Neutral Citation Number: [2024] EAT 72

Case No: EA-2022-001288-NU

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 April 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

ADEFUNKE ADEKOYA & OTHERS

Appellants

- and -

HEATHROW EXPRESS OPERATING COMPANY LTD

Respondent

- -
- -

Darshan Patel (instructed by Thompsons Solicitors) for the **Appellants**
Michael Salter (instructed by Eversheds Sutherland) for the **Respondent**

Hearing date: 16 April 2024

- -

JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT

While employed by the respondent the claimants all received a benefit of discounted leisure rail travel. In 2020 they were all made redundant after more than five years' service. They all brought breach of contract claims in the employment tribunal asserting that, in these circumstances, they had the contractual right to continued lifelong enjoyment of the travel benefit.

The respondent had three lines of defence. The first was that the claimants no longer had the continued right to the benefit, because it had been provided by a third party, the Rail Delivery Group (RDG) (formerly ATOC) pursuant to an agreement with respondent, and, in May 2019 RDG had given the respondent notice that the provision of the benefit to those who were employed after 1996 (which included all the claimants) post termination in certain circumstances would stop.

At a preliminary hearing the tribunal upheld that line of defence. It erred in law in so doing. The tribunal found that the claimants' contracts incorporated the right to retain the benefit if made redundant after five years' or more service. However, it went on to find that the 2019 notice from ATOC/RDG had the effect of depriving the claimants of their rights to it as against the respondent. It erred in doing so. There was no proper basis for finding that the agreement between the respondent and RDG was incorporated into the claimants' contracts, nor otherwise that the 2019 notice from ATOC (not given to the claimants at the time) had that effect upon their rights as against the respondent. The fact that they knew that the benefit was furnished by ATOC was not sufficient. **Amdocs Systems Group Ltd v Langton** [2022] EWCA Civ 1027 considered and applied.

The matter was remitted to the tribunal to consider the respondent's two other lines of defence.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they are in the employment tribunal as claimants and respondent. The respondent runs the Heathrow Express train service. The claimants were all employed by it. Following a consultation process in which they all volunteered for redundancy, the claimants were all given notice of dismissal on the grounds of redundancy, which took effect on 30 June 2020.

2. The claimants all presented claims of breach of contract to the employment tribunal. These asserted that at the relevant time they all had five or more years' service and then continued as follows:

> **"3. Pursuant to their contracts of employment, having been made redundant, the Claimants have become eligible for life-long travel benefits, namely, a discount of 75% on leisure use on selected rail services both for them and certain dependents.**
>
> **4. The relevant contractual term provides as follows:**
>
> ***"Privilege travel facilities will be granted to the following:-***
> ***...***
> ***4. Redundancy***
> ***Staff who leave the employment of Heathrow Express under redundancy arrangements with 5 years or more service are regarded as having retired and are eligible to retain privilege travel facilities".***
>
> **5. Upon the Claimants having been made redundant and having had 5 years or more service, and in breach of the term pleaded in the paragraph above, the Respondent has refused to provide the Claimants with any travel benefits.**
>
> **6. As a result of the breach of contract set out in the paragraphs above, the Claimants have suffered loss and damage."**

3. In its response, the respondent asserted that the claimants were not contractually entitled to ongoing membership of the scheme following the termination of their employment. Alternatively, if they were so entitled, then that right had been bought out in return for a £750 payment, as part of a settlement agreement. The first of those two lines of defence was pleaded as follows:

> **"2.2.Those redundancies were preceded by a comprehensive consultation exercise. As part of that consultation exercise, the issue of the historic term referenced at paragraph four of the grounds of complaint was discussed with the RMT (the Respondent's recognised trade union). In particular:**
>
> **2.2.1 the scheme referred to within the term is administered by, operated by, and is the responsibility of, the Rail Delivery Group ("RDG") which is a leadership body (previously known as the Association of Train Operating Companies) made up of the UK's rail companies;**

