Neutral Citation Number: [2017] EWCA Civ 20

Case No: A2/2015/1540

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the High Court, Queen's Bench Division
The Honourable Mr Justice Supperstone

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2017

Before:

LORD JUSTICE McFARLANE
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BRIGGS

- -

Between:

BRITISH AIRLINE PILOTS ASSOCIATION	**Appellant**
- and -	
JET2.COM LIMITED	**Respondent**

- -
- -

Mr Bruce Carr QC and **Mr Stuart Brittenden** (instructed by **Farrer & Co. LLP**) for the **Appellant**
Mr John Bowers QC and **Mr Ben Cooper** (instructed by **Bird & Bird LLP**) for the **Respondent**

Hearing dates: 10th and 11th November 2016

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Approved Judgment

Lord Justice Underhill :

INTRODUCTORY

1. The Respondent to this appeal, Jet2.com Ltd ("Jet2"), is a low-cost passenger airline based in Leeds and serving a number of destinations in the U.K. and elsewhere in Europe. It has been required by the Central Arbitration Committee ("the CAC"), in accordance with the statutory recognition procedures and very much against its will, to recognise the Appellant trade union, the British Airline Pilots Association ("BALPA"), to conduct collective bargaining for the pilots employed by it. The issue in these proceedings is whether, or in any event to what extent, it is obliged as a result of that recognition to negotiate with BALPA about (broadly) the pilots' rostering arrangements. Supperstone J held that it was only obliged to do so in certain limited respects conceded by Jet2. BALPA appeals against that decision.

2. BALPA has been represented before us by Mr Bruce Carr QC, leading Mr Stuart Brittenden. Jet2 has been represented by Mr John Bowers QC, leading Mr Ben Cooper.

THE CORE STATUTORY PROVISIONS

3. The scheme for compulsory recognition is contained in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, which takes effect by section 70A (introduced by the Employment Relations Act 1999 with effect from 6 June 2000). We are only concerned with Part I, which is entitled "Recognition", and within that only with a limited number of provisions.

4. The machinery for recognition is triggered by the union making a formal request to the employer to be recognised "to be entitled to conduct collective bargaining" for a group of workers: see paragraph 1. The collective bargaining in respect of which a request for recognition may be made is defined in paragraph 3. This reads (so far as material):

> "(1) This paragraph applies for the purposes of this Part of this Schedule.
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> (2) The meaning of collective bargaining given by section 178 (1) shall not apply.
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> (3) References to collective bargaining are to negotiations relating to pay, hours and holidays; but this has effect subject to sub-paragraph (4).
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> (4) If the parties agree matters as the subject of collective bargaining, references to collective bargaining are to negotiations relating to the agreed matters; and this is the case whether the agreement is made before or after the time when the CAC issues a declaration, or the parties agree, that the union is (or unions are) entitled to conduct collective bargaining on behalf of a bargaining unit.
>
> (5)-(6) ...".

The key provision for our purposes is sub-paragraph (3), the effect of which is that the default position is that in a case of compulsory recognition collective bargaining will be about "pay, hours and holidays".

5. As will have been noted, sub-paragraph (2) of paragraph 3 makes it clear that the definition in sub-paragraph (3) applies to the exclusion of the definition of "collective bargaining" applicable elsewhere in the Act, which appears in section 178 (1). Because of one of the submissions which I shall have to consider below I should set that definition out. "Collective bargaining" is there defined as "negotiations relating to or connected with one or more of the matters referred to in sub-section (2)". The matters referred to in sub-section (2) are:

> "(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
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> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
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> (c) allocation of work or the duties of employment between workers or groups of workers;
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> (d) matters of discipline;
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> (e) a worker's membership or non-membership of a trade union;
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> (f) facilities for officials of trade unions; and
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> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."

6. It is unnecessary to set out the details of the process which follows a request for recognition. In short, if various steps are gone through and conditions satisfied the CAC may, notwithstanding the opposition of the employer, make a declaration that the requesting union is recognised. Paragraphs 30-31 provide for how, following such a declaration, the method for conducting collective bargaining should be arrived at. The primary object is that the parties themselves should agree a method; but paragraph 31 (3) provides that if this does not prove possible "the CAC must specify to the parties the method by which they are to conduct collective bargaining". By sub-paragraphs (4)-(6) the method so specified will have contractual effect, though the only remedy for its breach is specific performance.

7. Section 168 (1) of the 1992 Act gives the Secretary of State power by order to specify for the purpose of paragraph 31 (3) "a method by which collective bargaining might be conducted" – in effect a kind of model method – though sub-section (2) provides that, while the CAC must take any such model into account in specifying a method for

the parties, it may depart from it to such extent as it thinks appropriate. Under that power the Secretary of State has made the Trade Union Recognition (Method of Collective Bargaining) Order 2000 ("the 2000 Order"). The method appears in the Schedule to the Order. Paragraphs 2 and 3 of the specified method are introductory and read as follows:

> "2. The purpose is to specify a method by which the employer and the union conduct collective bargaining concerning the pay, hours and holidays of the workers comprising the bargaining unit.
>
> 3. The employer shall not grant the right to negotiate pay, hours and holidays to any other union in respect of the workers covered by this method."

Paragraph 4 of the method provides for the establishment of a joint negotiating body "to discuss and negotiate the pay, hours and holidays of the workers comprising the bargaining unit". I will refer later to certain other particular provisions that are relevant to the issues before us.

THE RECOGNITION OF BALPA

8. After failing to achieve recognition from Jet2 on a voluntary basis, BALPA made a formal request under Schedule A1. On 18 November 2010, after a prolonged process, the CAC declared, in accordance with paragraph 30, that BALPA was recognised as entitled to conduct collective bargaining for the flight deck crew employed by Jet2. By virtue of paragraph 3 (3), since the parties did not reach any different agreement the collective bargaining covered by the recognition decision related to "pay, hours and holidays".

9. Accordingly the next step was for the parties to seek to agree a method for conducting collective bargaining about pay, hours and holidays. That did not prove possible, and by a further decision dated 19 May 2011 the CAC, in accordance with paragraph 31 (3) of Schedule A1, specified the method which the parties were to follow. The method so specified in all material respects followed the model set out in the 2000 Order.

THE DISPUTE ABOUT ROSTERING ARRANGEMENTS

10. As already noted, the issue in the present appeal concerns the extent to which Jet2 is required, as a result of its compelled recognition of BALPA, to negotiate with it about the arrangements under which pilots are rostered for work. Unsurprisingly, given the requirements of operating an international airline, the rostering arrangements are complex. In October 2010, i.e. shortly before the CAC's decision on recognition, Jet2 promulgated a document called the "Rostering & Crewing Policy" ("the RCP") which was produced following consultation with a body intended to represent the interests of pilots called the Jet2.com Flight Deck Crew Council. Its declared purpose is to document what are "the basis and terms of the operation and management of the rostering and crewing of Flight Deck Crew Workers that have been in operation for many years, together with the improvements that have recently been put in place".

11. As part of its written "Pay Claim" in the 2014/2015 round BALPA submitted, under the heading "Hours and Holiday", a proposal for a replacement to the RCP by way of what was described as a "Scheduling Framework for a mutually agreed Scheduling Agreement": I will refer to this as "the Framework". The evidence of BALPA's principal witness, Mr White, was that it was based closely on similar scheduling agreements which he had negotiated with other airlines and represented the union's view of the industry standard for such agreements.

12. The full text of the Framework is appended to this judgment. I shall have to consider aspects of it fairly fully in due course. All that it is necessary to say at this stage is that it sets out in considerable detail[1] a complete system of rostering arrangements which both defines specific rights and obligations as to when pilots may be required to fly, or undertake other duties, and establishes principles and procedures for drawing up the fortnightly rosters and for dealing with the various issues that may arise in connection with their implementation. Importantly, these procedures include the establishment of a Joint Monitoring Committee, comprising both management and union representatives, which will be responsible for the "management and monitoring" of the Scheduling Agreement. The matters covered by the Framework are mostly also covered by the RCP, but its provisions are in various respects more favourable to pilots than those of the RCP, and it is generally more prescriptive and allows less scope for management discretion: an important difference is that the RCP has no equivalent to the Joint Monitoring Committee.[2]

13. Jet2 took the position that it was not required to negotiate with BALPA about most of the matters contained in the Framework because they do not "[relate] to pay, hours and holidays" within the meaning of paragraph 3 (3): I explain its reasoning below. Accordingly it declined to do so.

