



UT Neutral citation number: [2026] UKUT 00366 (TCC)

UT (Tax & Chancery) Case Number: UT/2025/000052

**Upper Tribunal
(Tax and Chancery Chamber)**

Hearing venue: Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

**Heard on: 10 and 11 June 2026
Judgment date: 28 September 2026**

NATIONAL INSURANCE CONTRIBUTIONS – INCOME TAX – provision of accommodation to flight crew at home base during “back-to-back” rotations – whether expense deductible under section 337 Income Tax (Earnings and Pensions) Act 2003 – yes – appeal dismissed

Before

**MR JUSTICE RAJAH
JUDGE ASHLEY GREENBANK**

Between

**THE COMMISSIONERS FOR HIS MAJESTY’S
REVENUE AND CUSTOMS**

and

BRITISH AIRWAYS PLC

Appellants

Respondent

Representation:

For the Appellants: Richard Vallat KC and Thomas Williamson, counsel, instructed by the General Counsel and Solicitor for His Majesty’s Revenue and Customs

For the Respondent: Jonathan Peacock KC and Georgia Hicks, counsel, instructed by Deloitte LLP

DECISION

Introduction

1. This is an appeal by the Commissioners for His Majesty's Revenue and Customs ("HMRC") against a decision of the First-tier Tribunal (Tax Chamber) released on 3 April 2025 (the "FTT Decision")¹. The respondent is British Airways Plc ("BA").
2. The appeal concerns the treatment of hotel accommodation provided by BA to cabin crew operating "back-to-back" ("B2B") transatlantic rotations through London Heathrow Airport ("LHR") for the purposes of income tax and National Insurance contributions ("NICs").
3. The decisions under appeal relate to a contractual settlement reached by HMRC and BA on 16 February 2022. Under that agreement, HMRC agreed to issue decisions under section 8 Social Security Contributions and Benefits Act 1992 ("SSCBA") in respect of Class 1A NICs for a sample period between 6 April 2018 and 5 April 2019 for an agreed sum of £555,916.92. HMRC and BA also agreed that the outcome of any appeal against those decisions would determine the treatment of the accommodation for both income tax and NIC purposes over the period from 6 April 2016 to 5 April 2020. The amount in dispute is approximately £5.78 million.
4. HMRC's case is that the provision of the accommodation should be treated as earnings of the BA cabin crew for NICs purposes. BA appealed the decisions on the basis that any expense on the accommodation should be treated as a deduction from the earnings of the employee pursuant to one of sections 336, 337 or 338 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") with the effect that no liability to NICs arose.
5. The FTT allowed BA's appeal against the decisions on the grounds that the cost of the accommodation was deductible under section 337 ITEPA and, in the alternative, under section 338 or section 336 ITEPA. The FTT Decision was not published. For ease of reference, we attach a copy of the decision as an Appendix to this decision notice.
6. HMRC contend that the FTT erred in law in reaching those conclusions. HMRC appeal to this tribunal with the permission of the FTT.

Relevant legislation

7. We will begin by setting out the relevant legislation.
8. Under section 10 SSCBA, Class 1A NICs are payable in respect of benefits constituting "general earnings" of employment. It is agreed between the parties that the scope and structure of the provisions governing liability to Class 1A NICs follow a similar structure to the provisions of ITEPA that apply to determine liability of employees to income tax on employment income. The parties therefore conducted the appeal by reference to the relevant provisions of ITEPA.
9. Under section 7(3)(b) ITEPA, "general earnings" includes "any amount treated as earnings". The amounts "treated as earnings" for this purpose include any amount treated as earnings under Chapters 2 to 10 of Part 3 ITEPA (the benefits code) (section 7(5)(b) ITEPA). BA accepts that the provision of the accommodation constituted a benefit within the benefits code (in particular, section 102 ITEPA) unless an exemption applied.

¹ In this decision notice, we refer to paragraphs from the FTT Decision in the format "FTT [xx]".

10. Section 289D ITEPA provides that no liability to income tax arises by virtue of a provision of the benefits code in respect of an amount treated as earnings of an employee where an equivalent amount would be allowed as a deduction from the employee's earnings under Chapter 3 of Part 5 ITEPA in respect of the provision of the benefit. Within Chapter 3 of Part 5 ITEPA, section 361 and section 365 ITEPA permit a deduction where an amount in respect of the benefit would be deductible under Chapter 2 of Part 5 ITEPA if the employee had incurred and paid it.

11. In this appeal, the question is whether an amount in respect of the benefit of the accommodation would be deductible under one or more of sections 336, 337 and 338 ITEPA, all of which fall within Chapter 2 of Part 5 ITEPA.

12. The focus of the parties in this appeal has been on whether the expenditure on the hotel accommodation at Heathrow fell within section 337. Section 337 allows a deduction for "travel expenses" if an employee is obliged to incur them and they are "necessarily incurred" on travelling in the performance of the duties of the employment. Section 337(1) provides:

337 Travel in performance of duties

- (1) A deduction from earnings is allowed for travel expenses if—
 - (a) the employee is obliged to incur and pay them as holder of the employment, and
 - (b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.

13. The other two provisions under which BA claims that expenditure on the accommodation was deductible are section 336 and section 338 ITEPA. For reasons which we will address later in this decision, we will not need to refer to them in detail. However, for completeness, we set them out below.

14. Section 338 allows a deduction for "travel expenses" if an employee is obliged to incur them, and the expenses are attributable to necessary attendance at any place in the performance of the duties of the employment except where the travel constitutes ordinary commuting. Section 338 provides so far as relevant:

338 Travel for necessary attendance

- (1) A deduction from earnings is allowed for travel expenses if—
 - (a) the employee is obliged to incur and pay them as holder of the employment, and
 - (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.
- (2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.
- (3) In this section "ordinary commuting" means travel between—
 - (a) the employee's home and a permanent workplace, or
 - (b) a place that is not a workplace and a permanent workplace.
- (4) Subsection (1) does not apply to the expenses of private travel or travel between any two places that is for practical purposes substantially private travel.
- (5) In subsection (4) "private travel" means travel between—
 - (a) the employee's home and a place that is not a workplace, or
 - (b) two places neither of which is a workplace.

15. The definitions of "workplace", "temporary workplace" and "permanent workplace" for the purposes of section 338 ITEPA are found in section 339 ITEPA. But we will not need to refer to them for the purpose of this decision.

16. Section 336 is the general rule which permits a deduction where an employee is obliged to incur an expense and the expense is incurred "wholly, exclusively, and necessarily" in the performance of the duties of the employment. Section 336(1) provides:

336 Deductions for expenses: the general rule

- (1) The general rule is that a deduction from earnings is allowed for an amount if—
 - (a) the employee is obliged to incur and pay it as holder of the employment, and
 - (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

The facts

17. We have set out in this section a summary of background facts. It is derived from the findings of the FTT as set out in the FTT Decision.

18. The FTT made extensive findings concerning the aviation regulatory framework, the contractual terms governing employment of the cabin crew, and BA's implementation and enforcement of the requirement to use the LHR accommodation (FTT [68]-[81]). We will need to refer to various aspects of the FTT Decision in more detail later in this decision. But, for present purposes, the following summary should suffice.

19. BA operated B2B rotations on certain routes from the 1990s until 2020, typically on transatlantic routes to North America and the Caribbean. They provided BA with an efficient means of managing cabin crew as part of BA's normal operations. It was BA's commercial choice to operate the B2B rotations. It was not required to do so. (FTT [5], [81(1)]-[81(2)])

20. On a typical B2B rotation, the cabin crew would staff a flight from LHR to, say, New York; stay overnight in New York; staff a return flight to LHR; spend a rest period in hotel accommodation near to LHR; staff another flight to, say, Washington DC; stay overnight in Washington DC; and then staff a return flight to LHR (FTT [5], [81(13)]).

21. At all material times, BA was subject to a regulatory framework imposed by the European Aviation Safety Agency ("EASA") as implemented and enforced in the UK by the Civil Aviation Authority ("CAA"). In particular, from February 2016, BA was subject to the EASA Flight Time Limitation Regulations found in Annex III of Commission Regulation 965/2012, as amended by Commission Regulation 83/2014 (the "EASA FTL Regulations"). The EASA FTL Regulations were supplemented by legally binding EASA Certification Specifications and Guidance Material (FTT [13(7)]-[13(9)]).

22. The EASA FTL Regulations and Guidance Material provided for minimum rest periods for cabin crew between flight duty periods (FTT [13(7)]-[13(9)]). In summary, the EASA FTL Regulations and Guidance Material specified different minimum rest periods depending on whether cabin crew were starting the next flight duty period from home base or whether they were away from home base, with the required minimum rest period being shorter when cabin crew were away from home base (FTT [13(8)]-[13(10)]). For B2B rotations, the minimum rest period at home base between the two outbound transatlantic flights was treated as a period away from home base but "only if the

crew member does not rest at his/her own residence, or temporary accommodation, because the operator provides suitable accommodation” (FTT [13(10)]).

23. For the purpose of providing “suitable accommodation” under the EASA FTL Regulations, BA made arrangements for staff accommodation with the Premier Inn near LHR Terminal 5. The hotel was approximately 1 mile from LHR Terminal 5. The facilities were adapted for use by cabin crew and included blackout blinds, kitchen and laundry facilities, a private gym, 24-hour room service and other amenities designed to facilitate rest between flight duties (FTT [60], [81(13)]).

24. The requirements of the EASA FTL Regulations and Guidance Material were incorporated into the Flight Time Limitation Scheme (“FTL Scheme”) agreed by BA with the CAA under the Air Navigation Order 2000, to which BA was also subject. The FTL Scheme in turn formed part of BA’s operations manual (“OMA”) (FTT [21]-[23]).

25. Each cabin crew member had a short contract of employment, which required cabin crew to perform “all work normally undertaken in this post and such additional duties as [BA] may require from time to time” (FTT [81(4)]). The contracts also incorporated the OMA, the Worldwide Scheduling Agreement (“WSA”), collective agreements between BA and relevant trades unions, and the Employment Guide, which contained various BA policy statements (FTT [29]-[45]).

26. For the purposes of working time regulation, cabin crew were treated as working throughout the B2B rotation, including the rest periods. The parties agreed that the full period of the B2B trip, from when the crew members reported for duty of the first outbound flight to when they cleared the airport at the end of the last flight in the B2B rotation was treated as “working time” for the purposes of the Civil Aviation (Working Time) Regulations 2004 (FTT [15]).

27. Before the introduction of the EASA FTL Regulations in February 2016, cabin crew on B2B rotations were able to use the LHR accommodation, but were not required to do so. Following the introduction of the EASA FTL Regulations, use of the accommodation was mandatory for cabin crew during a B2B rotation. BA amended its operational documentation, collective agreements, guidance to crew, and communications to staff to specify that use of the LHR accommodation during a B2B rotation was mandatory (FTT [26]-[28], [33], [78]-[79]).

28. Once rostered on a B2B rotation, cabin crew were contractually obliged to undertake the rotation and to stay in the LHR accommodation provided by BA at LHR between the outbound flights as part of the rotation. The crew were required to use the LHR accommodation “to rest and ensure that they could compliantly commence” the second outbound flight (FTT [78]-[79], [81(6)], [81(13)]-[81(17)]).

29. BA monitored compliance with this requirement. BA followed up reported breaches through management processes and, where appropriate, disciplinary procedures. (FTT [46]-[51], [79], [81(16)]-[81(19)]).

30. In the tax year 2009/10, BA agreed that the accommodation provided to cabin crew at LHR was to be reported as a benefit in kind on the basis that the cabin crew were not required to use the accommodation (FTT [7]). However, following the introduction of the EASA FTL Regulations, BA took the view that the provision of the LHR accommodation was no longer a benefit in kind on the grounds that staff on B2B rotations were required to use the LHR accommodation (FTT [8]).

31. BA also provided accommodation to cabin crew for the overnight stays that formed part of B2B rotations when they were abroad, say in the United States. The cabin crew were permitted to stay outside that accommodation with the approval of BA (FTT [81(11)]).

32. At all material times, HMRC accepted that accommodation provided to cabin crew between outbound and return flights outside the UK, in the above example, in the United States, qualified for relief as travel expenses under section 337 ITEPA and so was not subject to income tax or NICs (FTT [6], [116]). The dispute concerns only the accommodation provided at LHR between flights making up the B2B rotation.

The FTT Decision

33. The FTT allowed BA's appeal against the decisions.

34. The FTT concluded that the duties of employment of the cabin crew extended throughout a B2B rotation. In its view, from sign-on at the commencement of the B2B rotation until the crew were released at its conclusion, the crew were performing their duties of employment notwithstanding that parts of the rotation consisted of prescribed rest periods (FTT [102]-[104]).

35. On that basis, the FTT held that the cost of the accommodation was deductible under section 337 ITEPA because the crew were travelling in the performance of their duties throughout the B2B rotation. In that respect, the LHR accommodation was indistinguishable from accommodation provided between flights at overseas locations (FTT [115]-[116]).

36. In the alternative, the FTT found that the expense was deductible under section 338 because the accommodation constituted a "temporary workplace" where the cabin crew were obliged to take mandatory rest periods (FTT [117]).

37. In the further alternative, the FTT also found that the expense was deductible under section 336 ITEPA on the grounds that it was incurred wholly, exclusively and necessarily in the performance of the duties of employment of the cabin crew (FTT [118]-[125]).

38. Before the FTT, BA also argued that the accommodation fell within section 97 ITEPA (living accommodation provided by reason of employment) but was excluded from charge to income tax and NICs because it was necessary for the proper performance of the cabin crew's duties that they should reside in it within section 99 ITEPA. The FTT rejected that argument on the grounds that the cabin crew did not "reside" in the accommodation (FTT [90], [111]-[114]). BA has not challenged that aspect of the FTT Decision and it does not arise on this appeal.

The Grounds of Appeal

39. HMRC applied to the FTT for permission to appeal on five grounds. The FTT granted permission on all five grounds. They are as follows.

(1) Ground 1: the FTT erred in holding that the expense of providing accommodation at LHR between the first and second transatlantic trips (of a B2B rotation) was an expense incurred "in the performance of the duties" of the employment of the cabin crew as required by sections 337, 338, and 336 ITEPA.

(2) Ground 2: the FTT erred in concluding that the expense of providing the accommodation was incurred by the cabin crew "on travelling" in the performance of the duties of the employment for the purposes of section 337 ITEPA.

(3) Ground 3: even if the expense was incurred on travelling in the performance of the duties for the purposes of section 337 ITEPA, the FTT erred in concluding that it was necessarily incurred for the purposes of section 337 ITEPA.

(4) Ground 4: the FTT erred in holding that the expense of providing the accommodation was attributable to the “necessary attendance” of the cabin crew at a “temporary workplace” for the purposes of section 338 ITEPA.

(5) Ground 5: the FTT erred in holding the expense of providing the accommodation was deductible under section 336 ITEPA as it was not wholly and exclusively incurred as well as necessarily incurred in the performance of the duties of employment.

The issues before the Tribunal

40. HMRC pursued all of its grounds of appeal before us. However, for reasons to which we will return later in this decision, the focus was on the application of section 337 ITEPA.

41. In respect of each of sections 336, 337 and 338, the parties agreed that the requirements of subsection (1)(a) in each of those sections were met: that is, that in each case, the cabin crew were obliged to incur and pay the costs of the accommodation as holders of their employment.

42. HMRC also agreed that the expenditure on the hotel accommodation was a “travel expense” for the purposes of sections 337 and 338 ITEPA.

43. Finally, as we have mentioned above, before the FTT, BA argued that section 99 ITEPA could apply to exclude the provision of the accommodation from the benefits code. The FTT rejected that argument. BA did not pursue it before us.

44. We will take each of the grounds of appeal in turn.

Ground 1: duties of the employment

45. By Ground 1, HMRC say that the FTT erred in law in holding that the expenditure incurred in providing accommodation at LHR was expenditure incurred in the performance of the duties of the employment of the cabin crew.

46. The arguments of the parties in relation to Ground 1 concentrated on the scope of the duties of the employment of the cabin crew. This issue is relevant to the application of all of sections 336, 337 and 338 ITEPA.

The FTT Decision

47. The FTT approached the issue of determining the duties of the employment from its review of the contractual and regulatory position. It supplemented this review with points derived from the witness evidence.

