount to a variation of the Facilities

Agreement and that agreement was not incorporated into the claimants' respective contracts of employment.

147. When it comes to the question of whether the sums claimed by the claimants are wages within the meaning of s.27 ERA, our conclusions above mean that the EHR was not payable to the claimants under their contracts or under the Facilities Agreement (s.27(1)(a) ERA). However, if we find that payment was not made in accordance with s.169 TULRCA then those sums would be wages within s.27(1)(e) ERA.

148. We cross-refer to our conclusions that there has been a failure to pay the claimants in accordance with s.169 TULRCA. The claimants should have been paid "an amount calculated by reference to the average hourly earnings for that work": s.169(3) TULRCA. We are satisfied that they were paid only basic pay for time off under section 168 and that that is less than the average hourly earnings for that work. The amount of the average hourly earnings for that work is not something which can be calculated on the evidence presently available and will be determined at a remedy hearing.

149. The next question is whether the deductions amount to a series within s.23(3) ERA (LOI 5) as that has been interpreted in Agnew. We do not know the amount of the deduction on each occasion because parties have not presented their cases directed to the calculation of average pay s.169(3). Indeed, they have neither of them prepared evidence directed towards issue LOI.7. Given that it is clear that the claimants were paid less than an amount calculated by reference to the average hourly earnings for that work we do not think it in the interests of justice to dismiss the claim under s.169 TULRCA because we are unable to assess the amount of the shortfall. Equally, to make a calculation on the basis of such evidence as there is now, risks overestimating or underestimating the loss.

150. The consequence is that we do not know all of the relevant circumstances mentioned in the Agnew decision to enable us make a decision on the series of deductions point. We are presently unable to make a decision on whether the claim was brought within the time period set out in s.23 ERA. However, we are satisfied that the reason for any underpayment is in all cases that respondent has failed to pay in accordance with s.169 TULRCA. This is likely to be a weighty matter when we do come to make a decision on this issue at the remedy hearing, by analogy with Agnew where the reason for all of the deductions was the way in which holiday pay had been calculated.

Payment for time off for carrying out trade union duties (section 169 TULRCA)

151. LOI 6: The first question in relation to this complaint requires us to consider whether the time off that the respondent permitted the claimants to take was taken during the claimants' working hours as defined by section 173(1)

TULRCA. The list of issues anticipated an argument by the respondent that trade union duties discharged during an "off period" when the claimant would not otherwise have been working do not fall within s.168 and that that would include any duties undertaken when the claimant would not otherwise have been rostered for duties and/or when furloughed.

152. The first claimant has not claimed for the period when she was actually furloughed. Through much of the pandemic she was stood down or taken off-line permanently for trade union duties. We heard disputed evidence about the extent to which she might have been allocated flying duties during this period. She would not have been allocated flying duties on as many days as she worked on Trade Union duties. However, we reject the argument that the prospect that the claimant would have been among those placed on furlough leave had she not been off-lined permanently for Trade Union duties means that this time off falls entirely outside TULRCA. She worked as she was directed to do having taken on the Trade Union role in the same way as those who volunteered for repatriation flights worked as they were directed to do. To say that this was not during working hours is artificial and ignores the reality of the situation, as well as being contrary to the para.19 of the ACAS code on Payment for Time off for Trade Union Duties.

153. The process agreed between the parties by which the respondent released a claimant from their normal duties to undertake a function on behalf of the trade union or its members is set out above (see para.72 above). This was referred to as being off-line and, by definition, the colleague has been released from normal duties to be off-line. (see definition of off-line in the Facilities Agreement and our findings at para.33 above). Off-line means released from their normal duties; both parties agree that – but neither party knows at the time when they are granted time off-line whether they would otherwise have been rostered for duty and, if so, for what. It seems artificial to say that an employee has been released from normal duties but the time covered by the permission is not time when they would otherwise be required to be at work – particularly when that employee works a complicated roster.

154. In the second place the contractual obligation is to attend at such times that they have been rostered to attend. For convenience, applications were made for particular times at which individual representatives wish to be released for trade union duties before the schedulers drew up the rosters. It cannot reasonably be argued that the effect of that logistical practice is that none of the time for which representatives are put off-line or de-rostered can be regarded as during their working hours. They couldn't know what days and hours they would be working before applying for time off for trade union duties. To say that, as a result, none of the time off was during working hours would be inconsistent with the Facilities Agreement itself and would deprive the TU representatives of any rights under s.168 & 169 of TULRCA. That cannot have been the intended outcome. We note the wording of para.19 of the ACAS Code on Payment for Time off for Trade Union Duties namely that

there is no requirement to pay for time off where the duty is carried out when the representatives would not otherwise have been at work "unless the union representative works flexible hours, such as night shift".