> **2.2.2 at the determination of the RDG, the scheme no longer applies (to the extent that it had ever applied) to former employees of UK rail companies, including the Respondent;**
>
> **2.2.3 that was a decision of RDG and is not one over which the Respondent had any influence or control;"**

4. At a case-management hearing in October 2021 it was identified that these two lines of defence were supplemented by a third argument on the part of the respondent, being that, for the purposes of Regulation 3(c) **Employment Tribunals (Extension of Jurisdiction) England and Wales Order 1994**, any breach was not outstanding and did not arise from the dismissals, so that there was no jurisdiction. That was disputed by the claimants.

5. Of the respondent's three lines of defence it was decided that two of them should be considered at a further open preliminary hearing, the two issues being expressed as follows:

> **"(1) Does the Employment Tribunal have the jurisdiction to consider the claims?**
>
> **(2) Did the Claimants or any of them have the pleaded contractual right to 'privileged travel'?"**

6. The further question of whether, if there *was* jurisdiction, and the claimants *did* have the contractual right pleaded, there was then a compromise of those rights by a settlement in which the claimants received payments of £750, was not included among the issues for consideration at that further preliminary hearing.

7. On the first occasion when it was listed, that further preliminary hearing was itself postponed; but it was relisted and then came before Employment Judge Apted sitting at London South on 17 and 18 October 2022. An oral decision was given at the end of the hearing and a written judgment and reasons were subsequently produced. The judgment was expressed in the following terms:

> **"The claimant's [*sic*] claims for breach of contract are dismissed as the Tribunal has no jurisdiction to hear them."**

8. The claimants appeal from that decision. At the hearing of their appeal today, they were

represented by Mr Patel and the respondent by Mr Salter, both of counsel, and both of whom had also appeared at the tribunal hearing.

9. In its reasons, by way of background facts, the tribunal identified that the respondent is part of the Association of Train Operating Companies (ATOC) and that membership of ATOC provided certain benefits, one of which was the provision of discounted travel on other members' services. The tribunal also flagged up a distinction, the relevance of which it was to explain later in its decision, between safeguarded staff or employees, being those who were employed before 31 March 1996, and all others, who were non-safeguarded staff or employees, including all of the claimants.

10. The tribunal decided to address first the issue of whether the claimants had the contractual right to continued provision of privileged travel facilities following their dismissals, as asserted. Because of the way the grounds of appeal are framed and how the arguments have developed, I will set out in full the tribunal's reasoning on that question. Following some initial findings that the contracts of employment of the claimants, as such, contained no reference to the discounted travel benefit, but that the contract of at least one of the claimants was accompanied by a letter, stating that he could, "look forward to the ATOC standard class leisure pass", the tribunal continued:

> **"19. The ATOC Terms & Conditions are at pages 120 – 134 of the bundle. This document bears the name and logo of the respondent. At page 122, it states that the following are terms and conditions upon which privilege travel is issued to Heathrow Express employees for leisure use on the services of the train operating companies. It states that the arrangement will grant those eligible unlimited privilege travel facilities.**
>
> **20. It then states that privilege travel facilities will be granted to a number of people who are then identified. It identifies retired members of staff and states that those members of staff who are retired and who had 5 years of service, were granted privilege travel facilities. It also states that staff who are made redundant are treated the same as retired staff – namely, if they have 5 years of service, they are eligible to retain privilege travel facilities.**
>
> **21. At the conclusion of this document, the employee is required to sign and date it and in doing so, the employee accepts that abuse of the ATOC travel card could lead to disciplinary action (including dismissal). Page 140 contains the signature of Mr Joseph on this document.**
>
> **22. Mr Cobb's application for his discounted travel card on behalf of his family**

members is found at pages 176 – 177. This makes it clear that the scheme is operated by Rail Staff Travel Ltd.