48. The FTT concluded that the obligation to stay at the LHR accommodation between transatlantic flights as part of a B2B rotation formed part of the duties of employment of cabin crew. The FTT said this at (FTT [101]-[104]):

101. HMRC made much of the regulatory definitions of duty to distinguish periods of rest from operational duties. However, we are required to determine whether the period of rest at LHR in a B2B rotation arises in the “performance of their duties of employment” (see 336/7) or “performance of the employee’s duties” (see section 99).

102. The crew were employed under contracts requiring that they perform the duties that the Appellant requires. Further, even within the scope of the regulatory definition “duty” encompasses “any task that a crew member performs for the operator” and more specific definitions are provided for “flight duty period” etc. We have found that rosters are issued by reference to an algorithm which ensures that crew are rostered to fly for the maximum permitted flying time allowing for adequate rest, within the terms of the EASA FTL Regulation, so as to ensure that they do not fly in a fatigued state. Rostering represents the means by which crew are directed by the Appellant to work and the duties/tasks they are required to perform when so working in accordance with their contracts and in the context of the regulatory environment. From the point at which they start a rotation, which may include a single duty or series of duties, the crew are performing their duties of employment until the rotation ends back at home base and they are free from duties (i.e. they start a period of at least minimum turnaround base rest).

103. As such we consider that the crew are performing their contracted duties of employment throughout any period when they are rostered by the Appellant.

104. We see a marked and relevant difference between minimum base turnaround rest and the rest required during a rotation (whether that be in flight, physically away from base, or in the case of B2B the rest in the Accommodation). In the former case the crew are released from all immediate direction of and obligation to the Appellant; all that is required of them is that they ensure that they are fit to perform their duties of employment for their next rostered rotation/itinerary. In the latter case they are still under the Appellant’s control and direction. They are resting at the direction of the Appellant in Accommodation provided by the Appellant and compliance with the direction to do so is monitored.

The parties’ submissions in outline

49. Mr Vallat KC for HMRC says that this passage demonstrates that the FTT failed to identify the correct legal test. The FTT identified the issue that needed to be addressed (at FTT [101]) i.e. whether the periods of rest at LHR in a B2B rotation were in the performance of the duties of the employment of the cabin crew. But, the FTT failed to identify the case law test to determine the duties of the employment and then to apply that test correctly.

50. In summary, Mr Vallat KC submits:

- (1) The FTT failed to apply the correct test derived from the case law to determine duties of employment of the cabin crew.
- (2) The authorities establish that the “duties” of an employment for these purposes are not simply the contractual duties. The case law authorities require the court or tribunal to distinguish between the “intrinsic” or “core” duties of the employment and duties which are “collateral” or “extracurricular”. Only the “intrinsic” or “core” duties were duties of the employment.
- (3) Instead, the FTT identified the contractual duties and regulatory obligations but failed to determine the intrinsic or core duties of the employment. That was an error of law.
- (4) If the Tribunal had identified the intrinsic or core duties, the FTT would have found that the core duties were essentially the in-flight duties of the cabin crew to ensure operational safety and security and provide customer service. The cabin crew were not performing the duties of their employment whilst they were resting at LHR during a B2B rotation.

51. Mr Peacock KC makes the following points:

(1) This ground of appeal is a disguised challenge to the factual findings of the FTT. The FTT identified the correct test. If HMRC are to succeed they must meet the requirements in *Edwards v Bairstow*: either there must be no evidence to support the FTT's findings; or the conclusions that the FTT arrived at must be "perverse" so that no reasonable tribunal could have reached that conclusion.

(2) The correct test is that prescribed by law i.e. what were the duties of the employment? The distinction made in the case law between "intrinsic" duties and "collateral" or "extracurricular" duties is not a separate test. Those terms were labels to describe why particular duties or obligations did or did not meet the statutory test.

(3) The FTT applied the correct test. It conducted a thorough analysis beginning with the contractual duties and regulatory obligations supported by reference to the witness evidence to determine which duties and obligations were dictated by the employment.

(4) The argument that an obligation to rest was not a duty of the employment was misplaced. The point was that stays in the accommodation were duties of the employment. HMRC's argument was based on the regulatory definitions of "rest" and "duty". But the regulatory definitions could not be determinative of the duties of employment.

(5) There was no material difference between the stays made by the cabin crew in overseas hotels (e.g. in the US) and the stays at LHR accommodation during B2B operations. They were all required by the regulatory framework and were all duties of the employment of the cabin crew. HMRC accept that the costs of accommodation in the US qualify for a deduction under section 337 ITEPA even though there was no requirement (contractual or regulatory) for the cabin crew to use the accommodation. It could not be the case that there was no deduction in circumstances where the cabin crew were required to use the accommodation at LHR.

A question of law or fact?

52. There is a dispute between the parties as to the nature of this ground of appeal.

53. As we have described, Mr Vallat KC says that this ground of appeal is based to a clear error of law; the FTT failed to identify the correct legal test and then to apply it. Mr Peacock KC submits that this ground of appeal is a thinly disguised challenge to the facts as found by the FTT, which can only succeed if HMRC are able to demonstrate that the FTT's conclusion was "perverse".

54. Both parties rely on the judgments of the House of Lords in *Fitzpatrick v Inland Revenue Commissioners and related appeals (No. 2)* [1994] STC 237 ("*Fitzpatrick*"). *Fitzpatrick* involved two sets of appeals: one in Scotland and one in England. The cases concerned the deductibility of allowances paid to journalists for the purchase of newspapers and journals. The Scottish commissioners found that the journalists incurred the expense as a means of preparing to perform their duties of employment and not in the performance of their duties. They dismissed the appeals. The English commissioners, on the other hand, allowed the journalists' appeals finding that the expenditure was incurred in the performance of the duties of the journalists' employment.

55. The House of Lords, by a majority of 4 to 1, found that the question of whether the expenditure was incurred in the performance of the journalists' duties was a mixed question of fact and law, which an appellate court was entitled to review. On the facts, the majority also found that the journalists did not read the newspapers and other journals in performance of their duties as journalists, but in order to prepare themselves to perform the duties of their employment more effectively. On that basis, the House of Lords allowed the Revenue's appeals.

56. Of the majority, Lord Templeman gave the only fully reasoned judgment. Lord Keith agreed with Lord Templeman. Lord Jauncey and Lord Mustill both gave short judgments agreeing with the conclusion that Lord Templeman had reached. They both decided that the question was a question of mixed fact and law (*Fitzpatrick* p248d, and p255b). The dissenting judgment was given by Lord Browne-Wilkinson. He found that this issue was a question of fact, and it was not open to an appellate court to disturb the findings of the Commissioners.

57. Both parties referred to passages in the judgment of Lord Templeman. He said this, at p246d-f

As I have indicated, in the Scottish cases the special commissioners and a majority of the Inner House considered that the expenditure by a journalist on newspapers and periodicals was not necessarily incurred in the performance of his duties. In the English cases, the general commissioners, after surveying the evidence, concluded that the expenditure was necessarily incurred in the performance of the duties. The Court of Appeal were content to treat the conclusions of the general commissioners as findings of fact. In the English cases the courts appear to have been powerfully influenced by the belief, naturally held and strongly expressed by the journalists and supported by their employers, that their reading of newspapers was necessary and was carried out in the performance of their duties. But it is for the court to determine on the facts and evidence whether those beliefs are justified having regard to the wording of section 189(1) of the Act of 1970 and to the authorities. Questions involved in the present cases are mixed questions of law and fact.

He continued at p247c-d:

In all the cases there was but one question of law, namely whether upon the facts and upon the true construction of section 189 of the Act of 1970 the journalist incurred expense “in the performance” of his duties when he selected, purchased and read newspapers and periodicals in his own time. If either set of commissioners failed to answer that question of law correctly, the error of law must be corrected by the courts who are always entitled and bound to correct errors of law. In my opinion the Scottish commissioners reached the right conclusion of law, and the English commissioners did not.

And at p247h-248a, referring to the judgment of Lord Browne-Wilkinson:

My noble and learned friend now suggests that the question of law shall be decided by the evidence of newspaper proprietors and journalists to be given to a third set of commissioners whose decision will not be subject to correction by the courts. He also suggests that the commissioners should not be asked to decide whether upon the undisputed facts and upon the true construction of section 189 of the Act of 1970 journalists are acting “in the performance” of their duties as reporters, authors, editors, photographers but should be asked to decide whether reading is “objectively part of the core duties of their employment.” In my opinion the question of law involved in these cases cannot be decided by the non-statutory and in my view incomprehensible test of “core duties” nor by the non-statutory dicta of a lower court dealing with different facts in *Humbles v. Brooks*, 40 T.C. 500 . My noble and learned friend's suggestion demonstrates a confusion of facts, opinion and law of a kind which was corrected by the House of Lords in *Ensign Tankers (Leasing) Ltd. v. Stokes* [1992] 1 A.C. 655 , 677. Such confusion would cause chaos in the administration of revenue law.

58. The parties also referred to the decision of the Court of Appeal and the High Court in *HMRC v Banerjee*, the Court of Appeal decision in which is found at [2010] EWCA 843 (“*Banerjee CA*”), and the High Court decision at [2009] EWHC 62 (Ch) (“*Banerjee HCT*”). *Banerjee* concerned a specialist registrar in dermatology at various London hospitals, who claimed to deduct the cost of attending

training sessions. On the facts of the case, the General Commissioners allowed the deduction. The High Court and Court of Appeal affirmed that decision. In the High Court, Henderson J said this in relation to the decision of the House of Lords in *Fitzpatrick (Banerjee HCT [46]-[47])*.

46. The majority, however, unanimously upheld the decision of the lower courts in the Scottish appeals, and with varying degrees of hesitation held that the English appeals had been wrongly decided. They reached this conclusion by characterising the question as a mixed question of fact and law, and by holding that the only conclusion reasonably open to the English commissioners was that the English journalists were not carrying out the duties of their employment when they were reading other newspapers. As Lord Templeman, delivering the leading speech, said, at p 316:

“It does not matter therefore whether in the present case the journalists were contractually bound to their employers to expend money in the purchase of other newspapers and magazines or whether they did so voluntarily. Whether or not a journalist thinks it is necessary to read one or more newspaper and periodical his duty is in the production of his employer's newspaper and he is not carrying out that duty when he is reading other newspapers.”

Lord Templeman went on to say, at p 316, that the reasons for the strictness of the rule governing deductible expenses are not hard to find:

“If a journalist or other employee were allowed to deduct expenses incurred by him in his spare time in improving his usefulness to his employer, the imposition of income tax would be distorted and the amount of the expenses claimed by an individual would depend entirely on his own choice.”

47. I confess that my instinctive sympathy is with the approach taken by Lord Browne-Wilkinson in his dissenting speech, and I have always had some difficulty in understanding how the majority in the House of Lords felt able to divine an error of law in the decision of the English commissioners. However, the important point for present purposes, as it seems to me, is that the majority decided the case by applying the well-established principle that expenditure is deductible only if it is incurred in the performance of the duties of the employment. That principle is not in dispute, and in my judgment it is not undermined in any way by the decision of the general commissioners in the present case. Their decision turns on the fact that they identified Dr Banerjee's duties under her contract of employment as including attendance at the relevant courses. That may be a relatively unusual state of affairs, but it is not conceptually impossible or obviously absurd; and where that is the true state of affairs, as found by the sole tribunal of fact, I can see no error of law in the conclusion that expenditure incurred on attending the courses is deductible.

59. Mr Vallat KC relies on all of these statements as demonstrating that the question of whether an employee is incurring expenditure in the performance of the duties of the employment is a mixed question of fact and law. The error in this case is that the FTT failed to identify the correct legal test, and, even if it did identify the correct test, it failed to apply it. That was an error of law.

60. Mr Peacock KC says that it is clear from the judgment of Lord Templeman that the majority in the House of Lords in *Fitzpatrick* is applying an *Edwards v Bairstow* test. Lord Templeman finds that the English commissioners have reached a conclusion which, on the facts of the case, was not a conclusion that any reasonable tribunal could have reached. Mr Peacock KC relies on the passage at *Fitzpatrick* p247c-d in support of this submission. He also says that this conclusion is supported by the analysis of Henderson J in the High Court in *Banerjee HCT* at [47].

61. Mr Peacock KC put his argument elegantly and forcefully. However, we cannot agree. We are bound by the decision of the House of Lords in *Fitzpatrick*. In our view, it is clear from the judgment

of Lord Templeman, with whom Lord Keith agreed, that he regarded the question as a question of mixed fact and law (*Fitzpatrick* p246d-f). That approach is endorsed by the judgments of Lord Jauncey and Lord Mustill. We therefore agree with Mr Vallat KC that the question of the scope of the duties of the employment is one of mixed fact and law. An error by the FTT in its approach to that question is capable of founding an appeal to this tribunal.

Scope of “the duties of the employment”

62. We must therefore turn to the substance of this ground of appeal – whether the expenditure incurred in providing accommodation at LHR was incurred in the performance of the duties of the employment of the cabin crew.

Relevant case law

63. We were referred by the parties to a number of cases concerning the meaning of the duties of an employment for income tax purposes. They included: *Ricketts v Colquhoun* [1926] AC 1 (“*Ricketts*”), *Lomax v Newton* [1953] 1 WLR 1123 (“*Lomax*”), *Brown v Bullock* [1961] 1 WLR 1095 (“*Brown*”), *Lupton v Potts* [1969] 1 WLR 1749 (“*Lupton*”), *Fitzpatrick, Banerjee HCT*, *Banerjee CA*, and *Niasse v HMRC* [2024] UK FTT 179 (“*Niasse*”).

64. We do not intend to engage on an extensive review of that case law. The key principles that we derive from the cases are set out below.

(1) The “duties of the employment” are those which are an “objectively necessary requirement” of the employment itself. They are the duties which form “an intrinsic part of the job” that the employee is paid to perform, not merely a collateral obligation undertaken at the employer’s request, nor an extracurricular obligation that the employee chooses or is required to undertake in order to qualify to do the job, or to improve his or her prospects of promotion (Henderson J in *Banerjee HCT* at [34], cited with approval by Rimer LJ in *Banerjee CA* at [34]).

(2) An express contractual requirement to perform a particular obligation is not an absolute requirement. For example, in *Banerjee*, Dr Banerjee’s employment was “essentially a training post”. When Dr Banerjee attended training courses, she was performing the duties of her employment even though her contract simply referred to her maintaining her National Training Number and not to attending specific courses (*Banerjee HCT* [33]-[34], *Banerjee CA* [6], [35]).

(3) Equally a contractual requirement is not sufficient. An expense does not become a deductible expense simply because there is a contractual obligation placed on the employee to incur it. In *Fitzpatrick*, the obligation to read other newspapers and periodicals was not a duty of the employment of the journalists, whether or not there was a contractual obligation to expend money in purchasing them (*Fitzpatrick* per Lord Templeman at p245h).

(4) The cases provide various examples of circumstances in which an expense incurred under some form of obligation (contractual or otherwise) is not an expense incurred in the performance of the duties of the employment.

(a) In *Brown*, the requirement to join a club, imposed by the employer on a bank manager, was not one of the duties of his employment as a bank manager (*Brown* p1102 per Lord Evershed MR). It was a collateral obligation undertaken at the employer’s request.

(b) In *Fitzpatrick*, the obligation to read other newspapers and periodicals was not a duty of the employment of the journalists. It was an extracurricular obligation designed to put the employee in a better position to perform the duties of the employment (*Fitzpatrick* p243b-d per Lord Templeman).

(c) Similarly obligations that are “personal or social obligations” will not form part of the duties of employment (for example, attendance at functions of the officers’ mess in *Lomax*).

65. There is no material dispute about these principles. However, Mr Peacock KC objected to the elevation of the terms used in these cases – such as “intrinsic”, “core”, “collateral” and “extracurricular” – to the level of a separate test. He referred to these terms as “labels” which may be used to describe the reasons why a particular expense was or was not deductible, but, he argued, they do not replace the basic test.

66. We agree. Lord Templeman makes a similar point when he refers to there being “but one question of law” (*Fitzpatrick* p247c-d, quoted above) and when he refers to the “incomprehensible test of core duties” (*Fitzpatrick* p247h-248a, also quoted above). However, we regard them nonetheless as useful guidelines, which help delineate the scope of the concept of duties of the employment and underscore the strict objective nature of the test. Once the contractual obligations of the employee have been identified, it is a useful exercise to consider whether – based on the previous case law – the obligation in question falls within one of the categories of obligations identified in those cases that fail to meet the test (and so are not regarded as “intrinsic” to the employment).