155. To make the system workable where the employee works a roster with many variables, the Trade Union representatives applied to permission to be off-lined for Trade Union duties before decisions were taken about what duties they would otherwise be allocated to. Nevertheless, we think that the employer did permit the claimants to take time off "during working hours".

156. In addition to the Facilities Agreement definition, and the contractual obligation to attend when directed, the contract of employment requires the claimants to attend for a certain number of hours a year in accordance with a roster. The contract does not specify hours a week or set hours per day. When they are rostered for trade union duties then, on the facts of the present case, those are their designated working hours. So far as we know, those hours contribute to the working hours for which they are contracted to provide labour to their employer. Time within those hours are therefore "any time when in accordance with [their] contract of employment [they are] required to be at work within s.173 TULRCA". The employer's arrangements require the claimants to seek off-line time before they know their working schedule which is presumably why the parties agreed to specify in the Facilities Agreement that it is time in working hours. That is a logistical matter not something which affects the substance of the claimants' obligation to attend work during those hours.

157. As it says in the ACAS Code of Practice section 5:

> "To take account of the wide variety of circumstances and problems which can arise, there can be positive advantages for employers and trade unions in establishing agreements on time off in ways that reflect their own situations. It should be borne in mind, however, that the absence of a formal agreement on time off does not in itself deny an individual any statutory entitlement. Nor does any agreement superseded statutory entitlement to time off."

158. The statutory framework mandates a reasonable amount of time off during working hours. It cannot have been intended that the statutory obligation to allow an employee such time off during their working hours as is reasonable in all the circumstance could be, in effect, avoided by implementing a system which required an employee working a roster with variable hours and days of work to fix the time off for Trade Union duties before their non-union duties were allocated.

159. The claimants are not claiming for TU duties outside of their normal working hours despite the fact that they cannot show that, had they not been offline for TU duties on any specific date they would have been working 8.00 am till 4.00 pm on that date (for example). Where they have been granted that time

in accordance with Facilities Agreement that was within their working hours. The Facilities Agreement and the claimants' contracts are evidence that the time off was within working hours.

160. It is against the spirit of the Facilities Agreement that the claimants should be penalized for following the employer's procedure for applying for time off because the system doesn't allow them to make the application for time off after the working hours for a particular week or month have been set. It risks undermining the Facilities Agreement which is written because there is an obligation under TULRCA. For the avoidance of doubt, that applies to all of the dates in the schedules of loss of both claimants, including when Miss White was off-lined during the pandemic. She was fully occupied during her contracted hours in negotiations about pay and hours. This is clearly within the scope of the voluntary recognition agreement and therefore of s.168(1)(a) TULRCA.

161. Our conclusion on LOI 6.a. is therefore that all time off taken by the claimants on the dates set out in their respective Schedules of Loss was taken off during working hours within the meaning of s.173 TULRCA.

162. Our conclusion means that the decision in Hairsine is distinguishable on the facts of the present case. There the employee was allocated a particular shift. He then needed to attend to Trade Union duties earlier in the day and sought to take time off during part of his shift. He did not apparently argue that reasonable time off would have been the hours after the course when he was scheduled to work. The working hours for that employee on that day were the shift he had been allocated. These claimants were never allocated work duties for the respondent because their request for offline time was approved first. That does not mean that the offline time was not during working hours. It was part of their contractual "working time" (see para.37 above) of 2000 hours per annum according to such roster pattern as is in place from time to time.

163. LOI 6.b. Were the claimants carrying out Trade Union duties within s.168(1)(a) to (e) or training within s.168(2) during that time off? Here the respondent argues that, because the claimants have not shown what specific tasks they carried out they have not proved their case. The claimants, in effect, rely on the fact of the respondent's consent as evidence that the purpose for the time off was within s.168(1) or (2). They argue that because they applied in advance, saying in the application what the time off was required for, then if the respondent agreed to the time off, to allocate it a particular code and to pay for it then that shows that the respondent accepted that the particular Trade Union duty fell within the Facilities Agreement and was therefore covered by s.168(1) or (2). They argue that that acceptance, together with their description of the kinds of tasks carried out by them under those designated codes, should be taken by us as evidence that the time off was for a statutory purpose.