23. In her witness statement at paragraph 5, Mrs Jones on behalf of the respondent states that the ATOC terms and conditions was usually sent out to new joiners as part of their contract packs. At paragraph 7, Mrs Jones accepts that historically, those employed for at least 5 years and whose employment terminated by reason of retirement or redundancy could retain the privilege travel facilities.

24. I therefore find (and I do not think this is disputed by the respondent), that when objectively construed, when each of the claimants was originally employed by the respondent, the terms and conditions of the ATOC agreement were incorporated into the claimants contracts of employment, such that they could benefit from the privilege travel facilities if they were employed for 5 years and their employment ended by reason of retirement or redundancy. Although the ATOC document may not be referred to as a contract, it does in my judgment use language of entitlement. The document at pages 133 – 134 expressly states that as an employee of the respondent, employees "...will enjoy the benefit of discounted leisure train travel (ATOC)"

25. If the ATOC agreement is incorporated into the claimant's contract (as I have found it to be), then it follows that in my judgment, all of its terms and conditions must also be incorporated. As I have already set out, the scheme is operated by Rail Travel Staff Ltd. The terms and conditions are set out in the document at pages 198 – 220. This Reciprocal Agreement between Rail Staff Travel Ltd and the respondent states that the agreement may be withdrawn.

26. I then move on to consider what occurred in May 2019 and beyond. In May 2019, the position changed. On that occasion, the Rail Delivery Group, drew a distinction between safeguarded and non-safeguarded employees. As of May 2019, only safeguarded staff who retired or who had been made redundant would retain the benefit of the discount. No reference is made in this document to non-safeguarded staff.

27. The effect of this document therefore is obvious. As of May 2019, any non-safeguarded employee would not retain the travel discount upon retirement or upon being made redundant. This means that each of the claimants in this claim, therefore lost that benefit.

28. It is accepted that this document which came into effect in May 2019 was not sent to the claimants. I have been referred to the judgment of HHJ Auerbach sitting in the Employment Appeal Tribunal in the appeal of Amdocs Systems Group Ltd v Langton 2019 EAT 001237 and in particular paragraphs 68 – 69. However, as I have already said, the terms of the contract permitted the contract to be varied. I have also already found that those terms were incorporated into the contract. I therefore find that the respondents were able to vary the terms of the contract of employment.

29. In February 2020 the respondents undertook a review of their pay and conditions. (These can be found at pages 330 – 335). It is clear in my judgment that this document relates to employees and at Appendix B, it sets out the travel discounts that employees can benefit from. This document does not make reference to any travel discount that an employee can enjoy after they have left the respondent's employment.

30. During the redundancy negotiations, various employees raised with the respondent questions over whether staff would retain their travel discount. It is clear from the emails in the bundle (at pages 336 – 338 and 354 – 356) that the

> **respondent's position was that the rules had previously been interpreted incorrectly and that non-safeguarded staff were not eligible for the travel discount.**
>
> **31. Prior to being made redundant, each employee received a copy of their Notice of Redundancy (a copy is at page 357. Mr Cobb confirmed in evidence that he had received such a letter). This letter confirms a payment in lieu of notice and that any other benefits will cease on the 30th June 2020. It then sets out what each claimant would receive. This letter does not state that any of the claimants would be entitled to reduced travel. Each claimant accepted the terms of the redundancy package.**
>
> **32. Drawing all of this together, I therefore make the following findings. When the claimants were employed by the respondent, they were entitled to the benefit of the discounted travel scheme. I find that that the terms and conditions of the scheme (as set out in the ATOC document and the Reciprocal Agreement) were incorporated into their contracts of employment. As such, when originally employed, if they were made redundant, then subject to having 5 years' service, they could continue to benefit from the scheme. However, I find that the respondent changed the claimants' contracts, as they were entitled to do under the terms and conditions. As a result, unless an employee was a safeguarded employee, then upon redundancy, they could no longer benefit from discounted travel.**
>
> **33. Additionally, during the redundancy negotiations and as part of the redundancy package, the claimants were aware that they were not entitled to the benefit of reduced travel upon being made redundant.**
>
> **34. In answer to the second issue to be determined, I therefore find that the claimants originally had the pleaded contractual right to privilege travel, but that their contracts were varied, so that upon being made redundant, they no longer had that pleaded contractual right."**