THE PROCEEDINGS

14. BALPA commenced the present proceedings in the High Court in August 2014 seeking a declaration "on the proper construction and scope of the term 'pay, hours and holidays' to assist the parties in future collective bargaining exercises". In practice, the aim was to obtain a decision that Jet2 was obliged to negotiate about the proposed Framework. There was also a separate claim that Jet2 had in previous years in effect circumvented the Specified Method when making annual pay rises.

15. The claims were tried before Supperstone J over five days in March 2015. The parties produced for the purpose of the trial a schedule identifying the various proposals contained in the Framework and summarising their respective positions on the negotiability of each. There were some specific elements which Jet2 accepted were

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1 Indeed the level of detail is such that it is not very easy to envisage what more could appear in the full Scheduling Agreement for which it is supposed to be the "Framework". It may be that the latter term is inapt. But nothing turns on this for our purposes.

2 There seems to have been a good deal of evidence before the Judge about the RCP, and analysis of its terms. But counsel acknowledged before us that it was of limited relevance, save possibly as background, since the only issue is the negotiability of the provisions of the Framework Agreement.

negotiable, but with regard to most of the Framework it maintained its position that it fell outside the scope of paragraph 3 (3).

16. By a judgment handed down on 23 April 2015 Supperstone J dismissed BALPA's claim in relation to those items in the Framework that remained in dispute. He also dismissed the claim in relation to Jet2's approach to annual pay increases. In the interests of economy, and without any disrespect to him, I will not set out an analysis of his judgment at this stage. I will refer to the essential parts in the course of my discussion below.

17. BALPA appeals, with the leave of Dame Janet Smith, only as regards the dismissal of the claim about rostering arrangements.

THE ISSUES

18. The ultimate task for us is to determine which if any of the proposals[3] in the Framework, beyond those conceded by Jet2 before Supperstone J, "[relate] to pay, hours and holidays" within the meaning of paragraph 3 (3); and that will in due course require a section-by-section analysis. But it is both parties' case that the outcome of that analysis will be largely determined by our conclusion on certain disputed general points about the construction of that phrase. Their positions can be summarised as follows.

19. It is convenient to take Jet2's case first. In his oral submissions Mr Bowers advanced three general propositions about the correct approach to paragraph 3 (3).

20. First, he submitted that on its true construction the phrase "negotiations relating to pay, hours and holidays" covers only negotiations about proposals which if accepted would constitute specific contractual rights enjoyed by individual workers. It is more convenient to set out his specific arguments in support of this proposition when I come to consider whether I accept it.

21. Secondly, and following on from the first proposition, he submitted that most of the proposals in the Framework would not, if accepted, give rise to such rights because they would not, in the well-worn phrase, be "apt for incorporation" in the contracts of employment of individual pilots. His essential point was that the exigencies of operating an airline, and the paramount importance of operational flexibility, mean that rostering arrangements can never be set in stone; and thus that even if the proposals in the Framework, which he described as "suffused with the language of aspiration", were agreed they could not be regarded as conferring contractual rights on individual employees. He relied on what he said were concessions made by Mr White in the course of cross-examination to the effect that if some of the proposals in the Framework were accepted as giving rise to obligations enforceable by individual pilots there might be "catastrophic consequences" for Jet2.

22. In connection with his second proposition Mr Bowers referred us to a number of decisions in "aptness for incorporation" cases. There are different strands in those

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[3] The word "proposal" does not appear in paragraph 3 (3), but I use it to connote the subject-matter of the negotiations which BALPA wishes to engage in.

authorities. Some, for example, are concerned with provisions that are arguably inapt for incorporation into individual contracts of employment because they deal with matters of negotiating machinery or procedures that of their nature confer rights (if at all) only at the collective level: the start of this line of cases (which is the source also of the phrase "apt for incorporation") is the decision of Scott J in *National Coal Board v National Union of Mineworkers* [1986] Ch 736. But Mr Bowers relied in particular on the decision of this Court in *Malone v British Airways plc* [2010] EWCA Civ 1225, [2011] ICR 125, in which the basis of the alleged inaptness was rather different. The issue was whether a provision in a collective agreement setting minimum numbers of cabin crew was enforceable by individual crew members. Smith LJ, with whom the other members of the Court agreed, identified various factors which pointed towards enforceability, including (at para. 61 (p. 141 A-B)) the fact that "crew complements do impact to some extent upon the working conditions of individual employees". But she continued, at para. 62 (p. 141 C-E):

> "Set against that are the disastrous consequences for BA which could ensue if this term were to be individually enforceable. It seems to me that they are so serious as to be unthinkable. By that I mean that if the parties had thought about the issue at the time of negotiation, they would have immediately have said it was not intended that [the provision in issue] could have the effect of enabling an individual or a small group of cabin crew members to bring a flight to a halt by refusing to work under complement. So, if I apply the rule by which a term of uncertain meaning is to be construed, that of asking what, objectively considered in the light of the factual matrix against which the agreement was made, the parties must be taken to have intended the provision to mean, I am driven to the conclusion that they did not mean this term to be individually enforceable. I accept that there are pointers towards individual enforceability but these are not conclusive. In the end, I think that the true construction of this term is that it was intended as an undertaking by the employer towards its cabin crew employees collectively and was intended partly to protect jobs and partly to protect the crews, collectively, against excessive demands in terms of work and effort. I think that it was intended to be binding only in honour, although it created a danger that, if breached, industrial action would follow."

Mr Bowers submitted that that reasoning showed that the Court would be very slow to find that provisions in a collective agreement were intended to be enforceable by individual employees, and thus to be incorporated in their contracts of employment, if that produced the risk of disastrous consequences for the business; and that the present case was similar in so far as BALPA's proposals would deprive Jet2 of the essential flexibility about when pilots could be required to undertake their duties.

23. Mr Bowers' third proposition was by way of alternative to his first two, though there is in fact considerable overlap between them. He submitted that if, contrary to his primary case, paragraph 3 (3) could in principle cover matters going beyond individual contractual entitlements, it was nevertheless confined to what he called "core issues of pay, hours and holidays" and did not encompass "adjectival or ancillary matters", into which category he submitted that most of the elements of the

Framework fell. That distinction is similar to the distinction underlying the cases, such as *National Coal Board v National Union of Mineworkers*, where it has been held that provisions in a collective agreement addressing matters of machinery are not apt for incorporation in the contracts of individual workers.

24. Supperstone J accepted each of Mr Bowers' three propositions[4]: see in particular paras. 33, 43-44 and 47 of his judgment. It is not necessary that I set out the relevant passages.

25. Mr Carr did not accept any of those propositions, which he submitted constituted unjustified restrictions on the statutory language. He contended that it was irrelevant whether the matters on which BALPA wished to negotiate would, if accepted, be apt for incorporation in the contracts of employment of individual pilots[5]; and that the distinction between "core" and "ancillary/adjectival" matters was equally immaterial. The only question was whether, on an ordinary use of language, BALPA's proposals "[related] to pay, hours and holidays". As to that, he submitted that they plainly did (subject to some possible exceptions at the margin). Specifically:

    (1) As regards "hours", the proposed Framework in part specified particular obligations as to the number of hours that pilots were required to work (together with associated matters such as rest breaks) and in part established the arrangements under which the time at which they had to work those hours would be prescribed. In both respects it "related to" the pilots' hours within the meaning of paragraph 3 (3).

    (2) As regards "holidays", the proposed Framework likewise both specified some specific entitlements and established arrangements whereby other aspects of the holiday entitlement (such as the particular times at which holiday can be taken) could be defined; and in both respects it related to holidays within the meaning of paragraph 3 (3).

    Mr Carr did acknowledge that there were a few particular matters covered by the Framework where the relationship with hours or holidays was debatable. As appears below, he made one specific concession, and there were some other particular points on which he did not seek to rebut Jet2's case.

26. I will consider those basic differences of approach between Mr Bowers and Mr Carr before proceeding to an analysis of the various particular elements in the Framework.

27. I should at this point mention for completeness one matter which was briefly canvassed by Mr Bowers at the end of his oral submissions but which does not seem

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4 In fact, as I read it, Mr Bowers' points were slightly differently structured in his submissions to the Judge (and indeed in his skeleton argument) than in his submissions before us; but the essential elements are the same.