164. We refer to our findings above about the activities undertaken by the claimants (paras.75 to 86). We specifically found that the period in May and June 2023 when Miss White was off-lined and seconded to Unite's regional office was for training within s.168(2) TULRCA as explained in paras.86 to 92. For some reason this was coded with the internal code TUB when BAU seems more apt. We also accept that Miss White was probably engaged in managing the Trade Union office, administrative duties connected with the branch or acting as a workplace representative on 5 and 15 March 2021 and those are correctly included in her Schedule of Loss. Based on those findings, we accept that the claimants took time off for the purposes of carrying out duties concerned with the matters in TULRCA.

165. LOI 6.c. The claimants have shown that the time they were permitted to take was reasonable in all the circumstances having regard to any relevant provisions of the ACAS Code of Practice. In our view, the concept of reasonable time off applies both to the quantity of the time and the hours at which that time should be granted. The fact that the management and Trade Union agreed upon the hours recorded in the Facilities Agreement clause 9 (see para.33.d. above) is itself evidence that that was reasonable time off for the duties. It is the amount of time that the two negotiating parties compromised on.

166. The respondent argues that they've agreed to a standard period of time for TU duties of 8 hours but have not policed that to see whether 8 hours of work is actually done by comparing it to the attendance records. They argue that, if that approach results in pay for more hours than the claimant actually worked on a particular day - and therefore that the claimant has been overpaid their basic pay - then credit should be given for it.

167. We think that misunderstands the statutory regime. The statutory regime provides under s.168 TULRCA that the individual can have reasonable time off. Once it is established what was a reasonable amount of time off is, the employer should pay the employee in accordance with s.169 TULRCA.

168. The first question is therefore what is a reasonable amount of time? In the present case, that was decided in the Facilities Agreement. We think that the Facilities Agreement defines what a reasonable amount of time off is and when time off is approved as within the scope of the Facilities Agreement that is evidence that the time off on that occasion was reasonable.

169. The claimants have shown that the respondent permitted them to take time off for TU duties in working hours for all of the times claimed in the Schedule of Loss and that that time was reasonable in all the circumstances and therefore fell within s.168(1) TULRCA.

170. LOI 7: What s.169 TULRCA then provides is that the employer shall pay the employee who has been permitted to take time off either in accordance with s.169(2) (if the remuneration does not vary with the amount of work done) or in accordance with s.169(3) (if the remuneration does vary with the amount of work done). The latter is the applicable measure in the present case.

171. It seems to us that neither the claimants nor the respondent have approached this question with the statutory test in mind. The claimants argue that it would have been fair for them to be paid flying allowances and claim E.H.R. or (for the later period) Duty Pay and Short Haul Duty for each and every date they were off-lined for Trade Union duties. The respondent argues that they cannot show that they would have been flying on any particular route and therefore cannot show they were entitled to any particular allowance. They repeated that the claimants were entitled to basic pay only. Neither approach engages with the need for average hourly earnings for the employee or a comparable employee to be paid.

172. On the other hand, we have found that the average hourly earnings for In-Flight Managers (the claimants' substantive role) was more than basic hourly rate. We are satisfied of this despite not knowing what the claimants' average earnings were as we explain in paras.96 to 116 above, among other things.

    a. Up to 900 hours of the 2000 contracted hours per annum may be block flying time but other ground duties which attracted the same allowances or allowances of equivalent value were also available. Mr Serrao carried out such ground duties when a trainer. That is a flying to not-flying ratio of 9:11.

    b. On days from 2020 to 2022 when duty pay and shorthaul payments were payable, the effect on that day's pay would be to increase it by 50 – 100% (see the table at para.104). To increase the pay from about £80 a day by about £50 would increase it by more than 50%. To increase the pay from about £90 a day by £87.60 would increase it by nearly 100%. Clearly this would increase the average pay above the basic pay if payable in respect of up to 900 of the contracted 2000 hours.

    c. The advertised package which Miss White brought to our attention also suggests that the expectation is that, on average, Cabin Crew would earn appreciably more than the basic pay.