11. The tribunal then turned to the jurisdiction issue. After citing the part of the text of paragraph 3(c) of the **1994 Order** which refers to a claim which "arises or is outstanding on the termination of the employee's employment", the tribunal said this:

> **"36. I have already found that the claimants' contracts were varied, so that upon being made redundant they were no longer entitled to the benefit of discounted travel. It therefore follows that at the date of termination, no claim arose. Accordingly, I find that the tribunal has no jurisdiction to hear the claim."**

12. The tribunal then dismissed the claims on the basis that there was no jurisdiction to hear them.

13. There are eight numbered grounds of appeal before me. The first five proceed on the basis that the tribunal founded its conclusions on a finding that the terms of the Reciprocal Agreement between Rail Staff Travel Ltd and the respondent were incorporated into the claimants' contracts of employment, in addition to the terms found in the ATOC terms and conditions document (which

was also referred to as the "Colleague and Dependant ATOC Terms and Conditions").

14. In summary, these five grounds assert that the tribunal erred in this regard because:

i) The proposition that the Reciprocal Agreement was incorporated into the claimants' contracts was not raised or treated as relevant in the hearing before the tribunal. So, the tribunal erred by relying upon it in its decision.

ii) The tribunal's reasons in relation to its conclusion that the withdrawal provisions contained in the Reciprocal Agreement were incorporated into the claimants' contracts of employment, were not *Meek* compliant, because the tribunal did not, in particular, set out any reasoned basis for that conclusion at all.

iii) That finding of such incorporation was perverse because there was no evidence that could have properly supported it.

iv) There was a failure by the tribunal to consider whether the provisions of the Reciprocal Agreement relating to withdrawal were apt for incorporation into the claimants' contracts of employment.

v) The relevant provisions did not actually confer a right upon the respondent to vary the provision made for the claimants in this respect.

15. I start my consideration of these five grounds, as a group, by noting that there is no appeal or cross-appeal from the tribunal's finding and conclusion, in particular at [24], that, at least initially, the claimants did have an incorporated contractual right to enjoy the travel privileges, including, in the event of their being made redundant after at least five years' service, to the continuing benefit of those privileges following the termination of employment. The source of that right was clearly found by the tribunal to be clauses 3 and 4 of the ATOC agreement. These were the clauses that the claimants had identified that they were relying upon in their Particulars of Claim; and it is to these provisions that the tribunal was plainly referring in particular at [20] of its reasons.

16. The core of the tribunal's reasoning, at [25] to [28] and further referred to at [29] and [32],

was, in effect, as follows:

a. The ATOC agreement, and those clauses in particular, were incorporated into the claimants' contracts of employment.
b. Incorporation of the ATOC agreement also entailed incorporation of the Reciprocal Agreement.
c. The Reciprocal Agreement contained provisions indicating that the benefits for which it made provision could be withdrawn.
d. The effect of the May 2019 document was to withdraw or curtail this benefit so that it would no longer be available to non-safeguarded staff who thereafter retired or were made redundant.

17. I note in this regard that the tribunal did not indicate which specific provision of the Reciprocal Agreement it had in mind as providing for withdrawal, but that there is a clause in the Reciprocal Agreement headed "Withdrawal of the Facility" which makes provision for the benefit to be withdrawn or curtailed in certain circumstances.