5 I should make clear that BALPA's position in the 2014/15 claim was that the provisions of the Framework should be incorporated in the contracts of individual pilots; and it was Mr Carr's position before the Judge and, by way of alternative, before us that they were capable of such incorporation. But his primary submission was that from the point of view of whether they fell within the scope of paragraph 3 (3) it did not matter whether they were or not.

to me to fall for resolution in this appeal. He referred to three items in BALPA's 2014/15 claim which did not fall under the "Hours and Holiday" heading under which the proposed Framework appears. These were claims for Private Health Insurance, for the introduction of a Share Incentive Scheme for pilots and for a revision to the Staff Travel Scheme. He submitted that none of these claims were negotiable under paragraph 3 (3). They plainly do not relate to hours or holiday, and he submitted that they did not fall under the heading of "pay" either. A claim in relation to these items does appear to have been formally before the Judge. They were included in a list of items pleaded at para. 21 of the Particulars of Claim in respect of which BALPA sought a declaration that collective bargaining was required. This was unsatisfactory since the only pleaded basis for the declaration concerned "rostering arrangements" (see paras. 19 and 20) and these three items have nothing to do with rostering. Nevertheless they were pleaded to by Jet2 and addressed in the schedule of disputed items that was before the Judge. However, there is nothing whatever about them in his judgment, where both the factual findings and the reasoning are concerned entirely with the rostering arrangements proposed by BALPA in the Framework. Nor is anything said about them in the Appellant's Notice, and Mr Carr advanced no submissions about them either in his skeleton argument or orally. There is no Respondent's Notice. It may be a nice point whether the Judge is to be treated as having dismissed the claim in relation to these items *sub silentio*; but all that matters for our purposes is that they are not in issue on the appeal.

THE CORRECT APPROACH TO PARAGRAPH 3 (3)

28. I begin by considering Mr Bowers' first proposition. The starting-point must be the language of paragraph 3 (3) itself. As to that, I can see nothing in the phrase "negotiations relating to pay, hours and holidays" to suggest that it covers only proposals which if agreed would give rise to individual contractual rights. No doubt the paradigm of a proposal relating to pay, hours and holidays is one which involves an enhancement of the contractual rights of workers, but that is not axiomatically the case. There is no reason why a trade union might not want to obtain agreement from an employer about aspects of pay, hours and holidays which would not give rise to individual contractual rights: matters of procedure of the kind discussed in such cases as *National Union of Mineworkers v National Coal Board* are the obvious example.

29. Mr Bowers, however, submitted that it was necessary to look at the other provisions in the legislative scheme, which comprises not only Schedule A1 but the 2000 Order. He referred us in particular to paragraph 17 of the Specified Method as set out in the Order. This forms part of a group of paragraphs headed "Bargaining Procedure". They can be sufficiently summarised for present purposes as follows:

(1) Paragraph 14 reads:

> "The union's proposals for adjustments to pay, hours and holidays shall be dealt with on an annual basis, unless the two Sides agree a different bargaining period."

(2) Paragraphs 15-16 provides for the bargaining round (i.e., typically, the annual bargaining round provided for by paragraph 14) to follow a multi-stage procedure of which I need not set out the details.

(3) Paragraph 17 begins:

> "The employer shall not vary the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit, unless he has first discussed his proposals with the union."

The rest of the paragraph goes on to say that such proposals by the employer should usually be made as part of the annual bargaining round but it provides for a process to be followed if he wishes to make changes between rounds.

(4) Paragraph 18 contains an exception to paragraph 17 which is immaterial for our purposes.

30. Mr Bowers submitted that the reference in paragraph 17 to the employer varying "*the contractual terms* affecting the pay, hours or holidays of workers" showed that the draftsman of the Order understood that it was only the terms of individual workers' contracts which were the subject of collective bargaining under the Schedule. It seems to have been this point which the Supperstone J regarded as particularly persuasive: see paragraphs 28 and 39 of his judgment.

31. I do not believe that the language of paragraph 17 of the Specified Method bears the weight that Mr Bowers seeks to put on it. Paragraphs 14-18 fall into two parts. The first part, consisting of paragraphs 14-16, deals with proposals for change made by the union. In this context the draftsman makes no reference to contractual terms: paragraph 14 refers simply to "proposals for adjustments to pay, hours and holidays". Paragraph 17 is about something different, namely proposals for change made by the employer. Its language cannot be read back so as to govern proposals made by the union: indeed if anything the difference in the language used might be thought to indicate that a different meaning is intended. There is nothing anomalous in the draftsman limiting the restrictions on the employer's freedom of action to changes in contractual terms, leaving him free to make changes which did not affect contractual terms.

32. If the legislative provisions themselves do not suggest the restrictive construction argued for by Mr Bowers it could only be justified, if at all, on the basis that it was necessarily implicit. I do not believe that to be the case. On the contrary, I find it entirely unsurprising that the draftsman has not chosen to make contractual effect the touchstone of whether a proposal falls within the scope of the Schedule but to define the scope of collective bargaining simply by reference to its subject-matter – that is, whether it "relates to" pay, hours or holidays. Trade union representatives and managers are not lawyers. It should not normally be difficult for them to identify whether a proposal relates to the specified matters. But the question whether it would if granted give rise to a contractual right enforceable by an individual worker – and, more particularly, whether the right demanded would be "apt for incorporation" – will in many cases be a good deal less straightforward. That is indeed well illustrated by the circumstances of the present case. Rostering arrangements such as those contained in the RCP or in the Framework with which BALPA seeks to replace it are necessarily complex. They will contain elements which plainly confer or impose enforceable contractual rights and obligations on pilots, but they will also contain elements which, precisely for the reasons advanced by Jet2, do not. Exactly where boundary lies between the two will not always be easy to define, even by lawyers and

still less by managers and union officials whose concern is with practical workability and not the niceties of legal enforceability. It would be unsatisfactory if the borderline between negotiability and non-negotiability depended on so uncertain a distinction.

33. If Mr Bowers' first proposition is ill-founded, as I would therefore hold, we need not be concerned with his second proposition. It does not matter whether the proposals in the Framework would, if accepted, give rise to contractual rights enjoyed by individual pilots, since Jet2 is obliged to negotiate about them whether they would do so or not – so long as they relate to pay, hours or holidays.

34. I should nevertheless address Jet2's professed concern about the threat to operational flexibility, because this is a *leitmotiv* of its case throughout and was also a point which evidently weighed with Supperstone J. As Mr Carr pointed out, Mr Bowers' submissions on this aspect confused the subject-matter of negotiations with their outcome. To say that Jet2 is obliged to negotiate with BALPA about rostering arrangements is not to say that it is obliged to agree any such arrangements if it regards them as damaging to its business. It is open to it to decline to agree to any elements in the Framework which it regards as objectionable. More specifically, it is open to it, to the extent that it chooses to agree to the rostering arrangements proposed, to do so on the express basis that they give rise to no rights enforceable by individual pilots (or indeed by BALPA), in which case arguments about aptness for incorporation will not even arise.

35. I should also point out that for the same reason the issue in *Malone* was wholly different from that in the present case. The question for us is whether Jet2 is obliged to negotiate about particular terms which it is said might, if it were agreed, have disastrous consequences. The problem in *Malone* was that BA had not only agreed such a term but had included it in a collective agreement without any clear indication of whether it was intended to give rise to rights enforceable by individual pilots.[6]

36. I turn therefore to Mr Bowers' third proposition – that is, that paragraph 3 (3) is concerned only with "core" issues of pay, hours and holidays and not with issues whose relationship to those subjects is only "adjectival and ancillary". His case on this as developed below is helpfully summarised at para. 29 of Supperstone J's judgment as follows:

> "… Mr Bowers submits that the phrase 'negotiations relating to pay, hours and holidays' in paragraph 3 (3) of the Schedule is ambiguous. It is, he suggests, capable of a range of meanings, from a wide interpretation encompassing anything in a broad sense 'related' to those topics, including decisions about the allocation of hours of work during the day and decisions about consenting to holidays being taken at particular times, through to a narrow construction limited to contractual basic pay, basic hours and amounts of annual leave. That being so reference can, he submits, be made to ministerial statements made during the Committee stage of the 1999 Act which bear directly

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6 I note that Dame Janet Smith, who delivered the leading judgment in *Malone*, observed when giving permission to appeal in this case that "there is force in the argument that the judge applied the reasoning in *Malone* to a set of completely different circumstances".

> upon this ambiguity and satisfy the criteria laid down in *Pepper v Hart* [1993] AC 593. Mr Bowers relies in particular on the Minister's reference to the procedure being limited to pay, hours and holidays ('the core terms of employment'), which the Minister described as 'a minimalist selection, which both employer and union are likely to find restrictive'… ."