Discussion

67. HMRC’s main argument in relation to this ground of appeal is therefore that the FTT failed to have regard to this case law when it determined that the cabin crew were acting within the scope of the duties of their employment when they stayed at the LHR accommodation. Mr Vallat KC says that this is exemplified by FTT [102] and [103] which focus almost exclusively on the contractual and regulatory requirements.

68. We do not find it surprising that the FTT begins its analysis of the “duties of the employment” by referring to the contractual duties. Employment is after all a contractual relationship. It is inevitable that the primary source of the duties of the employment will be the contractual rights and obligations involved in the relationship between the employer and the employee whether they are express or implied from the regulatory framework in which the employer’s business is conducted or otherwise.

69. From that starting point, the case law demonstrates that there may be circumstances where, even if there is a contractual obligation, it cannot be regarded as a duty of the employment because it is not an “objectively necessary requirement” of the employment itself (to adopt the words of Henderson J in *Banerjee HCT* at [34]). This may be because the obligation is “collateral”, but performed at the employer’s request (for example, the requirement to join a club in *Brown*) or it is “extracurricular” because it improves the employee’s ability to do the job or the employee’s prospects of promotion but it is not part of doing the job (for example, the solicitor’s clerk taking the solicitors’ exams in *Lupton*, or the journalists reading other newspapers and journals in *Fitzpatrick*) or it is purely personal or social (for example, attending the officers’ mess in *Lomax*).

70. In this case, the FTT made a thorough review of the contractual and regulatory background. It took account of the evidence of the witnesses. It then reached its conclusions at FTT [101]-[104]. It did not express those conclusions in the terms of the previous case law. Once again, this is, perhaps, not surprising. HMRC’s case was put to the FTT in slightly different terms. As can be seen at FTT [95], HMRC’s case before the FTT was that the expenditure had to be incurred “in the actual

discharge of the crew's operational duties". It was argued that the cost of the accommodation was incurred "in order to put the crew in a position to perform the second period of duty [i.e. the second outbound flight as part of a B2B rotation] and not as part of that duty". That latter wording bears the hallmarks of what might be described in some of the other cases to which we have been referred as an extracurricular obligation that an employee undertakes to put themselves in a better position to do the job (*Lomax, Fitzpatrick*).

71. The FTT begins its conclusions by identifying the issue which it is seeking to address as "whether the period of rest at LHR in a B2B rotation arises in performance of [the cabin crew's] duties of employment" (FTT [101]). The FTT then refers to the cabin crew's contractual obligations to perform the duties directed by BA and under the regulatory regime. It then refers to the rostering as the means by which the requirements for rest under the EASA FTL Regulations are met, but also as the means by which BA directs the crew "to work and the duties/tasks that they are required to perform when so working" (FTT [102]). The FTT concludes that throughout the period of a B2B rotation for which the cabin crew are rostered by BA, they are performing the duties of their employment (FTT [102] and [103]) and contrasts the periods of rest during a B2B rotation with the "minimum base turn around rest" which occurs between rostered itineraries (FTT [104]).

72. The wording of these paragraphs is perhaps too broad. It tends to focus on the period of rest in the B2B rotation. As we understand BA's case, the question is not whether the cabin crew were performing the duties of their employment by resting. The question is whether it was a duty of their employment to stay at the LHR accommodation during the rest period required on a B2B rotation. In our view, the FTT appreciated that distinction.

73. The FTT's findings are consistent with the relevant obligation being an obligation to stay at the LHR accommodation during a B2B rotation (see FTT [75], [78], [79], [81(13)], [81(15)]). Although the FTT finds that the purpose of staying at the LHR accommodation was to rest (FTT [81(13)]), there is no express finding in the FTT Decision that there was a contractual duty to sleep or rest during that stay. On the basis of those findings, the FTT clearly comes to view that throughout a B2B rotation the crew are performing the duties of their employment. Even if it does not express it in precisely these terms, in our view, the FTT is concluding in these paragraphs that the contractual obligations of the cabin crew during a B2B rotation are part of the "objectively necessary requirements" of the employment itself (i.e. the "intrinsic" duties). This includes the obligation to stay at the LHR accommodation.

74. In these paragraphs, the FTT is concluding that the obligation of the cabin crew to stay at the LHR accommodation during a B2B rotation was a part of the job. The staff were obliged to act in accordance with the direction of BA and to meet the regulatory requirements. The regulatory requirements for a B2B rotation required that the cabin crew stayed at the LHR accommodation. If cabin crew did not stay at the LHR accommodation during a B2B rotation, they would be in breach of the regulations. For staff that were rostered on B2B flights, the job was the rotation. The obligation to stay at the accommodation was not a collateral requirement; it was not a personal or social obligation; it was not preparatory to performing the duties of employment. It was one of them.

75. We agree.

76. Before we leave this ground of appeal, we should also address some of the other arguments Mr Vallat KC made in support of it.

77. Mr Vallat KC pointed to the acknowledgement of some of BA's witnesses that resting in the accommodation was not part of the cabin crew's "operational duties" (FTT [61], [66]) in support of

his argument that the cabin crew understood that the “intrinsic” or “essential” duties of the employment of the cabin crew were their on-flight duties. We do not agree. As we have explained above, the relevant obligation in this case was the obligation to stay at the LHR accommodation, not any duty to rest or to be rested before the next flight duty period. Once the cabin crew were rostered to a B2B flight, their job was to undertake the B2B flights. It was a part of that job that they stay at the LHR accommodation.

78. As the FTT remarked, HMRC’s arguments on the extent of the “intrinsic” duties of the cabin crew’s employment included reference to the definitions of “duty” periods and “rest” periods in the EASA FTL Regulations. Any assertion that the FTT ignored this aspect of the regulatory regime is unsupportable. The FTT conducted a comprehensive review of the regulatory regime. Having done so, the FTT concluded that the regulatory definitions did not determine the duties of the employment for tax purposes (FTT [101]). We agree.

79. Mr Vallat KC also asserted that the provision of accommodation at overseas locations was fundamentally different from the provision of the LHR accommodation. He argued that the intrinsic duties of the cabin crew required travel away from their home base to other locations. They would therefore be displaced from their home base where they might be expected to have their own accommodation. Their need for accommodation in the US and elsewhere was an inevitable consequence of that displacement.

80. We see no relevant distinction between the provision of the LHR accommodation and the provision of accommodation when the cabin crew are abroad. In both cases, the accommodation is provided because the cabin crew cannot “go home”; in one case, because the duties of their employment require them to be abroad, and, in the other because their contractual and regulatory obligations require it. But, in both cases, the cabin crew are unable to use any other accommodation that may be available to them in the UK because they are doing their jobs elsewhere.

Conclusion

81. For these reasons, we agree with the FTT that it was a duty of the employment of the cabin crew to stay at the LHR accommodation during a B2B rotation when they were rostered to do so. We dismiss this ground of appeal.

Ground 2: travelling

82. By Ground 2, HMRC assert that the FTT erred in concluding that the expense of providing the accommodation was incurred by the cabin crew “on travelling” in the performance of the duties of their employment for the purposes of section 337 ITEPA.

The FTT decision

83. The FTT sets out its conclusion at FTT [116]. The FTT says this:

116. Whilst at LHR between the two western route trips the regulations deem the crew to be away from home base/at a slip station. In our view HMRC rightly accept that hotel accommodation provided in the USA is accommodation provided whilst the crew are travelling and deductible under section 337. In our view and in light of the regulatory and contractual requirements, the provision of Accommodation is relevantly indistinguishable from the USA hotel accommodation. In both instances, the crew are either physically or are deemed to be away from home base and thereby considered to be travelling in much the same sense as a commercial traveller. They are away from their usual or permanent workplace in performance of their duties and hence in our view all the time spent when not at or deemed not to be at home base is time spent travelling.

Accordingly, and without repeating our view set out above on duties of employment and necessity, we consider that the provisions of section 337 are met.

The regulatory position

84. As we can see from this passage, the FTT refer to the regulatory regime when reaching its conclusion on this point. We should look into the regulatory regime in a little more detail before we proceed any further.

85. The relevant regulations dealing with rest periods are in the EASA FTL Regulations at ORO.FTL.235. It provides so far as relevant:

(a) Minimum rest period at home base.

(1) The minimum rest period provided before undertaking an FDP starting at home base shall be at least as long as the preceding duty period, or 12 hours, whichever is greater.

(2) By way of derogation from point (1), the minimum rest provided under point (b) applies if the operator provides suitable accommodation to the crew member at home base.

(b) Minimum rest period away from home base.

The minimum rest period provided before undertaking an FDP starting away from home base shall be at least as long as the preceding duty period, or 10 hours, whichever is greater. This period shall include an 8-hour sleep opportunity in addition to the time for travelling and physiological needs.

...

It is the derogation in paragraph (a)(2) above that permits the use of a shorter rest period during a B2B rotation if the operator provides “suitable accommodation”.

86. That position is reflected in the OMA and is incorporated into the employment contracts of the cabin crew in the manner that we have described.

87. As can be seen, the provision does not expressly include any element of “deeming” to which the FTT refers at FTT [116]. The “deeming” element is found in the terms of the WSA which is also incorporated into the contracts of the cabin crew. It provides at paragraphs 11.1.3 and 11.1.8:

11.1.3 B2B ITINERARIES

B2B itineraries are made up by linking 2 Western Route trips with a guaranteed local night's rest at base. Both trips are planned separately within the rules of the Worldwide Agreement before being linked together. In this instance base is regarded as a slip station.

...

11.1.8 REST AT LONDON

The planned minimum rest for B2B operations at London is 1 Local Night taken in appropriate hotel accommodation. In this situation London is deemed to be a slip station (see definition 'Local Nights Rest Away from Base').

88. The reference here to a “slip station” is a reference to an airport which is not the home base (in our example, any airport other than LHR). This terminology is also used in FTT [116].

The parties’ submissions in outline

89. In summary, Mr Vallat KC makes the following submissions.

- (1) The FTT's conclusion, at FTT [116], that the cabin crew are travelling when staying at the LHR accommodation is based on LHR being treated as a slip station for regulatory purposes. That was a clear error of law;
- (2) The deeming of LHR to be a slip station for regulatory purposes cannot affect the factual position that is relevant for the purposes of the tax analysis. The cabin crew had finished "travelling" in any ordinary sense of the word when they completed the first return flight in the B2B rotation.
- (3) In any event, the regulatory regime does not deem LHR to be a slip station for all purposes. It adopts that terminology simply to define the length of required rest periods which cabin crew must have during a B2B rotation.

90. Mr Peacock KC makes the following submissions.

- (1) The FTT Decision has to be looked at in the round. The FTT does not rely on any deeming in the regulatory regime to reach its conclusion for tax purposes. The regulatory regime simply reflects the fact that the cabin crew are travelling when they stay at LHR accommodation during B2B rotation because the trip as rostered has not been completed. The treatment of LHR as a slip station is an indication of that fact. In that respect, the accommodation at LHR is indistinguishable from the US accommodation at which cabin crew stay at other points during the B2B rotation as the FTT found.
- (2) Furthermore, the important point is that the cabin crew are away from home. The regulatory regime defines "home base"; it does not define "home". There was no finding of fact by the FTT that cabin crew lived near to LHR. In fact, there was evidence before the FTT that some cabin crew whose home base is LHR live outside the UK. The statutory regime regarding travel expenditure in sections 336, 337 and 338 was built on the distinction between travel from home to work and travel at other times in the course of employment: see *Ricketts* and *Nolder v Walters* (1926) 15 TC 380. In the present case, the cabin crew were travelling away from home all the time during a B2B rotation.

Discussion

91. We agree with Mr Vallat KC that the FTT's conclusion is based on the regulatory treatment of LHR as a slip station. It is on that basis that the FTT treats the provision of accommodation at LHR as equivalent to the provision of accommodation at other slip stations and on that basis that the FTT concludes that the cabin crew are "travelling" when they stay at the LHR accommodation during a B2B rotation. Whilst we acknowledge Mr Peacock KC's points that the regulatory treatment reflects the facts on the ground, the FTT's conclusion at FTT [116] relies on the equation of the stay at "home base" during a B2B rotation with accommodation at a slip station.

92. We agree with Mr Vallat KC that the question of whether the cabin crew are travelling for the purposes of section 337 falls to be determined by reference to the underlying facts and not the treatment for regulatory purposes. The FTT's reliance on the regulatory position was an error of law.

93. If we turn to the facts as found by the FTT, we conclude, however, that the cabin crew were travelling for the purposes of section 337 ITEPA when they were staying at the LHR accommodation and that the expenditure on the accommodation was therefore incurred on "travelling" for the purposes of section 337.

94. Our reasons are set out below.

- (1) The cabin crew perform the duties of their employment throughout the B2B rotation.

(2) The duties of employment of the cabin crew whilst rostered on a B2B rotation include travelling as well as staying at the LHR accommodation during B2B rotation (as we have found).

(3) When they are rostered on a B2B rotation, the entire rotation is the job. It is also the journey. The journey does not end because of a stopover in New York or because of a stopover in LHR. The job and the journey do not end until the rotation is completed. It is only when the rotation is completed that the cabin crew are free from all duties of employment and can go home.

(4) Home base is not home. Home base is simply a term that is used for determining the required rest periods for regulatory purposes. The regulatory regime is not relevant to whether the cabin crew are travelling for the purposes of section 337 except to the extent that the classification of LHR as a slip station during a B2B rotation reflects the fact – and reinforces our conclusion – that the journey continues throughout the rotation.

Conclusions

95. For these reasons, we agree with HMRC that the FTT erred in reaching its conclusion that the cabin crew were travelling for the purpose of section 337 ITEPA when they were staying at the LHR accommodation.

96. As we have concluded that the FTT Decision involved an error of law, we may (but need not) set aside the FTT Decision (section 12(1) and (2) Tribunals Courts and Enforcement Act 2007). We will not set aside the FTT Decision on this ground. In our view, the error was not material. We would have reached the same conclusion albeit for different reasons.

Ground 3: necessarily incurred

97. By Ground 3, HMRC say that the FTT erred in concluding that the expense of providing the LHR accommodation was “necessarily incurred” for the purposes of section 337 ITEPA.

The FTT Decision

98. The FTT addresses the question of whether the expenditure on the LHR accommodation was “necessarily incurred” on travelling in the performance of the duties of the employment at FTT [105]-[107].

105. In accordance with the approach required by section 289D the question of necessity arises from the perspective of the employee in the context of their contract of employment. We have to ask: if the employee had incurred the cost was that cost one necessarily incurred by them.

106. On that basis we do not consider the choices available to the Appellant in how they operated their business to be material to the decision we have to reach. We accept they had the choice whether to roster B2Bs. They also had the choice, provided they acted within the regulatory restrictions as to the frequency, as to which crew members flew a B2B rotation. However, we see this as no different to the rostering of any other rotation/itinerary. The Appellant is entitled to operate its business as it chooses within the regulatory environment in which it operates. The duties of employment then flow from and are framed by those decisions.

107. When we ask the correct question: was the expenditure necessarily incurred by the cabin crew the answer is, in our view, yes. They had no option once rostered to fly the rotation. Once they had signed in on Crewlink for the first leg of the western route flight they would necessarily return to LHR; the regulations then required that, in order to be in a position to fly the second trip without the minimum base turnaround rest of two

nights, they were required to rest for 14 hours in suitable accommodation. As their rostering required them to be ready to undertake preflight checks approximately 14 hours after landing the stay in the Accommodation was therefore necessary.

99. The issue only arises in this appeal if, as we have found, HMRC are unsuccessful on Ground 1. The question of whether the expenditure is “necessarily incurred” in the performance of the duties of the employment is asked in this appeal on the assumption that the obligation to stay at the LHR accommodation was a duty of the employment of the cabin crew.

The parties’ submissions in outline

100. Mr Vallat KC submits that the FTT asked itself the wrong question. He says:

(1) The test of whether an expense is necessarily incurred in the performance of the duties of the employment is strictly interpreted (see Lord Templeman in *Fitzpatrick* at p246b-d, and Vaisey J in *Lomax* at p1125). The duties of the employment must prescribe the particular outlay (*Brown* per Donovan LJ at p1102). The preferences of neither the employer nor the employee can render an expense necessary (*Banerjee HCT* per Henderson J at [34]).