18. It appears to me that the tribunal's implicit reasoning more precisely was not so much that these provisions conferred a right on the respondent to withdraw the benefit *by taking action itself*, but, rather, that the effect of these provisions being incorporated into the claimants' contracts was that the contractual right to the continued provision of the benefits on the original terms, pursuant to the ATOC, was subject to the fact that, through the Reciprocal Agreement, there was a further provision enabling the benefits to be curtailed or withdrawn by the ultimate provider, so that, if it did so, then the respondent would not be in breach of contract in that regard.

19. Doctrinally, it is in principle possible for a contract of employment to provide that the provision of a benefit, which is dependent on the support of a third-party provider for the continuation of that provision on current terms, will be contingent on the benefit itself continuing to be supported by the third-party provider in the same way. The overall effect is that the ongoing

entitlement is only ever to what is currently being supported by the third party provider from time to time.

20. A conceptually analogous argument in a case where the benefit in question was originally supported by the employer having insurance cover to enable it to make the requisite provision was considered in **Amdocs Systems Group Ltd v Langton** EA-2019-001237, 24 August 2021 (EAT); [2022] EWCA Civ 1027 (CA). In particular, in the EAT's decision, from a review of the relevant authorities, the following conclusions were drawn at [68] and [69]:

> **"68. Thirdly, a consistent theme is that, if there is any ambiguity or uncertainty as to whether the employer's obligation to provide benefits is to be limited by reference to the specific terms of the employer's insurance cover, any such ambiguity will be resolved against the employer and in favour of the employee. That is not, I observe, a departure from orthodox contractual principles, but an application of the ancient common law rule, that any ambiguity as to whether a provision applies is to be construed against the party who seeks to rely upon it.**
>
> **69. Next, a reference to the fact that the employer has arranged insurance in respect of the benefit, was not, in these cases, alone sufficient to make good the contention that the employer's commitment was limited by reference to the terms of that policy. To be effective, the limitation of the employer's exposure must be unambiguously and expressly communicated to the employee, so that there can be no doubt about it. That might be done by spelling out unambiguously, in a document provided to the employee, or drawn to their attention, what the particular limitations are, by stating in terms that the employer's obligation will be limited to the amount of payments made by the insurer, or something unambiguous of that sort."**

21. This passage which included these paragraphs was endorsed by the Court of Appeal at [46] and [47] of its decision.

22. In the present case, the tribunal's reasons do not explain why it considered that the Reciprocal Agreement, or its particular provisions concerning withdrawal, formed part of the terms and conditions of the claimants' contracts, whether via the ATOC or by some other route of incorporation. The tribunal simply set out its conclusion to that effect at [25] and then returned to restate it at [28] and [32], but without any further supporting reasoning. Simply setting out the conclusion on such a point is not adequate reasoning and so, on that basis, I uphold ground 2.

23. But was it, in principle, open to the tribunal to find that the withdrawal provisions of the

Reciprocal Agreement were incorporated into the claimants' contracts? There was no dispute that the claimants were not parties to the Reciprocal Agreement as such. The only parties to it were the respondent and Rail Staff Travel Ltd. There was also no suggestion that any other contractual document that formed part of the claimants' contracts referred to the Reciprocal Agreement, and no such finding by the tribunal. While the tribunal found that the *ATOC document* was incorporated into the claimants' contracts of employment, the ATOC document also itself made no reference at all to the Reciprocal Agreement. There was a signature clause at the end of the ATOC document, but this referred to the employee agreeing to the terms and conditions laid out in the Colleague and Dependant ATOC Terms and Conditions, which is simply another name for that same document.

24. It was also confirmed by both counsel for the purposes of today's hearing that it was an agreed fact before the tribunal that the claimants were never given a copy of the Reciprocal Agreement and, indeed, did not know about it until a copy was provided in the course of the tribunal litigation.