The Ministerial statement there referred to is set out in full at para. 10 of the judgment. As Supperstone J explains, the Bill in its original form did not disapply the definition of "collective bargaining" in section 178 of the Act, which I have set out at para. 5 above. The present version of paragraph 3, substituting a more restrictive definition, was introduced by a Government amendment at the committee stage. Introducing the amendment, Mr Michael Wills, the Minister for Small Firms, Trade and Industry, said:

> "[They] are designed to ensure that, as a minimum, collective bargaining covers negotiations about pay, hours and holiday. The union and employer can agree that other matters be included, but if they cannot agree, and the CAC imposes a bargaining method, it will apply only to pay, hours and holiday. The amendments ensure that the Bill achieves the policy set out in the White Paper. We tabled them because we realised that the original wording went wider than originally intended. The union and the employer are free to include other matters in the collective bargaining agreement – that is a deliberate feature of the legislation, to encourage voluntary agreements by giving the parties room for manoeuvre. A union may wish to bargain about occupational pensions, for example. The employer may be prepared to agree to that, provided that the union accepts the employer's proposal on, say, time off for trade union duties.
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> …
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> We are inclined to give the parties the maximum room to find compromises on their own. However, if they are unable to agree and the CAC has to impose a procedure, that procedure will be limited to pay, hours and holidays – the core terms of employment. That is a minimalist selection, which both employer and union are likely to find restrictive. They will both therefore have an incentive to agree a different arrangement that suits them better. At every stage, the procedure encourages voluntary settlements …"

37. Supperstone J accepted Mr Bowers' submission. At para. 40 of his judgment he said:

> "I agree with Mr Bowers that whilst s.178 of the 1992 Act and paragraph 3(3) of Schedule A1 are not mutually exclusive, matters which are not core terms of employment relating to pay, hours and holidays, but which fall within one of the other topics in s.178 that Parliament has excluded from paragraph 3 of Schedule A1 are outside the scope of statutory collective bargaining pursuant to the Schedule."

38. I do not regard the passage relied on from the Minister's speech as supporting Mr Bowers' proposition or the Judge's conclusion. What the Minister said was that "pay,

hours and holidays" were the core terms of employment – distinguishing them from such matters as time off for union duties – not that collective bargaining would only relate to the core aspects of pay, hours and holidays, however those might be defined. Likewise, he was describing the selection of pay, hours and holidays as "minimalist", not saying that a minimalist approach should be taken to the construction of that phrase: he was not in fact addressing the question of what "pay, hours and holidays" covers at all. For that reason alone, his statement is inadmissible on *Pepper v Hart* principles; this is not a case where, in Lord Bridge's words ([1993] AC 593, at p. 617B), "the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue". But in fact I doubt whether it can be said that there is any real ambiguity in paragraph 3 (3) such as to open the door to *Pepper v Hart* in the first place.

39. When those objections were put to Mr Bowers in the course of his submissions he acknowledged that the passage did not address his point "head-on", but he said that it still shed light on the phrase "relating to". I do not accept that. For the reasons given, I regard it as entirely neutral.

40. However Mr Bowers also said that in any event his submission did not depend on any reference to Hansard. I turn therefore to the statutory language and the context. I accept that whether a proposal "relates to" pay, hours and holidays must involve questions of degree, and that in a particular case the relationship may be too remote or indirect to fall within the terms of paragraph 3 (3). But I think that fixing on the distinction between "core" or "ancillary/adjectival" matters as connoting the applicable criterion is liable to produce too restrictive an outcome. Certainly negotiability cannot be restricted to simple questions such as whether a worker should be paid £10 or £11 per hour or should work 39 or 40 hours per week or should have four or five weeks' holiday. In many employment contexts workers' entitlement to pay or what hours they are obliged to work (or indeed are entitled to work) may not be identifiable as a simple number but may depend on the operation of processes or procedures, or the exercise of a managerial discretion. There may, for example, be a performance element in pay, requiring an element of evaluation. As for hours, the present case is a good illustration of how in some employments the identification of the hours to be worked may, within certain fixed parameters, involve complex processes: this is as true of the RCP, which is Jet2's own document, as it is of the Framework produced by BALPA. The operation of such procedures and processes is, in the lawyer's sense of the word, "adjectival", and they could also in one sense be described as "ancillary"; but they are nevertheless integral to the identification of the rights and obligations in question. I can see no reason why Parliament should have intended artificially to exclude trade unions from negotiating about such matters; and there is nothing in the statutory language, or the context, to suggest, let alone compel, such a construction.

41. One argument which appears in Mr Bowers' skeleton argument (para. 5.5), though it did not feature in his oral submissions, is that "the disputed items are not apt for negotiation under the mechanism of the Specified Method" and accordingly could not form the subject of collective bargaining within the meaning of paragraph 3 (3). The point, as I understand it, is that under the Framework BALPA and Jet2 would be required to negotiate the contents of every roster, if not indeed of departures from the

roster that might be required in order to accommodate operational flexibility, whereas paragraphs 14 and 15 of the Specified Method provided only for negotiations to take place on an annual basis, and in accordance with an elaborate procedure. I see nothing in this point. BALPA's claim does indeed provide for monthly meetings of the Joint Monitoring Committee, which would carry out "management and monitoring" of the rostering arrangements (though it would not draw up the rosters themselves), but whatever transpired at those meetings would plainly not constitute collective bargaining within the meaning of the statute. It is the proposal for such a machinery which, on BALPA's case, requires to be negotiated.

42. In my view, therefore, one should approach the question whether a particular proposal advanced in negotiation "relates to" pay, hours or holidays untrammelled by any of the restrictions contended for by Mr Bowers.

43. Having reached this point I do not think it is necessary to carry out a detailed analysis of Supperstone J's judgment. His decision essentially depends on him accepting Mr Bowers' three propositions. Mr Carr did have some criticisms of the details of his reasoning, but there is nothing to be gained by examining these. The only possible exception relates to an observation in para. 44 of the judgment which appears to be to the effect that it was relevant that, as the Judge understood it, Mr White had conceded that there was no real likelihood that Jet2 would accept the terms of the Framework Agreement. Mr Carr submitted that even if that was a correct account of what Mr White had said (which he said it was not) the point was immaterial. I am not in fact sure that the Judge's observation was intended as part of his reasoning; but I should make it clear that if it was I agree with Mr Carr whether a proposal is likely to be accepted cannot be relevant to whether it falls within the terms of paragraph 3 (3).

THE DISPUTED ELEMENTS IN THE FRAMEWORK

44. Having decided on the correct approach to the application of paragraph 3 (3), it remains to determine whether the particular matters on which BALPA wishes to negotiate relate to pay, hours or holidays. For the purpose of that exercise Mr Bowers helpfully put in a marked-up copy of the Framework underlining in green items which were agreed to be negotiable for the purpose of Schedule A1 – or, in a phrase which I will adopt, "within scope" – and in red those which were not: red greatly predominates. The document incorporates explanations of the stance taken as regards each item, to which I will refer as "Jet2's comments". This document gives essentially the same information, at least as regards Jet2's position, as the schedule which was before the Judge (see para. 15 above) but in a more useful format.

45. I will go through the Framework section-by-section (save for the two sections concerned with definitions). I will for convenience sometimes refer to its various terms as "provisions", though of course they are only *proposed* provisions. The issue is not whether they are fair or unfair, workable or unworkable, but only about whether they relate to pay, hours or holidays. As will appear, my view on that question is in most cases determined by my conclusions on the points of principle discussed above, and there will accordingly be a fair amount of repetition; but there is enough variation in the issues raised for it to be safer to consider the provisions seriatim rather than on a compendious basis. Nothing in most cases turns on the detailed wording of the provisions, but they can be found in the Appendix if necessary.

Section 1

46. Section 1 contains a certain amount of background material to which Jet2 does not object, but its essential content is the proposal at para. 1.6, amplified, at para. 1.7, for the establishment of a Joint Monitoring Committee.

47. Jet2 in its comments contends that this proposal is not negotiable because it is not concerned "with core terms as to Pay, Hours and Holidays" but rather a "mechanism for monitoring, negotiating about and determining not only core entitlements but also operational rostering decisions on an individual and day-to-day basis". It follows from what I have said at para. 40 above that I do not accept that submission. The fact that the establishment of the Committee to "manage and monitor" the rostering of pilots, and thus the specific hours that they have to work, does not in itself determine a "core entitlement" does not mean that it is not related to those hours[7]. The most that might be said is that the relationship is too remote or indirect. But I do not accept that either. I see no reason why Parliament should have intended that the right to negotiate about hours should not extend to a right to negotiate about a mechanism intended to give employees a say in how the rosters that determine those hours are set.

48. Jet2 in its comments also voices its concern about the operation of such a committee being a fetter on operational flexibility. I need not express a view about whether that is how the committee would in fact operate if established. The basic point is, as I have already said at para. 34 above, that the objection confuses negotiability and outcome: if Jet2 does not believe that a joint monitoring committee can operate without creating such a risk it does not have to agree to it, or it can do so subject to safeguards that it believes will preserve the necessary flexibility.