173. It is clear in the present case that the remuneration of the in-flight managers does vary with the amount of work done; that was accepted by Mr Ayres in evidence. LOI 7 and LOI 8 require us to consider what were the average hourly earnings for the employee concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment. What the claimant's appear to have done in their Schedules of Loss is calculate what they

consider to be a fair amount. For reasons we explain above, they presume that on each of the dates for which they were offlined they would have earned duty pay and a short haul payment. We do not think the evidence supports that finding. The question is now what would be fair but what would have been average for them or a comparator.

174. We are satisfied that the claimants were not paid an amount calculated by reference to their average hourly earnings. They were paid an amount calculated by reference to basic only and more likely than not during that period they would have earned E.H.R. (before November 2020) or duty pay and shorthaul day pay (potentially other allowances) on at least some of the dates which meant the average would have been more. We can confidently state in relation to LOI 8 that the claimant were not paid in accordance with s.169(3) for their time off under s.168 TULRCA. We reject the respondent's contention that part of the time for which the claimant was paid was more than reasonable time off. The question of whether credit should be given does not arise. In any event, we do not think that is the correct way to interpret the statute.

175. However we do not have the necessary evidence to make a fair determination of what the average hourly earnings were. In the case of Miss White in particular, it will be challenging to make a fair estimate of her average earnings at times because she was offlined for weeks or months at a time. Therefore in order to calculate the hourly rate of pay which would comply with s.169(3) TULRCA, a comparable employee may need to be found. Furthermore, the average earnings of a comparable employee during the Covid-19 period may have been affected by the prospects of furlough and how furlough pay was calculated.

176. We do not have the evidence available to calculate what the average hourly earnings would be for Miss White or for a comparable employee throughout the nearly 5 years of her claim. This issue will need to be considered at a remedy hearing. We intend to list not only a remedy hearing but also a case management hearing before Judge George sitting alone to ensure that the necessary evidence is available for the remedy hearing.

177. Although it is something which should be determined after hearing further evidence and on the submissions of the parties, it may be that a person in comparable employment with the same employer would be an In-flight manager who is not a Trade Union representative. On the other hand, Mr Serrao's earnings other than when a Trade Union representative may provide a fair estimate of the average for his substantive role provided any increase in pay can be accounted for. He may be a suitable comparator for Miss White. It may be that in some periods of time the individual claimant's average earnings for the their substantive role can be fairly calculated but in some periods a comparable employee will be needed. A discussion about how the

assessment should be broken down can take place in the preliminary hearing for case management. LOI 11 will therefore be decided at a remedy hearing.

178. The is then the question of time limits. The alleged agreement on 8 August 2019 to pay E.H.R. is irrelevant under this complaint. The question is when was the first date on which the respondent first gave the claimant reasonable time off within working hours for Trade Union duty within s.168 TULRCA. We do not consider that attendance at the regional conference falls within s.168 TULRCA. Therefore the first date on which Miss White was offlined for TU duty for which she was not paid in accordance with s.169 was 26 June 2018 when she attended a Branch Meeting for which, with associated preparation, she was granted 8 hours.

179. Under s.171 TULRCA the time for presenting the claim is limited to three months (LOI.9). Therefore the potential award under s.171 TULRCA is limited by that time period and no question arises as to whether there was a series of deductions which would allow dates more than three months before the claim to be in scope (taking account of the effect of early conciliation).

180. However, any pay mandated by s.169 TULRCA is pay within the meaning of s.27(1)(e) ERA. As a claim under s.23 ERA, the award is not so limited and the question of whether the failures to pay Miss White in accordance with s.169 TULRCA on each of the dates in her Schedule of Loss were a series of deductions will have to be decided when the parties have addressed us further on that point when we have details of all of the relevant Agnew circumstances. This only applies to Miss White's claim.

181. Setting aside the overlap with the unauthorised deduction from wages claim, no basis for an extension of time has been advanced by Miss White (LOI 10). It would have been reasonably practicable for her to present her claim sooner. It had been asserted by the Trade Union since before Miss White became a representative that the pay agreed within the Facilities Agreement did not comply with the requirements of s.169 TULRCA. It was the subject of two collective grievances in May 2019 and December 2020 in which Miss White participated. Miss White found out about the Cowen panel decision in Mr Newall's claim on 8 June 2022 (CW para.60). Early conciliation started on 14 June which was within a reasonable time of finding out about that claim. Nevertheless, there is no good reason why a claim could not have been brought sooner and the ongoing internal grievances do not provide that reason.