(2) The FTT focussed on whether the cabin crew were obliged under their contracts of employment to stay at the LHR accommodation. But, even if the contractual obligation is to stay in the LHR accommodation (as we have found), the expense is still not necessarily incurred because the reason for the expenditure was BA’s own commercial choice to operate the B2B rotation. It was not the duties of the employment.

101. Mr Peacock KC supports the FTT’s analysis. He says:

(1) The duties of the employment define what is “necessarily incurred” for the purpose of this Ground 3.

(2) The fact that the duties of the employment are framed by the commercial choices of BA is not relevant. Once BA made the choice to roster the B2B rotations and provide suitable accommodation, the duties of the employment dictated that the employee incur the expense.

Discussion

102. We agree with Mr Vallat KC that the test has to be strictly interpreted. The duties of the employment must dictate that the expenditure was incurred. For the reasons given by Lord Templeman in *Fitzpatrick*, employers and employees cannot contract into deductibility by the simple expedient of including an obligation within a contract of employment to incur a particular expense.

103. For the reasons that we have given above, it is not the case that every contractual obligation is a duty of the employment. However, once the duties of the employment have been determined, the question is simply whether “the duties impose the expense” (*Brown* per Donovan LJ at p1102). In this case, we have determined that, where the cabin crew have been rostered to fly a B2B rotation, the duties of the employment included the obligation to stay at the LHR accommodation. In those circumstances, the conclusion that the expenditure on the LHR accommodation was necessarily incurred in the performance of those duties must follow for the same reasons that lead to the conclusion that staying in the LHR accommodation was itself a necessary feature of the employment (to adopt the words of Henderson J in *Banerjee HCT* at [35]).

104. As to the argument that it was BA’s commercial choice to implement the B2B rotations, and so the expense could not be “necessarily incurred” in the performance of the duties of the employment,

we reject that submission. The commercial choice of BA to fly the B2B rotations was part of the commercial background that determined the scope of the duties of the employment. The manner in which BA chose to configure its business within the regulatory framework inevitably affected the duties and obligations of its cabin crew and to an extent defined them. For the reasons that we have given, the obligation on cabin crew flying those B2B rotations to stay at the LHR accommodation became a duty of that employment, framed as it was by the commercial choices that BA had made. The question is whether the expense incurred in performing that duty was necessarily incurred. The FTT found that it was. We agree.

Conclusions

105. For the reasons that we have given, we dismiss this ground of appeal

Grounds 4 and 5

106. The effect of our conclusions on Grounds 1 to 3 of this appeal is that the employees were entitled to deduct the cost of the LHR accommodation for income tax and NICs purposes under section 337 ITEPA.

107. We have decided that we should not proceed to determine Ground 4 or Ground 5. Any views that we express on Grounds 4 and 5 would be obiter. In any event, it was common ground between the parties that our conclusions on those grounds would be moot. If HMRC had succeeded on Ground 1 (duties of employment) or on Ground 3 (necessarily incurred), the cabin crew would not have been entitled to a deduction under any of sections 337, 338 or 336. Ground 4 (section 338) could only become relevant if HMRC had succeeded on Ground 2 but not on Ground 1 or Ground 3. But, in that case, HMRC accepted that section 338 would apply because the expense was a “travel expense” and the ordinary commuting exception would not apply.

Disposition

108. We dismiss this appeal.

**MR JUSTICE RAJAH
JUDGE ASHLEY GREENBANK**

RELEASE DATE: 28th September 2026

APPENDIX



Case Number: TC/2022/13427

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2022/13427

NICs – whether costs incurred on accommodation at Heathrow on transatlantic back-to-back rotations represent a benefit in kind – no travel expenses allowable under section 337 Income Tax (Earning and Pensions Act) 2003 – appeal ALLOWED

Heard on: 11 – 13 February 2025

Judgment date: 03 April 2025

Before

**TRIBUNAL JUDGE AMANDA BROWN KC
SONIA GABLE**

Between

BRITISH AIRWAYS PLC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jonathan Peacock KC and Ms Georgia Hicks of Counsel instructed by Deloitte LLP

For the Respondents: Ms Dilpreet Dhanoa of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is the appeal brought by British Airways PLC (**Appellant**) against a decision (**Decision**) of HM Revenue & Customs (**HMRC**) dated 21 February 2022 pursuant to section 8(1)(c) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999. By the Decision HMRC determined that the Appellant was liable to pay National Insurance Contributions (**NICs**) for the period 6 April 2018 to 5 April 2019 (**Sample Period**) in the sum of £555,916.92. HMRC consider the NICs to be due because the cost of hotel accommodation (**Accommodation**) provided at the Appellant's expense to cabin crew between back-to-back (**B2B**) flights represents earnings in respect of which the Appellant, in its capacity as an employer, is liable to pay Class 1A NICs because the expenditure represents a benefit in kind which is not relieved or excluded.

2. The Decision was issued for the Sample Period and in respect of NICs pursuant to a contractual settlement reached between the parties. Pursuant to that agreement, had we determined that the cost of the hotel accommodation was earnings and thereby upheld the Decision, the Appellant would have been liable to NICs for the full period 6 April 2016 to 5 April 2020 (**Relevant Period**). The Appellant had also agreed to pay, on behalf of cabin crew, income tax which would have been assessable on the cabin crew in respect of those earnings for that same extended period. The total income tax and NICs at stake was agreed between the parties to be £5,784,167.

3. We would like to thank all Counsel for their thorough preparation, clear skeleton arguments and notes on evidence and to those instructing them and responsible for easy-to-manage bundles.

4. As communicated at the end of the hearing, and for the reasons set out below, we do not consider the expenditure to represent assessable earnings and we allow the appeal.

BACKGROUND

5. From the 1990s until 2020 the Appellant operated B2B flight arrangements. As an example of such an arrangement cabin crew would be rostered to service a return flight from Heathrow (**LHR**) to New York (**JFK**) and then, the following day, fly a return trip from LHR to Washington DC (**IAD**). Crew would be provided with hotel accommodation between the outbound and return legs of the transatlantic flights in New York/Washington DC and between the trips when at LHR. These arrangements were crewed only by those employed within the Appellant's worldwide fleet.

6. HMRC have consistently accepted that the expenditure incurred on the accommodation provided to cabin crew, by reference to the above example, in New York and Washington DC is not treated as assessable to either NICs or income tax. During the hearing they confirmed that this was on the basis that such expenditure was in respect of "travel expenses [where] the employee is obliged to incur and pay them as holder of the employment, and the expenses are necessarily incurred on travelling in the performance of the duties of the employment" and thereby meeting the requirements of section 337 Income Tax (Earnings and Pension) Act 2003 (**ITEPA**).

7. In the tax year 2009/10 the Appellant agreed that the accommodation provided at LHR was to be reported as a benefit in kind such that the Appellant paid Class 1A NICs and the crew paid income tax on the cost incurred. We were told, and accept, that the Appellant reached this agreement on the basis that there was no requirement on crew to use the LHR accommodation to rest between the B2B trips such that the costs were not therefore necessarily incurred in connection with the employees' employment.

8. However, following the introduction of new European Aviation Safety Agency regulations (see below) the Appellant considered that the provision of accommodation at LHR no longer represented a benefit in kind and was therefore neither assessable to income tax (on the cabin crew) nor to NICs. This was on the stated basis that in accordance with the new regulations, in order to continue to roster crew on B2B trips the Appellant was now obligated to provide accommodation at LHR and to ensure that crew used the accommodation in order to be sufficiently rested to fly the second trip as rostered.

LEGAL CONTEXT

NICs

9. The statutory framework was not disputed between the parties and therefore we only summarise it briefly before setting out the key provisions relevant to this appeal.

10. Section 10 Social Security and Benefits Act 1993 provides that Class 1A NICs are payable by an employer in respect of general earnings received by an employee where those earnings are left out of account in the computation of Class 1 NICs.

11. By virtue of regulation 22 Social Security (Contributions) Regulations 2001 the architecture for determining the amounts assessable to NICs derives from ITEPA:

(1) Section 7 ITEPA gives the meaning of “general earnings” which includes any amount treated as earnings under Chapters 2 to 10 of Part 3 ITEPA (**Benefits Code**). Those chapters bring within the definition certain costs incurred by an employer in providing a benefit to an employee.

(2) Under Chapter 5 of the Benefits Code “living accommodation provided for an employee ... by reason of the employment” represents a taxable benefit of employment unless, inter alia, “it is necessary for the proper performance of the employee’s duties that the employee should reside in it” (sections 97 and 99 ITEPA).

(3) Part 5 of ITEPA also relieves certain identified expenditure from the scope of a charge to tax, in particular, where it is incurred by the employer in circumstances in which it would have been treated as a deductible expense of the recipient had the recipient been self-employed. Such expenditure includes travel expenses incurred in the circumstances prescribed in sections 337 – 339 and more generally expenditure meeting the terms of section 336.

12. The key provisions of ITEPA we are called to consider and apply are:

(1) Section 99:

“(1) In section 102 (benefit of accommodation treated as earnings) ... does not apply to living accommodation provided for an employee if it is necessary for the proper performance of the employee’s duties that the employee should reside in it.”

(2) Section 336 -

“(1) The general rule is that a deduction from earnings is allowed for an amount if-

(a) the employee is obliged to incur and pay it as holder of the employment; and

(b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.”

(3) Section 337 –

“(1) A deduction from earnings is allowed for travel expenses if-

- (a) the employee is obliged to incur and pay them as holder of the employment, and
 - (b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.”
- (4) Section 338 -
- “(1) A deduction from earnings is allowed for travel expenses if-
- (a) the employee is obliged to incur and pay them as holder of the employment; and
 - (b) the expenses are attributable to the employee’s necessary attendance at any place in the performance of the duties of the employment.”

Aviation

13. We derive the following summary of the relevant regulatory legislation from the Agreed Statement of Facts and Issues, however we supplement it where relevant from the materials available to us:

- (1) The relevant regulatory bodies for aviation during the Relevant Period were the EU Aviation Safety Agency (**EASA**) and the UK Civil Aviation Authority (**CAA**). During the Relevant Period, EASA was responsible for developing safety regulations in relation to the aviation industry at a European level. The CAA was responsible for ensuring that UK airlines, such as the Appellant, complied with EASA regulations.
- (2) In 1991, the EU implemented Regulation 3922/91 part of which, known as “Subpart Q”, set out certain flight and duty time limitations and rest requirements, to which the UK was subject via the Air Navigation Order 2000 (**ANO**). Subpart Q includes requirements for minimum rest and the length of required rest periods at home base and away from it. No provision was expressly made for the rest periods required for B2B rotations.
- (3) These provisions required UK based aeroplane operators to agree a flight time limitation scheme (**FTL Scheme**) with the CAA, dealing with the regulation of flight times for crew members. The CAA had the authority to grant reduced rest periods but within the framework then applicable the Appellant had no specific agreement for the management of rest when flying a B2B rotation, however the Appellant was under an obligation to help and support the crew to maximise their rest so as to safely perform their duties.
- (4) An FTL Scheme is a legally binding document, with which flight operators, including the Appellant, are obliged to adhere and the CAA was responsible for its enforcement during the Relevant Period.
- (5) In the period prior to February 2018 the FTL Scheme provided expressly for the provision of accommodation when away from base and noted that accommodation was provided at home base only exceptionally. One such exception in practical terms was between the two trips rostered within a B2B rotation. Such accommodation was provided for the benefit of crew wishing to stay at LHR in the middle of a B2B rotation if they did not want to or could not return home.
- (6) In 2012, the EU implemented Commission Regulation 965/2012 setting down detailed rules for commercial air transport operations.
- (7) In 2014, following a period of consultation with Member States, the EU laid down Commission Regulation 83/2014 which set out specific flight and duty time limitations

and rest requirements, with which the Appellant and its crew members had to comply (**EASA FTL Regulations**). These Regulations became effective from 18 February 2016.

(8) The EASA FTL Regulations are a Subpart of Annex III of Regulation 965/2012. The relevant EASA FTL Regulations, as far as material to the issue we need to determine, are as follows:

(1) ORO.FTL.110 (Operator Responsibilities):

“An operator shall:

- (a) publish duty rosters sufficiently in advance to provide the opportunity for crew members to plan adequate rest;
- (b) ensure that flight duty periods are planned in a way that enables crew members to remain sufficiently free from fatigue so that they can operate to a satisfactory level of safety under all circumstances;
- (c) ...
- (d) take into account the relationship between the frequency and pattern of flight duty periods and rest periods and give consideration to the cumulative effects of undertaking long duty hours combined with minimum rest periods;
- (e) allocate duty patterns which avoid practices that cause a serious disruption of an established sleep/work pattern, such as alternating day/night duties;
- (f) comply with the provisions concerning disruptive schedules in accordance with ARO.OPS.230;
- (g) provide rest periods of sufficient time to enable crew members to overcome the effects of the previous duties and to be rested by the start of the following flight duty period;
- (h) plan recurrent extended recovery rest periods and notify crew members sufficiently in advance;
- (i) plan flight duties in order to be completed within the allowable flight duty period taking into account the time necessary for pre-flight duties, the sector and turnaround times;
- (j) change a schedule and/or crew arrangements if the actual operation exceeds the maximum flight duty period on more than 33 % of the flight duties in that schedule during a scheduled seasonal period.”

(2) ORO.FTL.115 (Crew Member Responsibilities):

“(b) The crew member shall: ...

- (4) comply with all flight and duty time limitations (FTL) and rest requirements applicable to their activities;”

(3) ORO.FTL.125 (Flight time specification schemes)

“(a) Operators shall establish, implement and maintain flight time specification schemes that are appropriate for the type(s) of operation performed and that comply with Regulation (EC) No 216/2008, this Subpart and other applicable legislation, including Directive 2000/79/EC.

(b) Before being implemented, flight time specification schemes, ... shall be approved by the competent authority.

...”.

(4) *ORO.FTL.235 (Rest periods)*

“(a) Minimum rest period at home base.

(1) The minimum rest period provided before undertaking an FDP starting at home base shall be at least as long as the preceding duty period, or 12 hours, whichever is greater.

(2) By way of derogation from point (1), the minimum rest provided under point (b) applies if the operator provides suitable accommodation to the crew member at home base.

(b) Minimum rest period away from home base.

The minimum rest period provided before undertaking an FDP starting away from home base shall be at least as long as the preceding duty period, or 10 hours, whichever is greater. This period shall include an 8-hour sleep opportunity in addition to the time for travelling and physiological needs.

...”

(9) When the EASA FTL Regulations were issued, EASA also published detailed material known as Certification Specifications and Guidance Material, relating to flight time limitation requirements; for example, requirements relating to the effects of time zone differences on flight duties. Flight operators, including the Appellant, had to meet the requirements contained in this additional material in order to comply with the EASA FTL Regulations. These requirements also had to be incorporated within an operator’s FTL Scheme before it could be approved by the CAA.

(10) The EASA Guidance Material GM1 ORO.FTL.235(a) 2 provides:

“MINIMUM REST PERIOD AT HOME BASE IF SUITABLE ACCOMMODATION IS PROVIDED

An operator may apply the minimum rest period away from home base during a rotation which includes a rest period at the crew member’s home base. This applies only if the crew member does not rest at his/her residence, or temporary accommodation, because the operator provides suitable accommodation. This type of roster is known as a back-to-back operation.”

14. As a result of the EASA FTL Regulations, the Appellant agreed a revised FTL Scheme with the CAA, which applied with effect from 1 February 2016 (**Revised FTL Scheme**). The Revised FTL Scheme was legally binding on both the Appellant and its cabin crew members and was also incorporated into the crew members’ terms of employment (the relevant detail of the Revised FTL is set out in paragraph 22(4) below).

15. The Civil Aviation (Working Time) Regulations 2004 (**CAWTR**) apply to the regulation of working time in the industry. The parties accept that “in relation to a B2B rotation, the full period of the B2B trip, from when the crew members first reported for duty prior to the first flight from [LHR], to when they cleared the airport at the end of their last flight back from the US, was treated as working time for the purposes of the [CAWTR]”. As such the B2B period of rest in the Accommodation is treated in the same way as time on standby where the crew is provided with accommodation and rest away from home base. That is to be distinguished from periods where the crew are free from all employment duties (regulation 10(1)). The parties agree that the rights and obligations under these regulations were enforceable by the CAA.