Section 3

49. The first part of section 3 sets out the basic proposal that fortnightly rosters should be published at least six weeks in advance, and identifies what they should cover. Jet2 contends that that is not within scope because it "is about when rosters are published and what they should show, not about any substantive entitlement to PHH [pay, hours and holidays]". It will be clear from the foregoing that I do not accept that. The questions of when rosters are published and the form they should take relate to pilots' hours, and that is enough.

50. The rest of section 3 consists of a number of sub-paragraphs relating to the "basic entitlement" to days off (specified as 122) and to an entitlement to so-called "request days off" within that total (specified as three per month), where the pilot can ask to have a particular day off.

51. As regards the basic entitlement to 122 days off (see para. 3.1), Jet2 accepts that this is negotiable. It also agrees that the provision in para. 3.3 for a pilot who is asked to

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[7] Indeed Jet2 in its comments characterises the proposal as demonstrating a desire by BALPA to become involved in anything that "'bears upon' the working patterns of pilots". That appears to involve a recognition (which is realistic) that the rostering arrangements do "bear upon" working patterns, and thus working hours; and "bearing upon" seems to me much the same as "relating to".

work a rostered day off to receive pay in lieu[8] or another day off is within scope. However it contends that the provision at para. 3.2 that pilots receive at least nine days off per month (i.e. in practice that the 122 days be reasonably evenly spread) is not apt for incorporation into individual pilots' contracts of employment because it would impair operational flexibility. Even if I had accepted Mr Bowers' first proposition, I would not have accepted that such a provision was not apt for incorporation: it is directly concerned with the rights of individual pilots and is completely different from the collective character of the term that was in issue in *Malone*. No doubt for that reason, Mr Bowers in the course of his oral submissions abandoned the objection to this item. But I would add that the original objection is a good illustration of the fallacy of Jet2's case based on its concerns about maintaining operational flexibility: it is easy to see why it would prefer not to be committed to spreading days off evenly throughout the year, but that is a reason for refusing to agree to such a provision rather than for treating the proposal as falling outside the scope of negotiability.

52. Para. 3.3 provides that "days off will be allocated at the pilot's home base except where otherwise mutually agreed". Jet2 contends that this is "not about amount of time off … but location". I see the point, but I think it involves too narrow a reading. If "hours" comprises the question of what particular days a pilot is entitled to have off (and Mr Bowers did not suggest otherwise) it is artificial to hive off the question, which may obviously be of considerable importance in practice, whether a day off falls at a time when he or she is at home rather than in (perhaps) the further reaches of the Continent.

53. Para. 3.4 provides, to summarise, that days off will (normally) be rostered in pairs and so that the pilot has at least 64 hours off. Paras. 3.7-3.8 set out the proposed system for request days off. In relation to both proposals Jet2 contends that the terms proposed are not apt for incorporation in individual contracts of employment because (a) provisions at this level of detail would compromise operational flexibility and (b) they are not in any event core entitlements to "PHH" but matters of process and/or general rostering practice. It will be clear from my conclusions on Mr Bowers' general propositions why I do not accept either point.

54. *Section 4*. Section 4 is concerned with rostered "standby", which may be at home or at the airport. We were not taken into the detail of how standby operates, but broadly speaking it involves a pilot being required to be available to be allocated to a flight if called on. Paras. 4.1 and 4.6 provide for maximum periods during which a pilot can be on standby, and Jet2 agrees – plainly correctly – that these proposals are "within scope". Para. 4.9 provides for pilots to be provided with "an exclusive lounge area suitable for rest and relaxation". Mr Carr conceded – also in my view correctly – that such a provision did not relate to hours. The remaining paragraphs contain more detailed workings out of the operation of the standby system. Jet2's contention that they are not negotiable depends on essentially the same points that I have considered and rejected above.

55. *Section 5*. Section 5 is concerned with "contactability". The substantive proposal is in para. 5.2, which for convenience I will reproduce here in full:

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8 This is the one element in the Framework which at least arguably relates to pay rather than hours or holidays.

> "Pilots rostered for a Contactable duty will be contactable for a defined period of two hours in-between 1400-1800 to receive future roster duty notification which will not commence for at least 16 hours ahead."

Jet2 accept that the first part of the proposal is negotiable because it constitutes a maximum limit on contactable hours. But it objects to the final part ("which will not commence …") on the basis (a) that it is inconsistent with operational flexibility and thus not apt for incorporation and (b) that it "relates to the amount of notice of a duty start time, but to any core substantive right to PHH". For the reasons already given I do not accept either point. As to (b), again I understand the point being made, but I believe that the proposed provision forms part of the overall arrangements for identifying the hours that a pilot has to work and can accordingly properly be said to relate to them. Mr Carr drew attention to Jet2's case on this paragraph as a good example of the kind of fine distinction that its minimalist approach to the construction of paragraph 3 (3) was liable to produce.

56. *Section 6.* Section 6 contains detailed provisions about the amount of night duties that a pilot may be required to undertake. Jet2 contends that this level of detail is inconsistent with operational flexibility and thus that the provisions would be inapt for incorporation and so not negotiable. For the reasons already given I reject that contention.

57. *Section 7.* BALPA's proposals about rest breaks are agreed by Jet2 to be within scope.

58. *Section 8.* Section 8 sets out the procedures to be followed by pilots who wish to swap rostered duties. Jet2 contends that such arrangements "are not about core substantive entitlements to PHH and in any event must be aspirational and subject to operational needs". For the reasons already given I do not accept that either of those points takes the provision outside the scope of negotiability. I have considered, though this point is not taken by Jet2, whether swapping duties can be said to relate to "hours"; but the truth is that the essence of a typical swap is not that a pilot wishes to perform different tasks but that he or she wishes to work at different times than rostered.

59. *Section 9.* Section 9 is concerned with "positioning", namely the rules governing cases where pilots have to be transported to a location other than their home base for the start of duty. Jet2 contends that this has nothing to do with hours, and on the face of it that would appear to be correct. Mr Carr did not contend otherwise. I would hold that provisions relating to positioning do not relate to pay, hours and holidays.[9]

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[9] It is fair to say that the second part of section 9 says that where a pilot is required to drive he or she should not have to do so for more than 2½ hours and that this "must count as a sector for any FDP calculation". But the former point appears to be concerned with the amount of time that it is reasonable to expect a pilot to drive, rather than with working hours as such; and the latter is said by Jet2 to be concerned with regulatory requirements. As I say, we were not addressed on these points, no doubt because the parties regard the question of their negotiability as only of marginal significance.

60. *Section 10*. Jet2 accepts that provisions about rostering around annual leave are within scope.

61. *Section 11*. Section 11 provides for a "roster stability window" or "block window protection". Again, the details were not elucidated, but, broadly, it is concerned with protecting pilots against late changes to the roster. This on the face of it relates to "hours", but Jet2 relies again on its contention that such protection is not concerned with "core rights to PHH" and quintessentially trespasses on its need for operational flexibility. For the reasons already given, these are not reasons for holding that the proposal falls outside the scope of paragraph 3 (3).

62. *Section 12*. Section 12 acknowledges the need for Jet2 in exceptional circumstances to be able temporarily to suspend the Scheduling Agreement but places limits on its right to do so. Jet2 contends that this trespasses on its need for operational flexibility and so cannot be negotiable. Again, I would reject that contention for the reasons already given.

63. *Sections 13-15*. These sections are concerned with "leave" for reasons other than holiday entitlement – compassionate leave, wedding leave and maternity and paternity leave. Jet2 says that leave of this kind is to do with neither "holidays" nor "hours". As regards the former, it submits that such leave is of a different character from "leave" in the sense of holiday. As regards the latter, it contends that the rights in question "are to do with leave during what would otherwise be working hours, not with working hours as such". It points out that BALPA had already conceded in the schedule that was before Supperstone J that maternity and paternity leave were not within scope. Mr Carr addressed no submissions to the contrary, and in those circumstances I would accept Jet2's case.

64. *Section 16*. This section deals with what happens about booked leave – evidently in the sense of "holiday" – where the pilot changes base, fleet or rank. On the face of it, it plainly relates to holidays. Jet2 advances the objections based on operational flexibility which I have already rejected.

65. *Sections 18 and 19*. These sections relate to leave, in the sense of holiday, distinguishing between summer and winter leave – summer leave being more restricted because summer is the busier period for the airline. Jet2 accepts that para. 18.2, which provides for a maximum of ten leave days in the summer peak period, is within scope, but it contends that the remainder of the provisions are not, because they concern the procedure for booking leave, "which is a matter of policy, always subject to operational flexibility" and/or because they do not concern "any core contractual entitlement to PHH". For the reasons already given I reject that submission.