182. Mr Serrao's claim entirely concerns dates within the primary three months limitation period in s.171 TULRCA.

183. Whether deductions from Miss White's pay insofar as that claim relates to dates more than three months before the presentation of the claim are a series of deductions which would therefore fall to be awarded within the

unauthorised deduction from wages claim will be decided at a remedy hearing.

Detriment on grounds of TU activities.

184. Based on the conclusions above, it is likely that the claimants were underpaid on the dates in their respective schedules of loss, even though the amount of the underpayment claimed is not made out and falls to be determined at a remedy hearing. This we accept that to be a detriment to them within their employment.

185. The determinative issue in the claim under s.146 TULRCA is whether the act of underpayment or failure to pay took place for the sole or main purpose relating to union activities (see the full wording in s.146(1)(b) and (ba) TULRCA in para.117 above). It is for the respondent to show the reason for the failure to pay in accordance with TULRCA.

186. The claimants argue that this unlawful reason can be inferred from the following:

a. Alleged different treatment of comparable representatives who are not HCCU reps, namely the One Vision representatives;

b. Mr Serrao's evidence of different treatment of In-line trainers who receive a payment equivalent to duty pay so that they are not disadvantaged compared with those allocated flying duties and not disincentivised to become trainers;

c. They argue that a deliberate and conscious decision has been taken not to pay representatives for Trade Union duties and this is illustrated by only paying E.H.R. where the rostered duty code was that of a BA ground duty rather than a Trade Union ground duty C1SUB para.87;

d. The fact that BA continued not to pay EHR despite the judgment in Mr Newall's case that it had been contrary to s.169 TULRCA;

e. The delays in resolving the collective grievances with promises to investigate or consult further which led to no action; C1SUB para.90 & 91;

f. In Mr Serrao's case this unresolved issue discouraged him and was instrumental in his decision to stand down as a TU representative;

g. The claimants have also pointed to the fact that the allowance system has been recoded to allow for payment of similar duties pay to those allocated ground duties such as training (see C2SUBS page 6). They

ask why the opportunity was not taken at the same time to allow for payment of allowances or something that represented an allowance to TU representatives. Time needed for implementation was one reason why it is said the negotiations on 8 August 2019 did not result in a concluded agreement.

187. The contrary argument by the respondents is that they genuinely believed that they were acting in accordance with the obligations on them under TULRCA which had been formalised within the Facilities Agreement. They argue that it should not be inferred that the sole or main purpose of paying only in accordance with the Facilities Agreement was a prohibited reason under s.146 TULRCA when the employer was abiding by the agreement negotiated with the recognised union.

188. We can understand why the claimants feel as strongly as they do and why they infer that their contribution has not been valued. They have each explained forcefully in their written submissions how the failure to pay what they have always regarded as fair and lawful has impacted upon them in carrying out their work and, particularly in the case of Miss White her health and wellbeing.

189. The chronology of the collective grievances is set out in para.68 above. Some of the delay is explained by a conscious decision to focus on other issues or by the respondent waiting for the claimants to provide further information (September 2019 to June 2020 and February 2021 to June 2022). There are lengthy passages of apparent inactivity which Mr Ayres was unable to explain in detail. However there are also matters such as the prospect that the branch would close and concurrent litigation. These may not be particularly good reasons not to provide an outcome at all – especially given Mr Ayres' view that the complaint was invalid. The presence of tribunal proceedings is no reason why the grievance should not be concluded – it is frequently the case that investigations continue under such circumstances and proceedings are sometimes stayed to permit that. It is not conducive to good industrial relations not to deal with collective grievances properly.

190. However they were genuinely the reasons for the delay and we do not infer antipathy towards union activities from the delays.

191. Our findings about the conversation between Mr Newall and Mr Holmes on 8 August 2019 was, in essence, that in the context of a collective grievance about more than whether E.H.R. should be paid in future, they kept the conversation going and reached agreement in principle on one point.

192. To say that the sole or main purpose is to prevent or deter when there is in place a Facilities Agreement and the respondent have followed the Facilities Agreement is a step too far. The reason the respondent has acted as it has is that they believed they were complying with the negotiated Facilities Agreement. They genuinely thought that what the claimants were asking for

was not required of them by that agreement or by TULRCA. Indeed, the claimants have not shown that TULRCA requires payment of a flying allowance for each and every off-line day.