16. In addition to the above accepted position we note the following definitions derived from the EASA FTL Regulations (as amended by the Decision of EASA (2014/002/R):

“accommodation” means, for the purpose of standby and split duty, a quiet and comfortable place not open to the public with the ability to control light and temperature, equipped with adequate furniture that provides a crew member with the possibility to sleep, with enough capacity to accommodate all crew members present at the same time and with access to food and drink;

“suitable accommodation” means, for the purposes of standby, split duty, and rest, a separate room for each crew member located in a quiet environment and equipped with a bed, which is sufficiently ventilated, has a device for regulating temperature and light intensity, and access to food and drink;

“duty” means any task that a crew member performs for the operator, including flight duty, administrative work, giving or receiving training and checking, positioning and some elements of standby;

“duty period” means a period which starts when a crew member is required by an operator to report for or to commence duty and ends when that person is free of all duties, including post-flight duty;

“Flight duty Period (FDP)” means a period that commences when a crew member is required to report for duty, which includes a sector or series of sectors, and finishes when the aircraft finally comes to rest and the engines are shut down, at the end of the last sector in which the crew member acts as an operating crew member;

“Flight time” means for aeroplanes ... the time between an aircraft first moving from its parking place for the purpose of taking off until it comes to rest on the designated parking position and all engines or propellers are shut down;

“home base” means the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned;

“operating crew member” means a crew member carrying out duties in an aircraft during a sector;

“rest period” means a continuous, uninterrupted and defined period of time, following duty or prior to duty, during which a crew member is free of all duties, standby and reserve;

“rotation” is a duty or series of duties, including at least one flight duty, and rest periods out of home base, starting at home base and ending when returning to home base for a rest period where the operator is no longer responsible for the accommodation of the crew member;

“sector” means the segment of an FDP between an aircraft first moving for the purpose of taking off until it comes to rest after landing on the designated parking position;

“standby” means a pre-notified and defined period of time during which a crew member is required by the operator to be available to receive an assignment for a flight, positioning or other duty without an intervening rest period;

“fatigue” means a physiological state of reduced mental or physical performance capability resulting from sleep loss or extended wakefulness, circadian phase or workload (mental and/or physical activity) that can impair a crew member’s alertness and ability to safely operate an aircraft or perform safety related duties ...”

17. Compliance with the Revised FTL Scheme is enforced through the ANO:

(1) Part VI concerns, inter alia, Fatigue of Crew. Article 72(1) requires that an operator of an aircraft shall not cause or permit an aircraft to make flight unless it has established and had approved, a scheme for the regulation of flight times for every person flying in the aircraft as crew which has been incorporated into the operations manual required under Article 31 ANO. The operator must have taken such steps as are reasonably practicable to ensure that the provisions of the scheme will be complied with in relation to every person flying as crew. In addition, under Article 72(2) the operator shall not cause or permit a person to fly as crew if it knows or has reason to believe that the person is suffering from fatigue while they are flying as may endanger the safety of the aircraft or its occupants. The responsibility of the crew in respect of fatigue are provided for in Article 73(1) which provides that a crew member shall not fly if fatigued.

(2) Section 122 and Schedule 12 Part B prescribe that unless due diligence and/or reasonable care is exercised contravention of the provisions of the ANO shall be an offence and in the case of contravention of the liabilities under Articles 72(1), (2) and 73(1), shall on summary conviction lead to a fine not exceeding the statutory maximum and on conviction on indictment to a fine or imprisonment for a term not exceeding two years or both.

ISSUES FOR DETERMINATION

18. The parties agree that the issue we must determine is:

“Whether the provision of Accommodation at LHR during B2B constituted general earnings pursuant to ITEPA such that Class 1A NIC is due under section 10 of the Social Security Contributions and Benefits Act 1992.

That issue encompasses the following sub-issues:

- a. whether a deduction was available under section 336, 337 or 338 ITEPA; and
- b. whether the Accommodation constituted “living accommodation” within section 97 ITEPA, and if so whether, for the purposes of section 99 ITEPA, it was necessary for the proper performance of the employees’ duties that they stay there.”

EVIDENCE

19. We were provided with a bundle of documents comprising 3,037 pages. We also had the benefit of witness testimony from three witnesses on behalf of the Appellant:

- (1) Captain Simon Scholey, Director of Flight Technical;
- (2) Geoffrey Ayres, Employee Relations and Strategy Manager;
- (3) Amy James, Director of Cabin Crew.

20. An ex-tempore judgment was given on the basis of the documents to which we were referred in the hearing, the witness evidence and the comprehensive notes on evidence prepared by the parties. Given the volume of evidence this judgment is, necessarily, only a summary of the evidence considered and relevant to the decision we reach. However, we confirm that in the preparation of this full judgment we reconsidered all of the material to which we were directed.

Documentary evidence

Operations Manual A

21. We were provided with two versions of the Operations Manual A (OMA): the first from November 2015 and the second from January 2016. These documents “define the organisation and procedures specified in the EASA Regulations and form part of the requirements upon which the grant of an Air Operation Certificate is based”. The terms of the OMA are required to be complied with by all relevant personnel including cabin crew. They are highly prescriptive. The 2015 OMA runs to 837 pages and that for 2016 is 802 pages. They cover all areas of operation.

22. We start by setting out the relevant provisions of the 2016 OMA as it is the one which governed operations in the Relevant Period:

(1) Section 1.5.2 Personal Responsibility:

“BA plans Crew Members’ rosters in accordance with its various industrial agreements, although the eventualities of day-to-day operations are such that it may be necessary to ask Crew Members to operate beyond these to ‘Scheme’ Rules, whether from base or downroute, to maintain the operation. It is the responsibility of every individual Crew Member to report for duty fully fit and rested and able to complete all duties and requirements of BA during the subsequent period of duty. OMA 7 Flight Time Limitations details the BA Scheme for Flight and Duty Time Limitations for both flight and cabin crew.”

(2) Section 5, concerning Qualification Requirements, provides at 5.3 the requirements for cabin crew and states that the EASA regulation introduced a requirement for an attestation to be issued to cabin crew. Attestation is stated to be issued following completion of initial training. It has unlimited duration unless suspended or where the holder has not exercised the associated privileges in the preceding 60 months. The attestation is liable to suspension or revocation in the case of non-compliance with EASA regulations including the EASA FTL Regulation.

(3) Section 6, Crew Health Precautions, in particular 6.0, repeats the personal responsibility section and reinforces the EASA FTL Regulation which states that “the crew member shall not perform duties on an aircraft ... if he/she knows or suspects that he/she is suffering from fatigue as referred to in 7F of Annex IV to Regulation (EC) No 216/2008 or feels otherwise unfit to the extent that the flight may be endangered”. It adds: “Note: The FTL Scheme in Section 7 fulfils the requirements of paragraph 7F of Annex IV to Regulation (EC) No 216/2008”.

(4) Section 7 sets out the Flight Time Limitation Scheme. It provides:

“This section contains the approved Scheme for Flight Time Limitations for all British Airways operations. It complies with the requirements of the EASA Implementing Rules for Commercial Air Transport and, within the United Kingdom, the Civil Aviation (Working Time) Regulations 2004, as amended, and the Air Navigation Order. The Scheme establishes the requirements to be met by British Airways and its crew members with regard to flight and duty time limitations and rest.

Compliance with the individual elements of the responsibilities for the management of fatigue is achieved by this Scheme and by other processes (such as scheduling, roster publication, the Management System etc).

...

[definitions as set out in paragraph 16 above]

...

7.3 Crew Member Responsibilities

7.3.1 Every crew member shall (i) comply with all flight and duty time limitations (FTL) and rest requirements applicable to his/her activities ...

7.3.2 A crew member shall not perform duties in an aircraft if he/she knows or suspects that he/she is suffering from fatigue or feels otherwise unfit, to the extent that the flight may be endangered. If a crew member considers himself or herself to be suffering from fatigue, he/she should, in the first instance, report the matter ...

7.4 Operator Responsibilities

British Airways is required to establish, implement and maintain a flight time specification scheme which is appropriate for its operation and which complies with Regulation (EC) No 216/2008, Subpart ORO.FTL and other applicable legislation, including Directive 2000/79/EC. Moreover, British Airways will: ... i. publish duty rosters sufficiently in advance to provide the opportunity for crew members to plan adequate rest; ii. ensure that flight duty periods are planned in a way which enables crew members to remain sufficiently free from fatigue so that they can operate to a satisfactory level of safety under all circumstances; ...

7.4.1 Scheduling

Scheduling has an important impact on a crew member's ability to sleep and to maintain a proper level of alertness. When developing a workable roster, British Airways will endeavour to strike a fair balance between the company's commercial needs and the capacity of individual crew members to work effectively. Rosters will be developed in such a way that they distribute the amount of work evenly among those who are involved.

Schedules will allow for flights to be completed within the maximum permitted flight duty period and flight rosters will take into account the time needed for pre-flight duties, taxiing, the flight and turnaround times.

7.4.2 Roster Publication

The industrially-agreed rostering processes, and roster-publication dates, provide a stable basis by which crew members can manage their duties and rest periods ...

7.5 Home Base

All crew members will be allocated to a Home Base. The Home Base is a single airport location assigned with a high degree of permanence. ...

[Detailed provisions are then provided for maximum flying duty periods. These are specified by reference to whether the crew are acclimatised (essentially where an individual's circadian biological clock is synchronised to the time zone plus or minus 1 hour where the crew member is), the number of sectors flown and the start time of the flying duty period. FDP can be extended in accordance with detailed rules and where in-flight rest is provided but always subject to absolute limits on duty periods and flying hours].

7.16 Rest periods

7.16.1 Minimum Rest Period at Home Base

i The minimum rest period provided before undertaking an FDP starting at Home Base shall be at least as long as the preceding duty period, or 12 hours, whichever is greater.

ii. By way of derogation from point (i), the minimum rest provided under paragraph 7.16.3 below applies if British Airways provides ‘Suitable Accommodation’ to the crew member at Home Base.

...

7.16.3 Minimum Rest Period Away from Home Base

The minimum rest period provided before undertaking an FDP starting away from Home Base shall be at least as long as the preceding duty period, or 10 hours, whichever is greater. This period shall include an 8-hour sleep opportunity in addition to the time for travelling and physiological needs.

The time allowed for physiological needs is 1 hour. Consequently, if the travelling time to the suitable accommodation is more than 30 minutes, British Airways will increase the rest period by twice the amount of difference of travelling time above 30 minutes.

...

7.16.4 Time Zone Differences – (v) Back-to-Back Operation

British Airways may apply the minimum rest period which would normally be required away from Home Base, during a Rotation which includes a Rest Period at a crew member’s Home Base. This provision may only be used once between 2 recurrent extended recovery rest periods (as specified in paragraph 7.16.5 below) and when the crew member concerned does not rest at his/her residence, or temporary accommodation, because British Airways provides suitable accommodation. This type of rostering is known as ‘back-to-back operation’. The minimum rest which must be provided at Home Base during a back-to-back rotation is as follows:

<i>Time difference (hours) between outstation and Home Base, for FDP before back-to-back rest</i>	<i>Minimum required back-to-back rest at Home Base (hours)</i>
<i>0 – 3:59</i>	<i>10 hours or as long as preceding FDP</i>
<i>4 or more</i>	<i>14 hours or as long as preceding FDP</i>

23. The provisions of sections 1.5.2 and 6 of the 2015 OMA are as reflected above in the 2016 OMA. Section 7 differs reflecting the introduction of the EASA FTL Regulation. The 2015 OMA provisions reflected the ANO’s requirement for both the Appellant and individual crew members to ensure that the crew was adequately rested prior to commencing duties. Maximum flight duty period was prescribed and the basis on which it could be extended were set out as in the later OMA but by reference to the EU regulations as they then stood. The scheme provided that crew members be notified in good time of a flying duty period so that sufficient and uninterrupted pre-flight rest could be obtained and provided that when away from base opportunities and facilities for pre-flight rest would be provided by the Company in suitable accommodation. No specific provision was made under the scheme for B2B.

Members Guide and FAQs

24. In February 2016 BA issued guidance to staff to “assist your understanding of your new OMA and how it should be applied”. A thorough explanation of the new rules is provided and demonstrated through tables and examples.

25. The FAQs provide the following overview of the changes introduced in February 2016:

“The scheme is fundamentally different from the one it replaces. It imposes more requirements on operators to implement FTLs as part of the safety management systems, and it contains more explicit requirements for individual crew members to abide by the requirements of the scheme. The overall premise behind the rules is that they will deliver crew acclimatised and rested at report for a duty ...”

26. As regards B2Bs the FAQs state:

“12. Will crew still be able to do back-to-back duties at Home Base?

A. Yes, but the rules now state a back-to-back roster can only be produced if the operator supplies accommodation at Home Base.

13. As a crew member when operating a back-to-back, when I return to home base in order to rest between the two trips can I go home for this rest period?

A. No EASA regulations state that a crewmember must rest in the suitable accommodation supplied by the company.”

Email communications announcing the introduction of the EASA FTL Regulation

27. In an email dated 20 January 2016, which we were told was sent to all cabin crew regarding the introduction of EASA FTL Regulation, crew were told that roster construction had been affected by the regulations and they were informed that they should familiarise themselves with the overview of the changes provided on the intranet and in section 7 OMA. That email was followed up the following day with an email specifically regarding B2B:

“This change will have a significant impact on crew operating a back-to-back.

Currently crew can decide for themselves if they wish to have a hotel room at London for their rest whilst in the middle of their back-to-back.

This will change from 01st February.

From this date ALL crew will be required to stay at the hotel BA have designated for their crew rest whilst in the middle of their back-to-back.

The current back-to-back crew hotel is the Premier Inn who have confirmed with Ian they can accommodate the extra capacity.”

28. We were provided with evidence that the basis of that communication was challenged by cabin crew; in response to the challenge the Appellant confirmed that all crew must stay in the hotel accommodation provided and referenced section 7.16.4 of the OMA.

Contracts of employment

29. We were provided with two contracts of employment for worldwide fleet cabin crew: one dated 13 July 1994 and the second dated 20 November 2003. There were no significant differences between the contracts. The relevant clauses provided:

“Job title and duties

Your job title will be Cabin Crew. Your duties will include all work normally undertaken in that post and such additional duties as the Company may require from time to time.

Location

Your initial location will be London Heathrow ...

Cabin Crew Collective Agreement and Employment Guide

... the Employment Guide contain the terms and conditions of employment as far as they are applicable to you and as amended from time to time. The Collective Agreement and Employment Guide are incorporated, where appropriate, into your contract of employment save as varied by this document.

Training and Development/Qualifications

... You must at all times during the period of employment be eligible to hold all necessary licences, permits and other qualifications ... to enable employment on any type of aircraft operated by the Company ...

Fitness and ability to fly

You must at all times have all appropriate inoculations, vaccinations and medication to enable you to travel abroad as a cabin crew member and it is your responsibility to ensure that all are current. In addition you are required to undergo full medical examinations from time to time as required by the Company in order to verify fitness to fly.”

30. The 2003 employment contract also included a clause concerning the Appellant’s safety policy which imposed a duty on employees to make every reasonable effort to ensure that safe and healthy working conditions were available. We do not consider it material that this clause was absent from the earlier contract because the Worldwide Scheduling Agreement (WSA) (the Collective Agreement referenced) clearly sets out safety and security matters and formed part of the Collective Agreement referred to in the contract.

WSA

31. We were shown two copies of the WSA agreed between the Appellant and the unions as referenced in the contract of employment. The first was dated November 2005 the second was negotiated to reflect the EASA FTL.

32. The relevant provisions of the 2016 Agreement provide:

(1) Introduction to document:

“... The Worldwide Cabin Crew manual contains agreements and information from various sources, including the Employment Guide, CAA documents and NSP agreements. You should note that the manual is a reference to our National Agreements and Company Regulations, which together with your manual are the authoritative sources of information. Agreements, regulations and procedures are regularly amended or modified and you should ensure that you keep your manual up to date including future amendment details as they are published.”