66. *Section 20*. Section 20 concerns "linked rostering", which is the process for ensuring so far as possible that two members of flight crew or cabin crew who are partners have the same working pattern. Apart from Jet2's usual objection on the grounds of aptness for incorporation, which I would reject for the reasons already given, it also contends that linked rostering "is not … about PHH but about the operational allocation of duties". This is essentially the same point as I have addressed at para. 58 above, and I reject it for the same reason: the provision is not aimed at the content of duties but at the time at which they are to be performed.

67. *Section 21*. Section 21 provides for pilots operating from two bases to have enhanced rest periods. Rest periods would appear to be an aspect of "hours"[10] but Jet2 contends that enhanced rest periods of this kind are not negotiable because they would trespass on operational flexibility and thus are not "apt for incorporation". I reject that contention for the reasons already given.

68. *Section 22*. Section 22 is concerned with what are called "rostered detachments". This is a rather misleading term. The actual subject-matter is the procedure for allocating pilots to work for periods of (typically) not more than 28 days from different (often overseas) bases. That is known as "detachment". It is, no doubt, "rostered" in the sense that it is pre-arranged, but it is not an aspect of the ordinary rostering process for determining what hours, and when, a pilot is required to work. Jet2 contends that for that reason it does not fall within the terms of paragraph 3 (3). Mr Carr advanced no argument to the contrary. I would accept Jet2's case.

CONCLUSION

69. I would allow this appeal and declare that the proposals contained in the Framework document properly form the subject of collective bargaining within the meaning of paragraph 3 (3) of Schedule A1 to the 1992 Act, save to the extent identified above. My provisional view is that that should suffice, but if counsel feel that a more elaborate form of declaration would be of assistance they may submit a draft.

Lord Justice Briggs:

70. I agree with both the general reasoning of Underhill LJ, and with his detailed application of that reasoning to the provisions of the Framework document. I would therefore allow the appeal to the same extent.

Lord Justice McFarlane:

71. I also agree.

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[10] Basic rest periods are not referred to as such within the Framework, no doubt because they would be catered for as part of the rostering process. But Jet2 expressly accepts that rest breaks are within scope: see para. 57 above.

APPENDIX

Jet2.com Scheduling Framework document for a mutually agreed Scheduling Agreement

This document is intended to form the Framework for a formal Scheduling Agreement to be negotiated between Jet2.com and the Jet2.com BALPA Company Council.

1. INTRODUCTION

1.1 The purpose of this agreement is the avoidance of crew fatigue, the promotion of good rostering practices and the fair and efficient distribution of duties amongst the Pilot workforce.

1.2 The Pilot Scheduling Rules have been designed to provide Company pilots with a stable working environment, the avoidance of crew fatigue, and the promotion of good rostering practices which balance productivity and lifestyle issues, whilst at the same time ensuring that all the Company's flying is fully crewed. Duties will be planned so as to ensure the most efficient use of the pilot resources available to the Company. Any changes to the Scheduling rules and the Company FTL Scheme will be subject to formal agreement between the Company and with the BALPA Company Council.

1.3 The guiding principles will be Stability, sustainability, productivity and flexibility whilst maintaining a safe operation.

1.4 This agreement applies to the initial roster production and subsequent roster changes unless a specific exemption is detailed in the agreement.

1.5 Nothing within these rules prevents the pilot from volunteering to operate outside of the agreement provided the Company scheme rules are always applied.

1.6 The management and monitoring of this agreement will be carried out by the Jet2.com Joint Monitoring committee (JMC) which is established as a joint group. Its purpose is to oversee the Scheduling Agreement and act in an impartial manner. The Group will be established with a minimum of two members appointed by the Company and two appointed by the BALPA Company Council.

1.7 Transparency of the leave system is the only way to ensure a fair and equitable leave allocation for all pilots. To ensure this transparency, the JMC will meet before the start of the leave year to discuss the allocation of leave and RDO lines according to base, fleet and rank. This discussion will take place during a normal JMC meeting; however will occur no later than the 1st November to coincide with the opening of the bidding process for the following summer period.

Meetings will be scheduled to take place monthly; a pre-notified agenda will be circulated prior to the meeting.

The JMC is responsible for:

Recommending alterations/amendments where productivity or lifestyle issues are being adversely affected.

Monitoring Rostering balance and processes. This will be discussed and reviewed within the JMC. In order to carry out its task all members of the JMC will have access to all information regarding scheduling.

2. DEFINITIONS

2.1 Any capitalised definitions used in this policy which are not set out below are defined in the Company's Operations Manual Part A.

2.2 The following definitions will apply in this policy:

Base or (where a Pilot is Dual Based) Primary Base means the airfield to which a Pilot is normally assigned.

Block Time means the period of Time from chocks off to chocks on.

Check – Out Time means at least thirty minutes after chocks on.

Contactable Period means any two hour period between 1400 and 1800 local time which does accumulate Duty time and is not a Day Off.

Crewing Team means the crewing team/department of the Company.

CWP (Crew Web Portal) means a web based program that enables Pilots to retrieve their new rosters and roster changes from the crew room of each Base or remotely via an internet link.

Day Off means a period of time at a Pilot's Base (or Primary Base) free of all duties for leisure and relaxation which may include a Rest Period.

Day(s) OAB (Day(s) Off Away from Base) means a Day Off or Days Off free of all duties for rest and relaxation rostered at a Company base or destination other than the Pilot's Base.

Day(s) Off in lieu means a Day Off or Days Off added back to the untaken balance of Days Off in a Leave Year which is provided to replace a Day Off or Days Off which has or have been affected or impinged upon due to operational requirements or Unusual Circumstances.

Day Off Payment means the currently agreed payments by rank.

Duty means any continuous period during which a Pilot is required to carry out any task associated with the business of the Company.

Dual Based means where a Pilot has a Primary Base and Secondary Base (e.g. MAN and BLK).

Early Start Duty means a duty which commences in the period 0500 – 0659 local time.

Excess Mileage means the mileage from home to Secondary Base minus the mileage from home to Primary Base.

Fixed Pattern means where a Pilot is rostered to work the same days each week for an entire season.

Flying Duty Period (FDP) means the period commencing at the Report Time and finishing at on-chocks on the final sector.

Late Finish Duty means a duty which finishes in the period 0100 – 0159 local time.

Leave Year means 1st May to 30th April annually (for the purpose of calculating annual leave days and annual number of days off).

Linked Roster means the matching of Days Off only of two Crew members, be they two pilots or a pilot and a member of cabin crew, pursuant to the procedure in clause 3.51-3.52 below, and for the avoidance of doubt other Duties will not be rostered to correspond with the linked partner.

Management means the Flight Operations Director, Chief Pilot and Chief Training Manager.

Mileage Rate means 40 pence per mile as amended from time to time by the Company and as set out in the Company's Travel Policy.

Night Duty means where any part of a Duty falls within the period 0200 to 0459 local time.

Regular means a run of four or five consecutive duties (Early Starts, Late Finishes or Nights), not broken by a period of 34 hours free from such duties, contained in seven consecutive days.

Report Time means the time when a Pilot is rostered to report for Duty before operating in an aircraft as a member of its crew, which will be one hour before scheduled departure time, or greater where operational or special requirements dictate.

RDO (Request Day Off) means a Day Off at Base (or Primary Base) on a date specifically requested by that Pilot and approved in accordance with the terms of this policy.

Rest Day/Period means the period before starting an FDP which is designated to give Pilots adequate opportunity to rest before an FDP, and which, for the avoidance of doubt, includes travel to and from an FDP.

Roster Period means the two week period for which a new roster is produced and released to Pilots. Roster Periods will include every day of the year including public holidays and weekends.

Rostering Team means the rostering team/department of the Company.

Secondary Base means the secondary nominated base for Dual Based pilots, as assigned by their roster.

Standard Bases means Leeds Bradford, Manchester, Blackpool, Edinburgh, Belfast, Newcastle, East Midlands, Exeter and Glasgow or any other location(s) in the United Kingdom designated as a Standard Base by the Company from time to time.

Standard Check-Out Time means thirty minutes after chocks on.

Summer Season means for annual leave purposes 1st May to 31st October each year. For rostering purposes the Summer Season operates from the 1st April to 31st October each year.

Time means Coordinated Universal Time (UTC), in which rosters are always issued.

Trainees means Pilots who are undergoing line flying under supervision and have not yet completed their final line check.

Travel Services Team means the travel services team of the Company.