193. No final agreement to amend the Facilities Agreement had been reached which covered the principal, implementation and back pay. Additionally, there were other priorities particularly in the period April 2020 to the end of 2022 and by then the employment tribunal was seized of the issue. The claim of detriment on grounds of Trade Union activities is dismissed.

194. It is only that claim which attracts a potential award for injury to feelings. Therefore, although a remedy hearing is necessary for reasons we have already explained, the jurisdiction to award injury to feelings does not arise.

Provisional list of issues for remedy hearing

195. Subject to the parties' submissions, the following appear to be issues which remain to be decided at a remedy hearing:

s.169 TULRCA

a. (LOI 7) What were the average hourly earnings for the first claimant during the period of her claim?

b. What were the average hourly earnings for the second claimant during the period of his claim?

c. If no fair estimate can be made of the average hourly earnings for either claimant, who is a "person in comparable employment with the respondent" for the purpose of s.169(3) TULRCA and what are their average hourly earnings during the period of the claims of the two claimants respectively?

d. If there is no such person, what rate of average hourly earnings would be reasonable in all the circumstances?

e. Comparing the hourly rate which it is found should have been paid in accordance with s.169(3) TULRCA with the rate paid to each of the claimants, what is the amount of the shortfall and when, acting lawfully, should the respondent have made that payment?

s.23 ERA

f. Any shortfall is an unauthorised deduction from wages within the meaning of s.27 ERA. In accordance with the guidance in Chief Constable of Northern Ireland v Agnew [2023] UKSC 33, was there a series of deductions and over what period did any series of deductions occur?

g. If there was a series of deductions, the first claimant's claim was brought within three months of the last deduction.

h. The second claimant's claim is in respect of deductions from payments which were all made within the three months prior to the issue of the claim.

i. How much is payable by the respondent to each of the claimants in respect of unauthorised deduction from wages?

j. Should there be an uplift on that for an unreasonable failure to comply with an applicable ACAS Code of Conduct in respect of grievances?

196. The parties are to provide dates to avoid in the next three months for a 2 hour case management hearing before Employment Judge George by C.V.P. and dates to avoid until 30 September 2025 for a remedy hearing before Judge George, Dr Whitehouse and Mr Kapur to take place by C.V.P. with a time estimate of three days (including deliberation and oral judgment) not less than three months after the case management hearing.

197. No later than 7 days before the case management hearing, the parties are to send to each other and to the tribunal their proposals for how the average hourly earnings of the claimants in their substantive roles during the relevant period is to be fairly calculated including the identity of an appropriate comparator. They should come to the preliminary hearing prepared to comment on the proposed issues at para.196.a. to j. and to explain what evidence they consider will be needed to enable the tribunal to decide issues a. to e..

_____
Employment Judge George

Date: …17 December 2024……..

Sent to the parties on: 19 /12/2024.

.....
For the Tribunal Office

APPENDIX – AGREED LIST OF ISSUES

Summary

1. By way of a claim form presented on 25 August 2022, the Claimants have brought the following complaints:

a. Unauthorised deduction of wages, contrary to section 13 of the Employment Rights Act 1996 (ERA);

b. Breach of section 169 of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA); and

c. Detriment on grounds related to union membership or activities (section 146 of TULRCA).

Unauthorised deduction of wages

2. Was the total amount of wages paid on any occasion by the Respondent to each Claimant less than the total amount of the wages properly payable to that Claimant on that occasion? (ERA, s 13).

3. In determining what was properly payable to each Claimant, the Tribunal will need to determine:

a. Was there an agreement reached on 8 August 2019 between Mr S Newall and Mr C Holmes that, from August 2019, all Unite Representatives carrying out Trade Union off-line duties under the Facilities Agreement would be paid their normal pay to include what was then the Elapsed Hourly Rate (EHR), and which subsequently became duty pay and the short-haul day payment?

b. Did any such agreement amount to a variation of the relevant Facilities Agreement between the Respondent and the union?

c. If so, was the Facilities Agreement (as varied) incorporated into the Claimants' respective contracts of employment such that the payments were properly payable to each Claimant?