(2) Introduction to section on scheduling:

“Most of this section deals with your industrial agreements which form part of your contract of employment. However, the Air Navigation Order, Part VI, requires that the operator of an aircraft to which the Air Navigation Order applies shall have a scheme for the regulation of flight times of crews. The scheme must be approved by the Civil Aviation Authority (CAA). Hence you will often hear reference to scheme. The BA scheme sets out the legal requirements for all cabin crew employed by British Airways as approved by the CAA. ...”

(3) The definitions section essentially replicates the definitions set out in paragraph 16 above. However, the following additional definitions are relevant:

“1.1.2 BACK-TO-BACK (B2B) This is 2 separate trips involving western routes, linked with a night stop at London to create 1 itinerary.

1.1.14 LOCAL NIGHT REST AWAY FROM BASE OR BETWEEN B2B LINKS AT BASE A rest period when 8 consecutive hours fall between 2200 – 1000hrs (inclusive), local time.

1.1.22 ROSTERED/PLANNED DUTY This is a duty period, or series of duty periods, with designated start and finish times given to you by British Airways in advance.

(4) General planning limits are set out:

“2.1.1 MAXIMUM MONTHLY DUTY HOURS

- In any calendar month 150hrs
- In any 6 calendar months 715hrs...
- Maximum monthly duty hours are based on current Worldwide Scheduling agreements only

2.1.2 MAXIMUM PLANNED TRIP LENGTHS

- B2Bs 10 days
- other trips 21 days

(5) Rosters:

“3.1 ROSTER PUBLICATION

Every effort will be made to publish your roster 28 days in advance.

...

3.4.2 AT OUTSTATIONS AND DURING B2Bs

... Normally during a slip overseas and UK stations, you are not expected to leave the station. However you may leave the slip station provided that:

- You request permission ...
- You ensure you are properly rested and prepared for your next flight ...”

(6) Back to Backs:

“11.1 PLANNING LIMITS

1.1.1 B2B MAXIMUM PLANNED TRIP LENGTH

10 days

...

11.1.3 B2B ITINERARIES

B2B itineraries are made up by linking 2 Western Route trips with a guaranteed local night’s rest at base. Both trips are planned separately withing the rules of the Worldwide Agreement before being linked together. In this instance base is regarded as a slip station.

...

11.1.8 REST AT LONDON

The planned minimum rest for B2B operations at London is 1 Local night taken in appropriate hotel accommodation. In this situation London is deemed to be a slip station (see definition of Local Nights Rest Away from Base)”

(7) 16. Minimum base turnaround (MBTR):

“Your time off at base is generated by the length and/or type of trip. It is known as Minimum Base Turnaround (MBRT) and is given in nights, so one local nights rest (base) represents 1 MBTR. If chocks on time is after 2115 and you are off duty after 2200 this will not count as your first nights MBTR (see definition of Local Nights Rest Base).

33. The WSA in force before the change replicated the information in the later agreement as set out in paragraph 32 above save in the paragraph equivalent to 11.1.8 above the agreement also provided “You may forego the hotel accommodation if you notify British Airways prior to the start of the B2B”. More substantive changes were made to the 2016 agreement in relation to re-routing.

Employment guide

34. The Employment Guide consists of a series of policies.

35. We note that included within the version provided in our bundle was policy EG501: Duty travel and temporary transfer dated May 2021 and therefore outside the Relevant Period. As it post-dates the period in which the Appellant rostered B2Bs it does not reference them.

36. The introduction provides:

“... The Employment Guide provides statements of policy and assistance on employment issues that directly regulate the employment terms and conditions between British Airways and its employees.”

37. Disciplinary procedures are set out in EG901 (the version provided is from December 2022, but the parties agreed that it was representative of the Relevant Period). The policy warns that disciplinary action, including dismissal may be taken for a variety of offences. The disciplinary procedure is set out and provides for a preliminary investigation (paragraph 3.5) the purpose of which is to establish the pertinent facts, circumstances and information relating to the case and present that information to the appropriate line manager who will decide if there is a case to be answered by the employee. Where the line manager considers that there is no case to answer all records are destroyed. Where there is a case to answer, and the employee is a member of the union, the matter is discussed with the union. Disciplinary hearings are held where an investigation so justifies and in order to determine what, if any, disciplinary sanction is appropriate. The policy then provides for appeals.

38. The range of disciplinary action is set out starting with warnings. The policy provides:

“4.1.1 The usual formal warning procedure is that an employee who breaches disciplinary standards will normally receive an oral warning. Thereafter ... repetition of breach will normally result in a first written warning ... Thereafter ... repetition of breach will normally result in a final written warning and subsequent shortcomings will normally result in dismissal.

...

4.1.4 Exceptionally where there is serious misconduct falling short of gross misconduct then British Airways reserves the right to issue a final written warning despite absence of previous warnings.”

39. Clause 4.2 addresses gross misconduct and provides for dismissal without warnings. Gross misconduct is stated to include “conduct prejudicial to safety”.

40. Clause 6 deals with criminal offences and at 6.3 states: “If ... a breach of British Airways Regulations has been committed, the disciplinary procedure will be invoked and may involve dismissal”.

41. Clause 7 concerns safety and provides that disciplinary action in connection with a safety event shall not be started unless a recommendation is made by the Investigation Review Group in accordance with the Safety and Security Management System Manual (we were not provided with a copy of this manual). However, clause 7.2 provides a definition of a safety and security incident as one which endangers or, if not corrected or addressed could endanger an aircraft, its occupants or others. Reference is made to the Appellant's Just Culture (we were not provided with any documents setting out the terms of the Just Culture).

Cabin Crew Job Profile

42. We were provided with two versions of the Cabin Crew Job Profile. Each sets out the accountabilities of the role which, as far as relevant, include ensuring that all operations safety, security and health and safety responsibilities are performed to the highest standards in accordance with Company Operations Manuals thus ensuring compliance with Regulators, British Airways requirements and all other relevant legislation. However, there is no specific reference to taking rest within the accountability of the role.

Training material

43. An excerpt provided of the operations training manual demonstrates at 6.2 that cabin crew are specifically trained at the Learning Academy to provide them with an understanding of aviation regulation covering: awareness of the regulations, continuing competence, and fitness to operate as cabin crew and the importance of performing their duties in accordance with the OMA.

44. Specific training was also provided concerning the EASA FTL Regulations. This training pack consisted of 285 slides. The learning objective was stated to be "To meet the new EASA regulatory requirements" and:

By the end of the course delegates will be able to:

- State the causes, consequences and the countermeasures of fatigue
- Determine a crew members state of acclimatisation
- Calculate a crew members maximum flying duty period
- Complete exercises using the EASA flight time limitation regulations
- Achieve a minimum pass mark of 80% in the validation

45. Detail is provided within the slides addressing all the stated objectives at some considerable length and interspersed with exercises/worksheets to reinforce understanding, in particular regarding calculation of flight duty periods, acclimatisation and required rest periods. Included within the worksheets are examples for B2B rosters. Slide 198 sets out the minimum rest required/permitted under the EASA FTL Regulation where accommodation is provided and can be compared to the minimum period without accommodation. It is plain from these 2 slides that suitable accommodation is to be provided for B2B rotations. Slide 200 provides the Appellant's interpretation of the EASA definition of rotation (see paragraph 16) as "a duty or series of duties, including at least one flight duty starting and ending at home base where British Airways are not responsible for the accommodation of the crew member before the start and after the end of the duty". Slide 202 explicitly provides that a B2B rotation is one that has a rest period at home base where the Appellant provides suitable accommodation and that "Crew member must use the accommodation". Mandatory records of flight time, start, end and duration of each duty period and flight duty period, rest periods, free of duty days, extended duty periods and reduced rest periods must be maintained. The final slide concludes "Who is responsible: You, Me, Crew, Management and British Airways".

Records regarding B2B hotel no shows

46. The Appellant maintained records and monitored the use of the hotel accommodation between the two component trips of a B2B through the communication of no-shows by the hotel. That no shows were followed up was also demonstrated by an example of engagement with someone recorded as a no show. On receipt of a violation report for 11 March 2016 from the hotel, an email was sent from the operations team to what we understand to be the line management of individuals on the violation report. The line management was asked to have a conversation with the individuals, highlight that they were in breach of the EASA regulation and that were there to be a further violation formal action would be likely. It is apparent that the line manager did follow up. The follow-up established that the individuals had in fact stayed in the provided accommodation and the violation report was incorrect.

47. At the end of April 2016 all Worldwide fleet management were sent a reminder to communicate with their teams. It reminded them that failure to comply with the requirement to stay at the provided suitable accommodation could lead to formal disciplinary action.

48. In a second example we were provided with the email dated 16 May 2016 sent to an individual who had violated. It reminds them of their regulatory obligation to stay at the accommodation and that formal action could be taken for violation.

49. By reference to an email exchange later in May 2016 it appears that crew members who violated were informed that they had committed a criminal offence. We were not provided with a copy of the email, but it was apparent that one recipient of such an email challenged this assertion providing an analysis of the terms of the OMA regarding B2Bs. The individual's interpretation was that the Appellant was required to provide suitable accommodation but not that crew were obliged to use it as is the case when outside the UK or "downroute". The individual challenged how the requirements could be more rigorous when at home base particularly as, in their view, they were better rested by sleeping at home than in the suitable accommodation. Over a series of further emails an explanation was provided, and the email chain came to an end. We note that the challenge was not dissimilar to HMRC's reading of the relevant provisions.

50. We were also provided with an employee record which demonstrated that in June 2016 a first violation led to an email reflecting the gentler emails referred to above and indicating that as it was the first occasion it would not be taken any further but that failure to comply with EASA rules could lead to a more formal process.

51. Later in June a communication was sent to all cabin crew members of the Worldwide fleet in June 2016. It stated:

"You'll recall at the beginning of the year you were advised that as of 1 February 2016, BA had to comply with EASA rule changes relating to Flight Time Limitations or FTL as they are more commonly referred.

BA's industrial agreements and frameworks already provided more generous arrangements than the legal limits under FTL.

One area which the rule changes impacted in particular for worldwide cabin crew was the use of hotel accommodation provided by BA for rest at LHR in the middle of back-to-back itineraries.

With the introduction on the rule changes on 1 February it became obligation on crew to use this hotel accommodation provided by the company – the EASA rules no longer allow crew to take rest at home or in an alternative personal choice of hotel For avoidance of doubt, not complying with this constitutes a criminal offence. Our Ops Manual is a fundamental part of our Air Operator Certificate (AOC) and is the legal

basis on which BA is granted the permission to operate – this is in effect a part of UK law and breaking of these rules is punishable by prosecution in the courts. Crew are explicitly directed to comply with the provisions of the Ops Manual in OM A 1.5.1 which requires every crew member to ‘comply with all flight and duty time limitations (FTL) and rest requirements applicable to their activities.’

Whilst the obligation is on the individual to ensure that they comply with this requirement BA has a duty to ensure that crew are adhering to this ruling. Consequently we will be advised of any instances where this rule is violated, and the line manager will follow up where it is identified that a colleague has not used the accommodation provided by BA in the middle of the back-to-back – a record of this follow up will be kept. Should there be any repeat occurrences then the company will deal with this in a more robust manner where disciplinary procedures will be considered.

We sincerely hope that this won’t be necessary and that in the vast majority of cases an initial conversation will be sufficient but felt that it was important to make clear the implications of not meeting your obligations in regards to this change.” (original emphasis)

Other documents

52. We were provided with a screenshot of the Crewlink system to which crew members are required to log in at the start of a period of duty. It demonstrates that the crew member must certify that they have briefed themselves on all current OM notices. The screen provides details of new notices. We were also provided with screenshots which show where historic notices and messages are stored and accessed and that the pre-flight safety checklist requires any new OM notices to be discussed.

Witnesses

53. At this juncture we note that we found the evidence of each of the Appellant’s witnesses to have been clearly and honestly presented and consistent with the documentary evidence. They each answered HMRC’s cross-examination openly. Their evidence was interesting, however we largely consider that determination of the issues before us lies in the proper interpretation of the law (including the relevant provisions of the EASA FTL Regulation, the OMA and ANO) together with the documents. For this reason we deal only relatively lightly with the evidence given by the witnesses.

Simon Scholey

54. Captain Scholey’s witness statement provided us with a helpful roadmap to aviation regulation; however, as he was a witness of fact we have not relied on his evidence as to the proper interpretation and meaning of the relevant statutory and regulatory provisions. On this we have formed our own view (as set out below).

55. In terms of his cross examination, Captain Scholey fairly accepted that rest periods did not form part of a flight duty period or duty period as prescribed under the regulatory regime and therefore were not operational duties. However, he stated that he considered rest periods provided within a rostered itinerary to be included within the work duties of the crew where the rest was in-flight rest (on particularly long flights), rest away from home base and where it was at home base rest in a B2B rotation.

56. He also accepted that sleeping and eating are basic human needs but considered that they both also represented regulatory activities. In his view sleep was an inherent part of a requirement to rest as required in order to avoid fatigue.

57. It was put to him that the Appellant chose to roster B2B rotations and that to fly them was a commercial choice. He did not feel able to comment on the commerciality of the decision to fly B2Bs but accepted that a B2B roster facilitated a quicker turnaround time in London between flights making the arrangement more efficient than operating two separate itineraries from a crew rostering perspective.

Geoffrey Ayres

58. Mr Ayres provided us with an uncontested overview of the Appellant's business and its relationship with employees including cabin crew. His statement appended the contractual materials pursuant to which crew were employed. He also narrated the engagement required with crew upon the introduction and implementation of the EASA FTL Regulation; a process that was not without its challenges as crew had been used to not being required to stay at suitable accommodation at LHR in the middle of a B2B rotation if they did not want to.

59. He provided us with an overview of the monitoring regime introduced to ensure that crew did use the accommodation provided.

60. His evidence, which we derive from his statement and cross examination, represents our only source of information concerning the accommodation provided. It is provided by Premier Inn approximately one mile from Terminal 5 at LHR. On a shared cost basis, Premier Inn adapted the general en-suite hotel accommodation so as to ensure that all rooms in which cabin crew might stay have blackout blinds, air conditioning, a fridge, ironing board and a safe. A lounge was provided with TV, reading material, table, comfortable seating and rudimentary cooking facilities i.e. microwave/toaster enabling the crew to warm up food if they did not wish to avail themselves of restaurant/room service facilities. In addition, a gym was provided for the exclusive use of the Appellant's cabin crew. In addition 24-hour room service was available to BA staff. Premier Inn guaranteed sufficient availability to meet the Appellant's needs but was free to let the bedrooms to any non-crew guests when not in use by the Appellant.

61. When cross-examined, Mr Ayres stated that a requirement that crew members be fit to fly required them to be adequately rested. He accepted that a B2B rostered itinerary was made up of two trips, and, for the purposes of the OMA as he understood it, these two periods of duty were linked by a required period of rest at the LHR accommodation as permitted under EASA regulations. He accepted that the rest period did not itself form part of a regulated period of duty, though it was part of a single itinerary. He considered that there was no clean divide between rest and "actual work". He accepted that the employee was expected to ensure that they were properly rested before undertaking operational duties and rest necessarily required that the crew sleep but as the cabin crew role was a safety critical role a core responsibility of crew was to ensure that they got adequate sleep.

62. Like Captain Scholey, Mr Ayres would not be drawn on the commerciality or otherwise of the Appellant's decision to roster B2Bs but accepted that the Appellant chose to fly B2B rosters.

63. When questioned regarding monitoring and in particular follow-up with staff who had failed to stay at the hotel Mr Ayres indicated that he believed that those who had not stayed were nevertheless likely to have flown the second leg of the B2B but that there would have been a conversation between the crew member and their line manager who would assess whether the crew member was fatigued and unable to fly. He was not aware how many individuals this applied to. He also stated he was unaware of whether anyone had been dismissed or received a final written warning in respect of failing to stay at the Accommodation but he considered that the process of monitoring and follow-up was one acceptable to the CAA who audited compliance with all regulatory obligations as it was consistent with the principles and operation of the disciplinary code.

Amy James

64. Mrs James's statement provided us with an overview of the roles and responsibilities of the Appellant's cabin crew. Her evidence was that the primary responsibilities of cabin crew are safety related of which an integral part is ensuring that they are not fatigued when working. She explained that these requirements were reflected in the OMA and training was provided to ensure crew understood how to comply with the regulatory requirements on them and this was a critical feature for the management of staff and the performance of their duties.