Unusual Circumstances means unusual or unforeseen operational or commercial circumstances, whether under or beyond the control of the Company, to which the

Company may be required to or wish to act in order to minimise impact to its operations or take advantage of opportunities, and which are designated as Unusual Circumstances by the Company's Operations Director or Flight Ops Director. Unusual Circumstances will include but not be limited to examples such as the volcanic ash cloud disruption or British Airways strike action opportunity.

Winter Season means for annual leave purposes 1st November to 30th April each year. For rostering purposes the Winter Season operates from 1st November to 31st March each year.

3. ROSTER CONSTRUCTION

The Company will produce fortnightly rosters and publish it to all crews at least 6 weeks before the expiry of the current roster. The roster will show days off, leave, training, standbys, flying and ground duties and the current flying schedule. The dates of the planned roster publication will be published annually and will normally coincide with the roster cut-off date for the next roster.

Days off

Basic entitlements

3.1 Full time Pilots are entitled to 122 days off (excluding annual Leave) for the Leave year. A running total will be published monthly on each pilot's roster to facilitate transparency with regard to this annual total.

3.2 Full Time Pilots will have a minimum of Nine days off per calendar Month.

3.3 Days off will be allocated at the pilot's home base except where otherwise mutually agreed.

3.4 Days off will be allocated in pairs and will have a minimum value of 64 hours off. Single days off will not be rostered unless to facilitate a Pilot's days off requests and in any case will be no less than 36 hours.

3.5 If a pilot agrees to work into a rostered Day Off, then the pilot will have the option of a day off payment or a mutually agreed day off in lieu.

Request Days Off (RDOs)

3.6 RDOs are Days Off which can be booked for a specific day in advance. These are counted in the monthly and annual totals of Days Off.

3.7 All Pilots can request 3 RDOs per calendar month in which they are rostered, to be bid for as per the relevant season's leave bidding scheme in the Appendix. Days Off adjacent to leave days are not guaranteed and should be requested as RDOs if required.

3.8 The percentage of Days off Requested and achieved will be monitored and will be a KPI of the Jet.com JMC.

4. STANDBY

4.1 Standby duties will be a maximum of 8 hours.

4.2 A Pilot may be called at any time during the rostered standby duty.

4.3 The Practice of standing down a Pilot from a Morning Standby, giving a rest period and then scheduling a night flight will not be permitted.

4.4 Normal time from Standby callout to report will be 90 minutes. Dual based Pilots who are called out to their secondary Base will be given a 150 minute callout time.

4.5 Callout from standby can be made at any time during the rostered standby period but the report time can never be more than 90 minutes (150 for Dual base) from the end of the planned standby period.

Airport Standby

4.6 Airport standby will not exceed a period of 7 hours from the report time at the airfield, a combination of Home and Airport standby will not exceed 12 hours.

4.7 A Pilot on Airport Standby cannot be called for a duty which has a report time after the end of the Airport standby period.

4.8 When calculating the maximum FDP, the Airport standby shall count as follows: over 3 hours on Airport Standby will count as a sector for FDP calculations.

4.9 When on airport standby Pilots will be provided with an exclusive lounge area suitable for rest and relaxation prior to any call to operate.

4.10 The FDP will commence when a pilot reports for Airport Standby.

5. CONTACTABLE

5.1 A Pilot may be rostered to be contactable on any day other than on days off.

5.2 Pilots rostered for a Contactable duty will be contactable for a defined period of two hours in-between 1400-1800 to receive future roster duty notification which will not commence for at least 16 hours ahead.

6. EARLY STARTS/LATE FINISHES /REGULAR NIGHT DUTIES.

6.1 Sleep deprivation, leading to the onset of fatigue, can arise if a crew member is required to report early for duty or finishes a late duty, on a number of consecutive days. Therefore, not more than 3 consecutive duties that occur in any part of the period 0100 to 0659 local time will be undertaken, nor may there be more than 4 such duties in any 7 consecutive days. Any run of consecutive duties (late finishes or Nights or Early Starts) can only be broken by a period of not less than 34 consecutive hours free from such duties. These 34 consecutive hours may include a duty that is not an Early, Late or Night Duty.

6.2 However, crew members who are employed on a regular early morning duty for a maximum of 5 consecutive duties will work to the following:

6.3 The minimum rest period before the start of such a series of duties will be 24 hours.

6.4 The duty will not exceed 9 hours, irrespective of the sectors flown. Discretion may be used to extend the duty by a maximum of 1 hour per day with a total of 2 hours in the 5 day cycle.

6.5 At the finish of such a series of duties, crew members will have a minimum of 64 hours free from all duties.

6.6 It is recognised that a significant portion of the Company's business involves regular night flying. This is often of short sector length, however over multiple sectors and the crews involved are expected to do this on a regular basis. This flying is currently covered by the Company Flight time limitations. No changes to these flight time limitations will be made without prior negotiation with the JMC.

7. REST BREAKS

For the purposes of Regulation 7(2)(a) of the Civil Aviation (Working time) Regulations 2004 and to achieve and maintain a high level of Health and Safety the Company will Schedule Pilots Rest Breaks which are the equivalent of 20 minute Break in any Six Hour Duty Period including any Flying Duty Periods.

8. SWAPS

8.1 It is up to the Pilot concerned to contact and agree mutual swap(s) with other Pilots.

8.2 Swaps are not allowed unless the following procedure is complied with:

8.3 Both Pilots must be agreeable to the swap; and

8.4 Both Pilots must contact the Crewing Team in writing (by email) to inform them of the proposed swap for approval.

9. POSITIONING

If positioning by Air the Company will only use Perf A Aircraft in agreement with the BALPA Company Council.

If pilots are required to self-drive using a hire car or their own vehicle then this may be used up to a maximum of 2.5 hours and must count as a sector for any FDP calculation if positioning before a Flying duty.

10. ROSTERING AROUND ANNUAL LEAVE

A duty immediately prior to a leave block will not be rostered to finish later than 1700L and a duty immediately after a leave period will not be rostered to start earlier than 0900L. RDO's attached to a leave period are considered to be part of that leave period.

11. ROSTER STABILITY WINDOW

The nature of airline operations can result in disruption to published rosters. Both flight crew and crew scheduling staff are committed to improving roster stability but a certain amount of roster disruption is inevitable due to delays, sickness, flying programme changes etc. The Company understands that pilots have the right to plan around their rosters, but the Company must also ensure the rosters afford protection to the programme as well as the pilots.

Block window protection is defined as follows:

11.1 Commencing 2 hours prior to the report time of a duty period and terminating 2 hours after the off duty time

11.2 Where an originally rostered duty is modified, and where the modified on and off duty times fall within the block window, then the pilot involved shall be required to accept that modified duty.

11.3 Where the times of an originally rostered duty become changed, then the pilot shall be required to complete that duty. Should an originally rostered duty be altered to a different duty that falls outside the block window the pilot shall have a right to reject the proposed changes. Should a Pilot reject the change he/she will be placed on a Standby duty within the confines of the Stability window.

11.5 The block window applies to all originally rostered flight and standby duties.

11.6 Detachments away from base will be subject to block window protection in respect to the start and finish of the detachment only.

11.7 Any pilot who is removed from a duty and is placed on standby, may decline to be called out for a duty which falls outside the block window of the originally rostered duty.

11.8 During a period of conversion or command training block window protection will not apply for the trainee until the final check.

11.9 Following a period of sickness or compassionate leave, no block window protection is applicable until after the pilot's next rostered day(s) off.

12. SCHEME SUSPENSION

In the event of major disruption, arising from events either internal or external to the Company, the DFO or his deputy, following consultation with CC representative, reserves the right to temporarily suspend the Jet.com Scheduling Agreement or part thereof, with immediate effect. This suspension will last no longer than 5 days unless otherwise agreed with the BALPA CC. Examples of major disruption are a 9/11 type event, volcanic ash cloud or Runway out of service for 12+ hours at LBA Airport.

13. COMPASSIONATE LEAVE

Pilots must request compassionate leave from their Base Captain/Coordinator or Manager, who will consider the request and liaise with the Crewing Team. Please see the Company's Absence Management Policy for further information. However this request will only ever be refused in exceptional circumstances.

14. WEDDING LEAVE

Requests for wedding leave for a pilot's own wedding must be submitted to the Rostering Team in writing as soon as dates are known and, subject to the discretionary approval of the Rostering Team, may be booked ahead of the leave bidding process. Pilots can request up to a maximum of 3 consecutive weeks for these purposes in Summer Season and in Winter Season.

15. MATERNITY AND PATERNITY LEAVE

15.1 Pregnant pilots who are no longer flying and are working in other roles will receive a maternity pack from HR and will be advised of their new leave entitlement whilst working on the ground. Leave should then be booked through their new line manager in their new job role who should then inform Rostering of what leave has been taken.