4. Do the sums claimed amount to wages or are some or all of the sums claimed by any of the Claimants excluded because they are payments of a type defined in ERA, s 27(2).

5. Was the claim brought in time in accordance with ERA, s 23? When considering time limits, the Tribunal will need to consider the following for each Claimant's claim:

a. In accordance with the guidance as provided in *Chief Constable of Northern Ireland v Agnew [2023] UKSC 33*, was there a series of deductions when looking at all the facts?

b. If it is found that there was a series of deductions, was the claim brought within three months of the last deduction or payment in the series, or the last of the payments so received (s.23(3 ERA)?

c. If it is found that there was not a series of deductions, was it reasonably practicable for the each deduction to have been presented before the end of the relevant period of three months?

d. If not, within what further period should the complaint have been presented, and was it presented within that further period?

e. By virtue of section 23(4A) ERA, is the claim limited to any deductions in the 2 years ending with the date of the presentation of the Tribunal claim (i.e. is the claim limited to deductions made in the 2-year period ending on 25 August 2020)?

Payment for time off for carrying out trade union duties (section 169 TULRCA)

6. What time off did the Respondent permit the Claimants to take under section 168 of TULRCA? When considering this, the Tribunal will need to consider:

   a. Was such time off taken during a Claimant's working hours as defined by section 173(1) TULRCA? R contends that section 169 TULRCA does not apply to any TU duties discharged during an "off period" (ie. during a period when C would not otherwise have been working). This would include any duties undertaken when C would not otherwise have been rostered for duties and/or any TU duties undertaken when furloughed.

   b. If so, was such time off during their working hours for the purpose of carrying out any duties concerned with the matters in TULRCA, s 168(1)(a) to (e) and/or for the purpose of undergoing training in aspects of industrial relations as defined in TULRCA, s 168(2)(a) & (b).?

   c. If so, was the time off which the Claimant was permitted to take under TULRCA, s 168 reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS?

7. In accordance with section 169(3) TULRCA, what were the average hourly earnings for the employee concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment with the Respondent or, if there are no such persons, a figure of average hourly earnings which is reasonable in all the circumstances?

8. In respect of the time off under section 168, was the Claimant paid an amount calculated by reference to the average hourly earnings for that work? R contends that any sums paid to C for time exceeding the reasonable period of time off should be taken into account when considering whether C has been paid in accordance with section 169 TULRCA. The Claimants contend that they were entitled to receive remuneration pursuant to the statutory language of TULRCA, s 169(3).

9. Were the claims brought in time pursuant to section 171 TULRCA? R's position is that time runs from the date of the failure to pay and there is nothing in the statutory provisions which relates to a series of failures with time running from the last failure in the series.

10. If the claims were brought after the period of three months referred to in TULRCA, s 171, as extended by TULRCA, s 171(2), was it reasonably practicable for the claims to have been lodged in time and if not, were the claims brought within such further period as the tribunal considers reasonable?

11. If it is found that the Respondent has failed to pay a Claimant in accordance with section 169 of TULRCA, what amount is found to be due to the Claimant?

Detriment on grounds related to union membership or activities - section 146 TULRCA

12. Were any of the Claimants subjected to a detriment as an individual? The detriments upon which the Claimants rely are the Respondent's alleged failures to pay them in accordance with TULRCA, s 169(3) for periods of time off for carrying out trade union duties under TULRCA, s 168.

13. Was any such detriment caused by any act, or deliberate failure to act, by the Respondent?

14. Did any act or failure take place for the sole or main purpose of:

a. preventing or deterring a Claimant from taking part in the activities of an independent trade union at an appropriate time, or penalising a Claimant for doing so (TULRCA, s146(1)(b)); or

b. preventing or deterring a Claimant from making use of trade union services at an appropriate time, or penalising a Claimant for doing so (TULRCA, s 146(1)(ba)).

15. If the claims succeed, what amount of compensation does the tribunal consider to be just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed the right (TULRCA, s 149)? The Claimant contends that, as part of an award under section 149 of TULRCA for a breach of section 146, the Tribunal has the power to make an award for injury to feelings, the assessment of which should be approached no differently than when the Tribunal makes an injury to feelings award in cases of other types of discrimination (*Cleveland Ambulance NHS Trust v Blane* [1997] ICR 851 and Adams *v Hackney London Borough Council* [2003] IRLR 402).