65. We were provided with an overview of the rostering arrangements and confirmation that staff were rostered using an algorithm aimed at ensuring optimum and effective allocation of staff in a way that ensured flight time limits were adhered to. Consistent with the EASA FTL Regulation rosters were issued a minimum of 28 days before they began. They were not subject to change (save for sickness etc) once they had been issued and leave had to be booked in advance of any roster being issued. Crew within the Worldwide fleet would not have a choice as to the routes or itineraries to which they were rostered.

66. Like the other witnesses Mrs James accepted that resting was not an operational duty for cabin crew, but she considered that sleep and rest were intrinsic to those duties. She also confirmed that the crew were considered to be representing the company at all times when in the Accommodation.

67. Her evidence reinforced that given by Mr Ayres concerning the facilities in place to monitor that crew rostered to B2B rotations did stay in the accommodation provided and that violations were followed through.

ANALYSIS OF THE REGULATORY AND CONTRACTUAL PROVISIONS

68. Before we set out our findings of fact, we outline the submissions and our analysis of (1) the EASA FTL Regulation and the duties it imposes on the Appellant and cabin crew and (2) the contractual arrangements between the Appellant and the cabin crew.

Regulatory

69. The Appellant contends that the EASA FTL Regulation, as implemented through the Revised FTL Scheme and enforced through the ANO, requires the Appellant to provide the Accommodation at LHR to all crew rostered to fly B2B rotations and that crew are required to stay in the Accommodation. They contend that criminal sanctions existed for both the Appellant and crew if the Accommodation was not provided and used.

70. HMRC's position is that as there was no regulatory requirement to provide the Accommodation because the Appellant chose to fly B2B rotations rather than had to do so. They accept that only having decided to fly B2Bs did the Appellant have to provide the Accommodation. However, they contend even where there was a requirement to provide the Accommodation there was no requirement that it be used by the crew. This they say was evident by the Appellant's failure to demonstrate that any crew member was precluded from flying in consequence of a failure to stay in the Accommodation. HMRC's position was that all the crew needed to do was ensure that they turned up fit and ready for work and, provided that the crew had signed in thereby confirming they were fit to fly, the Appellant had met its regulatory obligations.

71. We accept that the Appellant was not compelled by the regulatory environment to roster B2B rotations but chose to operate its business in the Relevant Period using B2Bs. However, B2B represented a facility/derogation expressly permitted under the EASA FTL Regulation for the operation of flying duties by an airline operator. In exercise of such permitted derogation the Revised FTL Scheme provided for B2Bs to be rostered as part of normal operations thereby permitting the Appellant to schedule crew with reduced rest periods. The OMA clearly sets out

(at paragraph 7.4.1) that the Appellant's scheduling allowed for flights to be completed within the maximum permitted flight duty period allowed under the EASA FTL Regulation and that the derogation permitted for the reduction of the minimum rest period when flying B2B rotations had been invoked. We see this choice as no different to selecting flying routes. It is a matter of which we are entitled to take judicial knowledge that the Appellant does not fly to every country in the world (and hence the use of code sharing arrangements).

72. In our view, having legitimately exercised a regulatory derogation, the regulatory architecture clearly required the Appellant to provide the Accommodation for use by crew members between the first and second legs of a B2B rotation. ORO.FTL.235 (Rest periods) specifies the minimum rest period which the Appellant must provide. In our view such interpretation of the EASA FTL Regulation is entirely supported by the terms of the guidance in GM1 ORO.FTL.235(a)(2) which provided: the minimum rest period away from home, i.e. slip station rest, applies "only" if the crew members "do not" rest at home "because the operator provides suitable accommodation". These requirements were reflected in the Revised FTL Scheme and OMA.

73. As is apparent from the terms of the OMA a B2B comprises a single rotation i.e. it is a series of duties (2 western trips each comprising 2 flights) starting at home base and ending when returning to home base after the second return trip after which the crew are entitled to minimum turnaround rest and off duty time. The return to LHR between the trips does not bring the rotation to an end because, at that point, the Appellant is responsible for providing the Accommodation. As explained in the WSA the Accommodation is slip station accommodation and not, from a regulatory perspective, treated as provided at home base despite its physical proximity to LHR.

74. As set out above, section 72 ANO requires the Appellant to agree, implement and operate an FTL scheme in accordance with the EASA obligations and take reasonable steps to ensure compliance with its terms. As the OMA invoked the B2B derogation any contravention of the conditions and requirements associated with the derogation would have given rise to a criminal offence as set out in Section 122 and Schedule 12. Accordingly, we consider that the Appellant was under a regulatory obligation to provide the Accommodation as a part of its normal business operations.

75. We also consider that there was a regulatory obligation on the crew members to stay in the Accommodation provided when between trips on a B2B rotation. The regulatory provisions were express in their purpose: the stay in Accommodation was to prevent fatigue and, in our view, a failure to comply was likely to breach the requirements of article 73 ANO as the crew member would be aware that reduced rest after the first trip of a B2B was permitted only where suitable accommodation was utilised in order to prevent fatigue.

Contractual

76. The Appellant contends that the crew members were contractually required to fly B2B rotations when so rostered and pursuant to the regulatory obligations associated with the B2B rotations they were then required to stay in the Accommodation as a matter of contract.

77. HMRC contest that position for essentially the same reasons as they contend there was no regulatory requirement that the crew stay at the Accommodation. Further, it was submitted that as there was no evidence of disciplinary action being taken against any employee it could be inferred there was no contractual requirement to stay in the Accommodation.

78. We agree with the Appellant. The contracts expressly incorporated the terms of the OMA and the WSA. Both documents demonstrate that a B2B rotation is one which requires an overnight stay in the Accommodation as a "slip station". Pre the Revised FTL Scheme the

WSA informed crew that they had a choice whether to stay in the Accommodation. That choice was expressly removed, and its removal was reinforced by communications and training provided at the time.

79. Where the requirement to stay in the Accommodation was not adhered to, we have seen evidence that it was treated as a disciplinary matter. The material provided shows that line managers were informed of reported no shows and these were followed up. We consider that EG901 was followed despite there being no evidence of any final written warnings or more serious disciplinary sanctions being invoked. There is evidence of investigations, and oral and first written warnings. The material provided entirely supports that use of the Accommodation was a contractual requirement.

80. We deal below with the implications of these conclusion in respect of the issues we have to decide.

FINDINGS OF FACT

81. In light of that analysis and from the evidence summarised above we make the following findings of fact:

- (1) B2B rostering was introduced by the Appellant many years prior to 2016. We have no evidence to enable us to determine why it was introduced. The witnesses would not be drawn on the commerciality of the decision to introduce or continue operating B2B rosters and we therefore make no finding on this issue. However, on the basis that the witnesses accepted that B2B rotations provided for a shorter turnaround time for western routes using the same crew, we find that for the period they were operated B2Bs provided the Appellant with an efficient way of managing crew to fly these routes as part of their normal operations.
- (2) As is apparent from the fact that B2B rosters ceased in 2020 the Appellant had a choice whether to roster them.
- (3) Cabin crew are recruited by reference to a job description and pursuant to an employment contract which requires them to ensure that they comply with all regulatory requirements imposed on them in connection with their role by EASA/CAA.
- (4) Their contract provides that they be required to perform “all work normally undertaken in this post and such additional duties as [the Appellant] may require from time to time”.
- (5) Before beginning to fly cabin crew undertake an extensive period of training through which they receive their attestation. In order to maintain their attestation they must comply with EASA/CAA regulations.
- (6) EASA FTL Regulation requires that rosters be issued to crew a minimum of 28 days prior to the start of the roster period, and they are so issued. Crew are allocated itineraries using an algorithm. Once rostered the individual cabin crew member is contractually required to fly the routes so notified.
- (7) Where assigned to fly a B2B the individual crew member will report for duty as required by the itinerary and will sign in using Crewlink. At sign-in they are required to confirm that they are aware of the terms of the OMA including any notices or updates which they are required to read.
- (8) From a regulatory perspective a B2B rotation consists of four periods of duty and four flight duty periods. A duty period is longer than a flight duty period as it includes post flight duties. Both flight duty periods and duty periods exclude rest periods.

(9) The activities performed during a period of duty represent the operational duties of the crew but do not define the limit of the duties of their employment.

(10) In respect of a return itinerary to the east coast of the USA, crew are required to rest at the end of the flight to the US for a minimum period of 14 hours calculated in accordance with the EASA FTL Regulation (having crossed four time zones and by reference to a duty period not exceeding 14 hours). They must be provided with an opportunity to sleep for a period of at least eight hours within the 14 hour regulated rest period.

(11) The Appellant provides this rest facility in hotel accommodation near the US airport. Whilst crew are required to obtain permission to leave a ship station, provided permission is given they are not required to use the accommodation so provided. They must ensure that they are adequately rested and not fatigued but may stay with friends, relatives or in another hotel.

(12) Where not operating B2B arrangements on a return to LHR following a western route, itinerary the EASA FTL Regulation required that cabin crew be provided with a period of two nights minimum base turnaround rest when the crew are free of all work obligations/duties.

(13) However, when a B2B has been rostered, the crew are not entitled to minimum base turnaround rest at the end of the first western route trip but are required to use the facilities at the Premier Inn at T5 for a period of 14 hours (including the opportunity to sleep for eight hours) in order to rest and ensure that they can then compliantly commence their second trip.

(14) When the EASA FTL Regulation was implemented, crew were trained on the changes introduced including testing at the end of the training.

(15) Crew were explicitly made aware of the requirement to stay at the Accommodation.

(16) We were provided with sufficient evidence to be satisfied that the Appellant had put in place an effective means of monitoring compliance of the requirement for crew to stay in the suitable accommodation when in LHR on a B2B rotation. The hotel was required to report no shows, and these were demonstrated to have been followed up.

(17) Consistent with the discipline policy EG901 the Appellant investigated violations of the B2B requirement to stay in the provided suitable accommodation. As use of the suitable accommodation had previously been voluntary the Appellant exercised a degree of management discretion as to how non-compliance was managed in period immediately following the change. However, we see an increasing intolerance to violation over the period from March to June 2016.

(18) We do not consider a line management decision taken to permit a member of crew who had not stayed at the Accommodation to indicate that the requirement was not enforced.

(19) It is reasonable to infer that the monitoring and follow-up of violations of the requirement to stay in the accommodation was a means of managing the Appellant's own liabilities under section 122 ANO providing reasonable care and acting with due diligence.

PARTIES' SUBMISSIONS

82. In this section we summarise the arguments set out by the parties in their comprehensive skeleton arguments as then supported by equally comprehensive notes on evidence (in total 61 pages for the Appellant and 44 for HMRC). Where we have not expressly narrated an

argument, it should not be taken to imply that the skeletons and evidence notes were not considered fully.

83. We start by setting out what we consider to be a broad level of consensus between the parties on the interpretation to be placed on each of the relevant provisions of ITEPA at issue in this appeal:

(1) There is a statutory batting order for consideration of the ITEPA provisions. Section 97/99 should be considered first as they scope the expenditure on the Accommodation in (or out of) the concept of general earnings/benefits in kind. We should then consider whether the expenditure is deductible starting with the more specific provisions of section 337/8. If not so deductible, the more general provision of section 336 should then be considered.

(2) Sections 97, 99 and 102 bring into the scope of general earnings the cost of “living accommodation” provided by an employer unless, pursuant to section 99, the living accommodation in question is provided because it is necessary for the proper performance of the employee’s duties that they reside in it. For these purposes “living accommodation” is not defined.

(3) By virtue of section 289D no liability to income tax (or NICs) arises in connection with the cost of the Accommodation if, had the employee borne the cost themselves, that expense would have been deductible under, relevantly, sections 336 – 8.

(4) Section 336 provides for the deduction of expenditure where the incurring of the cost is an obligation arising from the employment i.e. objectively determined it is expenditure that pertains to and is required by the employment and the duties to be performed rather than expenditure incurred as a matter of personal choice (see *Rickets v Colquhoun* [1926] AC 1 and *Fitzpatrick v ITC and Smith v Abbott* [1994] 1 All ER 673). In addition, in order to be deductible the expenditure must have been incurred wholly, exclusively and necessarily in the performance of the duties of the employment. The wholly/exclusively requirement is stringently applied, so as to exclude deduction of expenditure which has a dual, usually private, purpose (see *Bentleys, Stokes and Lowless v Beeson (Inspector of Taxes)* [1952] 2 All ER 82, CA and *Mallalieu v Drummond* [1982] 2 AC 861). Dual purpose in this context is determined from the perspective of the employee and will not generally include de minimis personal benefit (see summary of cases in this regard provided in *HMRC v Healey* [2013] UKUT 337 (TCC) (**Healey**)). The requirement that the expenses be necessarily incurred in the performance of duties requires a focus on the nature of the duties and the connection between them and the expenditure (again see references in *Healey*). A contractual requirement that the expenses be incurred or a view that the employer thinks the expenditure is beneficial is not enough (*Brown v Bullock* [1961] 1 W.L.R 1095).

(5) Section 337 allows for deduction of travel expenses where they are necessarily incurred by an employee who is travelling in the performance of their duties. There is no dispute that for these purposes generally the cost of hotel accommodation is considered to be expenditure on travelling. We understand this to be because, as confirmed in *Elwood v Utitz* [1966] NI 93 (**Elwood**), accommodation can be an inherent part of travelling. This is the section which HMRC accept forms the basis for deduction of the expenditure incurred on hotel accommodation in the USA when flying a B2B rotation.

(6) Section 338 makes express provision for travel between a temporary workplace from which tasks of a limited duration are performed to a permanent place of work but expressly excludes ordinary commuting.

Appellant's submissions

84. The Appellant invited us to start with section 337 ITEPA. In this regard the Appellant contends that once it is objectively established that the expenditure was incurred qua the employment of the crew member, all that then needs to be determined is whether the duties of the employment, properly identified, necessitated the provision of the Accommodation. What represents the employment duties of the crew is to be determined from the contract between the employee and the employer (see *Banerjee v HMRC* [2009] All ER 930).

85. In this context we are invited to determine that the crew's duties of employment are wider than the concept of "duty", "flight duty period" etc. as defined under the EASA FTL Regulation and Revised FTL Scheme and include periods of rest where rest is taken at a slip station. Thus, on the evidence, the cabin crew's duties of employment when flying a B2B rotation start at the point at which they sign in on Crewlink before the first western route flight and end after post-flight procedures are complete upon their return back to LHR after the second return western route flight. Throughout that period the crew are performing the duties required of them by the Appellant. When they are at LHR/staying in the Accommodation between the two return flights their employment duties continue or at the very least constitute travelling in performance of the ongoing duties of the rotation. They are not free of duties as they are when they start a period of minimum base turnaround rest. They continue to be under the direction and control of the Appellant and must rest in the Accommodation. That conclusion, they say, is entirely consistent with the definition of a B2B rotation and as recognised under the CAWTR and is not affected by the choice exercised by the Appellant to fly B2B rotations.

86. It is the Appellant's case that there is nothing which can relevantly distinguish the stay in the Accommodation from the stay in hotel accommodation in the USA. In accordance with the EASA FTL Regulation, as agreed with the CAA in the Revised FTL Scheme and provided in the WSA, LHR is treated for regulatory purposes as a "slip station" and not home base. The same rest period calculation applies for all slip stations; but when the slip station is physically near LHR the calculation applies only as far as the Accommodation is provided and used. It is submitted that the fact that the crew may live closer to LHR than overnight accommodation at the USA slip stations is an entirely irrelevant consideration.

87. The Appellant also contends that the cost of the Accommodation meets the requirements of section 336. In this regard they rely on *Healey* and the cases referred to by the Upper Tribunal in that case to support a conclusion that despite the provisions of section 337 being the more natural basis for deduction of the costs of hotel accommodation it is plain that the provision of such accommodation may nevertheless also meet the requirements of section 336 because:

"[66] ... (2) expenditure on items that outside a business context simply meet ordinary needs can be regarded as having solely a business purpose such as ... hotel accommodation in the context of business trips or conferences (*Elwood v Utitz*), ...;

(3) consequently, there is a distinction between effects which are aimed at (the purpose of the expenditure) and those which are incidental to that aim; the latter do not necessary colour the former, even if they are inevitable (*Elwood v Utitz* ...);

(4) however, expenditure will not be deductible unless there is a clear connection between the expenditure incurred and the trade or profession in question ... and a distinction must be drawn between living expenses and business expenses ...;

...