15.2 For details of maternity leave, please refer to the HR Team.

15.3 In the case of pilots being expectant fathers they can request leave up to a maximum of 2 consecutive weeks, to coincide with the birth of the child. This may be done in advance outside of the normal leave process. This can be taken as annual or paternity leave (subject to eligibility) or a combination of both, but must be in blocks of 1 or 2 consecutive weeks. If pilots wish to take paternity leave they should refer to the Paternity Leave Application form and policy to ensure correct procedures and timescales are followed.

15.4 If pilots opt to take this time off as annual leave and it is in the Summer Peak, no additional annual leave can be requested in the Summer Peak period. The Company will provide a certain amount of flexibility to move leave dates to coincide with the baby's actual birth date, dependent on Crewing and Rostering requirements.

16. FLEET/RANK CHANGES

16.1 Where a pilot has booked leave and subsequently changes fleet or base at the behest of the Company, their original leave booking will be honoured. Any subsequent requests or changes to leave should then fall in line with the new rank and/or base.

16.2 Where a pilot changes base or fleet as a result of a successful transfer request they may, at the Company's discretion, have to forego that leave period subject to the availability of leave in their new fleet or base. However the pilot will be allowed to submit a new bid to allow them to take their accrued annual leave in full.

17. DEFINITIONS (FOR THE PURPOSE OF THIS POLICY ONLY)

17.1 Summer is defined as 1st May to 31st October.

17.2 The Summer Peak period will be defined and published by the end of August each year for the following year. This will be based on the seasonal flying programme.

17.3 Winter is defined as 1st November to 30th April.

17.4 The Festive Period (Christmas and New Year) is defined as the 10 days from 24th December until 2nd January. For leave application purposes, this will be split into two bid periods: Christmas will be any leave from 24th December up to and including 28th December. New Year will be any leave from 29th December up to and including 2nd January. A pilot will only be awarded leave for one or the other period, NOT both in the initial leave bidding stage. However once "free bidding" has commenced, any free leave may be booked by any pilot on a first come first served basis.

18. SUMMER LEAVE

18.1 Pilots must bid for Summer leave within the time window provided for their bid group which will be advertised in advance by the Rostering Team on the Company's intranet and in memo books. Failure to do so will result in the pilot not being able to apply until after leave has been awarded to those who bid within the timescales.

18.2 During the defined Summer Peak period a limit of 10 leave days will remain as the basis of the policy. However, each year consideration will be given to the amount of leave to be made available to each pilot in the Summer Peak and if there is flexibility the 10 day limit may be increased at the Company's discretion. Details of how these may be booked will be published prior to bidding commencement.

18.3 Permanent Pilots may opt to take no leave in the Summer Peak. A Pilot wishing to take this option must notify the Rostering Team of their intention via email to leave@jet2.com by 31st December. Pilots who take this option will be eligible for 5 extra days leave, to be taken during the subsequent winter leave period.

18.4 At the initial bidding stage, pilots may make a maximum of two (2) bids. For information on how these bids should be made please refer to the Summer Leave Booking Form.

18.5 Once initial bidding has closed a second round of bidding known as Free Bidding will commence where any pilot who has missed their window for initial leave bidding can request leave, and pilots can request additional leave in the available periods. This is processed on a first come first served basis.

18.6 If a pilot does not make a request for summer leave, no leave will be allocated and the pilot's entitlement will be carried over into the winter months.

18.7 Requests for RDOs which are not adjacent to leave, can only be processed once free bidding for the leave period has opened. RDOs are restricted to 3 per Calendar month. When booking RDOs, pilots are reminded to take into consideration how their requests may affect other pilots and any requests that could limit roster fairness may be declined. There must be a minimum of 3 days between single RDOs.

19. WINTER LEAVE

19.1 Pilots must bid for Winter leave within the time window provided for their bid group which will be advertised in advance by the Rostering Team. Failure to do so will result in the pilot not being able to apply until after leave has been awarded to those who bid within the timescales.

19.2 At this initial bid stage, pilots may make a maximum of two (2) bids, with only one (1) bid covering either Christmas or New Year.

19.3 Once initial bidding has closed a second period of bidding will commence where any crew member who has missed their window for initial leave bidding can request leave, and pilots can request additional leave in the available periods.

19.4 If pilots do not make a request for Winter leave, the remaining leave will be allocated by the Rostering Team by the end of September each year.

20. LINKED ROSTER AGREEMENT

20.1 Pilots can apply for their roster to be linked with another employee so that they will be matched.

20.2 To apply for a Linked Roster each employee needs to do so in writing to the Rostering Team or via email at rostering@jet2.com stating the employee they wish to be linked with, the date they would like this to start and that they have read and agreed to the following terms relating to a Linked Roster.

20.3 A Linked Roster will only commence at the start of the Roster Period following the period in which an application by email from both employees has been received by the Company.

20.4 Both applying employees agree to being linked with each other employee in the rostering system;

20.5 The Rostering Team will endeavour to match Days Off for linked employees where possible. However there may be times and circumstances where for exceptional operational reasons this cannot be achieved;

20.6 Leave requests must be made by each employee only for themselves and not on behalf of their proposed linked employee. Any further changes to leave or RDOs should be submitted individually, as a Linked Roster does not guarantee linked annual leave, which must be applied for separately by each individual.

20.7 A Linked Roster can be cancelled at any time by contacting the Rostering Team in writing; and

20.8 Whilst all reasonable efforts will be made to maintain Linked Rosters, the Rostering Team reserves the right to have to cancel all or any part of a Linked Roster at any time due to exceptional operational requirements. This will only be done in extremis, and the reason for this will be provided in writing to both employees within five (5) working days.

21. DUAL BASING

For the purpose of Dual Based Pilots only, the following terms will apply:

21.1 Pilots operating from their Secondary Base for 2 or more consecutive days will have a 14 hour Rest Period between Duties;

21.2 Pilots operating from their Primary Base and then from their Secondary Base the following day will have a minimum of a 13 hour Rest Period between Duties. Similarly, pilots operating from Secondary Base to Primary Base the following day will have a minimum of a 13 hour Rest Period between Duties;

21.3 Standbys will be rostered from the Primary Base. However, pilots may be called out to work from their Secondary Base. If a pilot is called out from Standby to their Secondary Base a 150 minute call out time will apply. Notwithstanding this call out time, pilots shall report to their relevant Base as soon as reasonably possible, in order to assist the Company in minimising disruption to the flight programme;

21.4 No transport will be provided for travel to/from the pilot's home from/to both Primary and Secondary Bases.

22. ROSTERED DETACHMENTS

22.1 Rostered Detachments will be operated on the following basis.

1) The Company will always firstly actively seek to fill a Rostered Detachment with pilots who volunteer for the particular detachment.

2) Where it has not been possible to find sufficient willing volunteers for a Rostered Detachment the Company will be entitled to fill the Rostered Detachment through compulsory rostering. This will be done on as fair and transparent a basis as possible and so that all pilots will be required to complete one Rostered Detachment before any pilot is

required to complete a second Rostered Detachment (unless as a volunteer). This will be done in consultation with the JMC.

22.2 Duration

The length and location of a Rostered Detachment will depend on the terms of the contract that the Company has entered into.

1) A Rostered Detachment will not exceed more than 28 days in length, unless mutually agreed between the pilot and the rostering team.

2) A pilot will be rostered for two Days Off prior to commencing a Rostered Detachment. After every 28 days of a Rostered Detachment, a pilot will be rostered for five consecutive Days Off before being rostered to continue the Rostered Detachment.

3) When a pilot based in Europe (including the UK) is rostered for 3 or more consecutive Days Off during a Rostered Detachment, the Company will, where practicable and no less than once in every 28 day period, arrange and pay for transport home and back to the Rostered Detachment base in accordance with the Company's Travel Policy as amended from time to time.

4) When a Rostered Detachment ends a pilot will be rostered for the following Days Off:

a) 2 Days Off after a Rostered Detachment of up to and including 21 days;

b) 3 Days Off after a Rostered Detachment of 22 to 27 days (inclusive);

c) 5 Days Off after a Rostered Detachment of 28 days or more.

5) Post Detachment

After a Rostered Detachment:

a) a pilot will have the same Base and/or Dual Bases as before the Rostered Detachment; and

b) the terms of this policy will continue to apply (except those relating to Rostered Detachments).

c) expenses relating to a Rostered Detachment

d) the Company will arrange and pay for room and breakfast costs in accordance with the Company's Travel Policy from time to time.

e) during a Rostered Detachment a pilot will continue to qualify for any contractual entitlement to flight duty allowance and sector pay.