(6) in relation to accommodation costs it will often be the case that in the nature of things one of the purposes of the taxpayer in incurring the expenditure will be their ordinary needs for warmth and shelter (*Mason v Tyson, Prior v Saunders*) ...”

88. It is said that whilst resting at the Accommodation the crew are in the middle of an extended shift and their purpose is to comply with the requirements of the duties associated with that shift. They are not preparing themselves to perform their duties. Not only was the stay for the purpose of their employment duties, there was no private purpose for the crew or the Appellant. As evidenced by the exchange referred to in paragraph 49 above, crew may well have preferred to rest at home but could not do so.

89. The Appellant contends that section 338 expressly provides for a deduction of the costs for travel (including hotel accommodation) to and from a place of work provided that it is not ordinary commuting as defined. It submits that where there is a single contract which provides for duties of that employment to be performed in multiple locations travel between those locations will be deductible (in this regard contrast *Ricketts and Owen v Pook* [1970] AC 244). Critical to determining when section 338 applies will be to establish when the contractual duties of employment begin and end. On the basis that the expenses were attributable to the cabin crew’s necessary attendance at LHR in its capacity as a slip station there was no sense in which it could be said that travel to and from LHR and the stay in the Accommodation could be considered as ordinary commuting. The Accommodation meets the definition of temporary workplace for the purposes of section 339(1) as their attendance was necessary for the purposes of taking a reduced rest period in performance of the B2B rotation.

90. The Appellant contends that the Accommodation falls within the scope of section 97 but is excluded from being treated as a benefit in kind because of section 99. In this regard it is contended that as section 97 scopes benefits into the charge to tax it should be broadly construed. By reference to the judgement of the Court of Appeal in *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301 we are invited to conclude that the Accommodation is living accommodation because it provides the crew with all the facilities that they need to live for the short duration of their stay. It is also contended that the requirement to use the Accommodation meets the statutory requirement that the crew reside in it in the performance of their duties.

HMRC’s submissions

91. HMRC contend that the law provides a clear framework which brings the cost of providing hotel accommodation within the charge to income tax and thereby Class 1A NICs:

- (1) The provision of the Accommodation represents a benefit which falls under general earnings by virtue of section 7(1) ITEPA.
- (2) The expenditure is not deductible in the sense provided for under any of sections 336, 337 or 338 because it has not been incurred in connection with the employees’ duties of employment.
- (3) Further, the expenditure is not excluded from being taxable earnings and thereby outside section 7(5) as it was not incurred on living accommodation of the type envisaged in section 99.

92. It was contended that the cost of hotel accommodation generally, and specifically, the Accommodation in this case, could never be deductible under section 336 as accommodation will always meet the personal needs of the employee to sleep and eat and be provided with shelter. HMRC point to the witnesses’ acceptance of a distinction between the operational duties of the crew when preparing for a flight, serving on that flight and post landing and the requirement that they rest.

93. In this context HMRC also emphasise the choice that the Appellant made to roster B2B rotations. They contend that such choice represents a dual purpose of the type which precludes deduction under section 336.

94. In respect of sections 336, 337 and 338 HMRC also contend that the expenditure has not been “necessarily incurred” because the Appellant incurs the cost to lessen the obligatory rest duration between shifts by providing accommodation. The need is that of the Appellant who has chosen to roster B2B rotations and not the cabin crew.

95. HMRC’s particular focus however was on the language of “in the performance of the duties of the employment”. They contend the expenditure must be defrayed in the actual discharge of the crew’s operational duties or, put another way, that the duties require the outlay. It is contended that the cost of the Accommodation is incurred in order to put the crew in a position to perform the second period of duty and not as part of that duty, in essence that crew are required to rest to prevent fatigue before every flight. Where rest is taken at home base as defined in the OMA and Worldwide Scheduling Agreement it was the same as rest taken at home and to be ready to work not as part of working obligations.

96. In similar vein they contend that the expenditure cannot meet the requirements of section 337 because, whilst hotel expenditure might fall within that provision (as distinct from section 336), it is HMRC’s case that the expenditure on the Accommodation is not necessary and the crew, when at home base, are not travelling as part of their duties. This distinguishes the Accommodation from the provision of similar accommodation whilst in the USA. It is said that the ability of crew members to perform their core functions/operational duties is not reliant on the crew members resting in the Accommodation. HMRC repeat their submissions on duties of employment.

97. Regarding section 338, HMRC submit that staying in the Accommodation cannot apply by virtue of the terms of section 338(2) on the basis that the travel to and from the Accommodation is “travel between ... a place that is not a workplace and a permanent workplace” as defined, with the consequence that the stay in the Accommodation is attributable to non-qualifying travel i.e. because the Accommodation is where the crew rest it cannot be a workplace.

98. Finally, HMRC submit that the Accommodation is not living accommodation for the purposes of section 97. They contend that given its ordinary meaning living accommodation requires that the occupant be provided with the necessary facilities to live domestic life independently and with a degree of permanence. In this context they point to the limitations on privacy, and the aspects in which the Accommodation fell short of providing a place for the crew to live. Reliance was also placed on the fact that Premier Inn were free to let the rooms to other travellers when the Accommodation was not required by the Appellant depriving the accommodation of being permanently available to crew.

99. In the alternative, and were we to consider that the Accommodation was living accommodation, applying a similar rationale as underpins their case on section 336-8 the Accommodation is not “necessary for the proper performance of the employee’s duties” thereby precluding the application of section 99. Neither can it be said that it is customary for airlines to provide living accommodation for employees at their home base.

DISCUSSION

100. We set out our analysis following the statutory “batting order” agreed between the parties but before doing so we set out our analysis on “duties of employment” and “necessity” which are common to all of the relevant ITEPA provisions.

Duties of employment

101. HMRC made much of the regulatory definitions of duty to distinguish periods of rest from operational duties. However, we are required to determine whether the period of rest at LHR in a B2B rotation arises in the “performance of their duties of employment” (see 336/7) or “performance of the employee’s duties” (see section 99).

102. The crew were employed under contracts requiring that they perform the duties that the Appellant requires. Further, even within the scope of the regulatory definition “duty” encompasses “any task that a crew member performs for the operator” and more specific definitions are provided for “flight duty period” etc. We have found that rosters are issued by reference to an algorithm which ensures that crew are rostered to fly for the maximum permitted flying time allowing for adequate rest, within the terms of the EASA FTL Regulation, so as to ensure that they do not fly in a fatigued state. Rostering represents the means by which crew are directed by the Appellant to work and the duties/tasks they are required to perform when so working in accordance with their contracts and in the context of the regulatory environment. From the point at which they start a rotation, which may include a single duty or series of duties, the crew are performing their duties of employment until the rotation ends back at home base and they are free from duties (i.e. they start a period of at least minimum turnaround base rest).

103. As such we consider that the crew are performing their contracted duties of employment throughout any period when they are rostered by the Appellant.

104. We see a marked and relevant difference between minimum base turnaround rest and the rest required during a rotation (whether that be in flight, physically away from base, or in the case of B2B the rest in the Accommodation). In the former case the crew are released from all immediate direction of and obligation to the Appellant; all that is required of them is that they ensure that they are fit to perform their duties of employment for their next rostered rotation/itinerary. In the latter case they are still under the Appellant’s control and direction. They are resting at the direction of the Appellant in Accommodation provided by the Appellant and compliance with the direction to do so is monitored.

Necessity

105. In accordance with the approach required by section 289D the question of necessity arises from the perspective of the employee in the context of their contract of employment. We have to ask: if the employee had incurred the cost was that cost one necessarily incurred by them.

106. On that basis we do not consider the choices available to the Appellant in how they operated their business to be material to the decision we have to reach. We accept they had the choice whether to roster B2Bs. They also had the choice, provided they acted within the regulatory restrictions as to the frequency, as to which crew members flew a B2B rotation. However, we see this as no different to the rostering of any other rotation/itinerary. The Appellant is entitled to operate its business as it chooses within the regulatory environment in which it operates. The duties of employment then flow from and are framed by those decisions.

107. When we ask the correct question: was the expenditure necessarily incurred by the cabin crew the answer is, in our view, yes. They had no option once rostered to fly the rotation. Once they had signed in on Crewlink for the first leg of the western route flight they would necessarily return to LHR; the regulations then required that, in order to be in a position to fly the second trip without the minimum base turnaround rest of two nights, they were required to rest for 14 hours in suitable accommodation. As their rostering required them to be ready to undertake preflight checks approximately 14 hours after landing the stay in the Accommodation was therefore necessary.

Section 97/99

108. There is no statutory definition of living accommodation for the purposes of sections 97 and 99 and we agree that it is to be given its ordinary meaning. We were not referred to any case law on the interpretation of living accommodation under ITEPA or similar or equivalent predecessor provisions.

109. Although we were not referred to it, we note that HMRC's guidance (EIM11321) on what constitutes living accommodation for the purposes of section 97/99 requires that the accommodation is something that gives the occupant the necessary facilities to live domestic life independently without reliance on others to supply basic needs. They indicate such accommodation would at least have use of a refrigerator and full cooking facilities even if such facilities are shared. In their view the concept does not cover a hotel room or other forms of board and lodgings.

110. In contrast to that view, and in the context of housing protection legislation, the Court of Appeal in *Uratemp* determined that a long-term resident in a hotel room with no formal cooking facilities but in which the occupant had a kettle and a warming plate enabling them to prepare and heat simple meals was sufficient to represent a dwelling.

111. In this context we consider that the Accommodation did provide the crew with the facilities to live as the evidence we received demonstrated that the crew had a private room, bathroom, fridge, kettle, shared living space and facilities for cooking (i.e. a microwave). We therefore consider that it is living accommodation falling within section 97. We do not consider that the concept of living accommodation as provided for in section 97 per se connotes a concept of permanence and in this respect we agree with the Appellant that it is to be widely construed.

112. However, we do not consider that the Accommodation meets the terms of section 99. That section excludes the provision of living accommodation from being considered to be a benefit and within the concept of general earnings where it is necessary for the proper performance of the employees duties that the employee should reside in it.

113. This imports three additional requirements: the first that of necessity, the second that the necessity arises from the proper performance of the employees duties and thirdly that they reside in it.

114. For the reasons stated above we consider that it is necessary for the performance of the crew's duties that they stay in the Accommodation, but we do not consider that the necessity or the performance of their duties requires that they reside there. Quite plainly and within the ordinary meaning of the word reside (have as one's permanent home in a particular place), crew do not reside in the Accommodation; it is not their permanent home. They temporarily stay there as and when required to do so (and by virtue of the EASA FTL Regulation that is to be no more than once per 28 days amounting to no more than 12 nights in one year). Although not put in this way, we therefore accept that there is a requirement for permanence inherent in a right to deduct although that requirement does not, in our view, come from the meaning of "living accommodation" as HMRC contended.

Section 337

115. This provision applies to permit deduction of expenses the employee is obliged to incur in their capacity as an employee where the expenditure is necessarily incurred on travelling in the performance the duties of employment. For the reasons already stated we consider that the cost of staying at the Accommodation is a cost which the crew are obliged to incur in consequence of having been rostered onto a B2B rotation.

116. Whilst at LHR between the two western route trips the regulations deem the crew to be away from home base/at a slip station. In our view HMRC rightly accept that hotel accommodation provided in the USA is accommodation provided whilst the crew are travelling and deductible under section 337. In our view and in light of the regulatory and contractual requirements, the provision of Accommodation is relevantly indistinguishable from the USA hotel accommodation. In both instances, the crew are either physically or are deemed to be away from home base and thereby considered to be travelling in much the same sense as a commercial traveller. They are away from their usual or permanent workplace in performance of their duties and hence in our view all the time spent when not at or deemed not to be at home base is time spent travelling. Accordingly, and without repeating our view set out above on duties of employment and necessity, we consider that the provisions of section 337 are met.

Section 338

117. Section 338 expands the scope for deduction to expenses attributable to the employee's necessary attendance at any place in the performance of the duties of employment other than ordinary commuting as defined. If we are wrong that the crew members are travelling whilst not physically at or not deemed to be at home based (and hence section 337 does not apply) we consider section 338 applies. If it were, for instance, to be argued that a crew's usual workplace was home base plus any period on an aircraft we would conclude that any time when they are not in a designated area at LHR or on an aircraft they are travelling to, from or working at a temporary workplace. This could include transportation to and from slip station accommodation and stays in that accommodation where they perform the requirement to rest within a rotation. As the Accommodation is slip station accommodation and the crew are deemed not to be at home base we would view the Accommodation as a temporary workplace at which they are required to perform their obligation to take a shortened rest period and the expenses meet the provisions of section 338.

Section 336

118. Section 336 falls to be considered if we are wrong both in connection with section 337 and 338.

119. We accept that there are cases in which the courts have determined that accommodation provided might fall within section 336.

120. *Elwood* concerned a company director who lived in Northern Ireland but whose employment required him to make frequent visits to London where he stayed at a residential club. The Revenue accepted that had Mr Elwood stayed in hotels the expenditure would have been deductible but contested his residential club membership at least to the extent that it exceeded the cost of bed and breakfast. The relevant statutory provision permitting deduction of expenses was paragraph 7 Schedule 9 Income Tax Act 1952 which provided:

“If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment ... or otherwise expend money wholly, exclusively and necessarily in the performance of the said duties there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.”

121. The Special Commissioners had determined that the expenses of club membership were wholly exclusively and necessarily incurred in the performance of the taxpayer's duties. The Court of Appeal affirmed the Special Commissioners' decision. The Court proceeded on the basis that it was accepted that because Mr Elwood was required to travel to London the expenditure was necessarily incurred in the performance of his duties. Whilst it was accepted that by paying the membership fees Mr Elwood became a member of the club, the Court was

satisfied on the Special Commissioners findings of fact that his purpose in becoming a member was to stay in London at more economic rates than paying on a nightly basis at a hotel and that the benefits of membership were purely incidental to that purpose. The Court of Appeal inferred but did not consider that the expenses in question were not travelling expenses.

122. We interpret *Elwood* not as a case concerning the deductibility of hotel accommodation expenses generally as wholly and exclusively expenses of employment as the Revenue had accepted that such costs were deductible under the first part of paragraph 7 Schedule 9 of the 1952 Act (travel expenses). The case concerns membership subscriptions to a club. In our view the costs of membership of a club, even a residential club, is not squarely a cost of travelling despite accommodation being provided. Thus in *Elwood* the only basis for deduction was as a general expense.

123. However, we accept that in *Healey*, the Upper Tribunal considered that three propositions arose from *Elwood*:

- “[42] (1) expenditure on hotels can be ‘wholly and exclusively’ for business purposes;
- (2) there is a distinction between effects which are aimed at (the purpose of the expenditure) and those which are incidental to that aim; and
- (3) expenditure on such hotel accommodation can be exclusively for business purposes, even though it is inevitable that such accommodation will provide warmth and shelter which, say, a park bench will not, warmth and shelter being incidental effects of the expenditure.”

124. In our view the expense of providing the Accommodation is properly to be considered as a necessary expense of travel for the reasons given above. However, in light of the conclusion reached in *Elwood*, and by reference to the propositions drawn from it in *Healey*, we conclude that the Accommodation costs if incurred by the employees (and thereby when incurred by the Appellant) is expenditure incurred wholly (as in the entire amount) and exclusively for the purposes of the employment because of the regulatory and contractual requirement that rest be taken in a suitable accommodation in order that the B2B rotation can be flown in accordance with the applicable regulatory restrictions.

125. We do not consider that the Appellant’s choice to fly B2B rotations is the relevant focus for determining dual purpose of the expenditure as the correct perspective is that of the employee (as previously stated). But, and in any event, even were the Appellant’s purpose relevant we consider that the expenditure was incurred for the business purpose of providing suitable accommodation in which employees could comply with their duty to rest within the B2B rotation and thereby to perform their duties of employment, the decision to fly a B2B being a business decision taken by and open to the Appellant in the same way as any other operational decision which then frames the duties required to be performed by its employees.

DISPOSITION

126. We allow the appeal on the basis that the expenditure is deductible under section 337 and in the alternative under section 338 or 336.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

127. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

Release date: 03 April 2025