25. I note that the tribunal, at [22], did say that the application form for a discount travel card made it clear that the scheme was operated by Rail Staff Travel Ltd. It referred to that again at [25]. But that is not a finding that there was any reference in that document to the Reciprocal Agreement between that company and the respondent, let alone to its terms. The mere finding that the claimants were aware that the provision of this benefit was being operated or made available by that third-party provider would not, as a matter of law, by itself be sufficient to support a finding of incorporation of any part of the terms of that provider's agreement with the respondent (see the discussion in the passage from **Amdocs** to which I have referred).

26. All of that being so, and no other route to incorporation of the provisions of the Reciprocal Agreement having been argued before or found by the tribunal, and applying the guiding principles discussed in **Amdocs**, I do not see how the tribunal could properly, on the evidence before it, have found that the withdrawal provisions of the Reciprocal Agreement were incorporated into the

claimants' contracts of employment. So, I also uphold ground 3.

27. That being so, this plank of the tribunal's reasoning must fall away and could not have been sustained. If the claimants' contracts did not incorporate the withdrawal provisions of the Reciprocal Agreement, as the tribunal, had it applied the law correctly to the facts, would have necessarily concluded, then the respondent cannot have exercised any right to vary the provision of this benefit that the withdrawal provisions in that agreement might otherwise have catered for. Hence, it could not have relied upon the issuing by the Rail Delivery Group, which is synonymous, for these purposes, with Rail Staff Travel Ltd, of a document in May 2019, certainly not when, as the tribunal found, that document was not sent to the claimants.

28. That is sufficient to lead to the conclusion that the appeal in respect of the tribunal's reasoning relying upon the withdrawal provisions of the Reciprocal Agreement must be upheld.

29. But I add that I note, as to ground 1, that, while the grounds of resistance did refer to the scheme having been operated by the Rail Delivery Group and not the respondent, they did not refer as such to the terms of the Reciprocal Agreement. That said, I note that the respondent's skeleton argument before the tribunal did refer to the Reciprocal Agreement and to the May 2019 document, although it did not specifically advance an argument that the withdrawal provisions were incorporated into the claimants' contracts. Rather, the focus of that skeleton argument was on the fact of the May 2019 document having been issued and on the proposition that the terms of the ATOC were not part of the claimants' contracts or, if they were, that they did not confer an *entitlement* to the benefit at all, on the basis that references to eligibility were not to be equated with entitlement. Those are arguments that the respondent squarely lost in the tribunal, as is apparent from the reasoning leading up to [24], and in respect of which, to repeat, there is no appeal or cross-appeal before me.

30. All of that being so, I am not satisfied that the respondent could gainsay ground 1, which is

to the effect that the tribunal relied on a point that was not properly pleaded or argued before it.

31. As I have said, while I upheld grounds 1, 2 and 3, my decision on ground 3 is sufficient to mean that this aspect of the tribunal's reasoning cannot stand and could not have been sustainable.

32. Ground 4 asserts that the withdrawal provisions of the Reciprocal Agreement were not apt for incorporation into the claimants' contracts; and ground 5, that they did not, as such, give the respondent a right to vary unilaterally the provision which it was committed to making for the claimants. There is some force in these grounds, given that the withdrawal provisions of the Reciprocal Agreement cater for the provider, in the shape of Rail Staff Travel Ltd, to be able to withdraw the provision that it is making *to the respondent* in the circumstances there described, rather than saying anything about the respondent's relations with its employees, as such.

33. But, as I have indicated, in reality, it seems to me, the tribunal was relying on the proposition that, by some unarticulated route, there was effectively a provision incorporated into the claimants' contracts to the effect that the respondent's obligation to them was subject to a proviso that it might be unilaterally varied in the event of Rail Staff Travel Ltd exercising the withdrawal clause. But once again the outcome of this appeal does not in the event turn on these particular grounds.

34. Mr Salter sought to persuade me that none of this mattered, as there was an alternative basis or bases on which the tribunal's decision on this point could be read and supported. First, there was a line of argument in his skeleton argument to the effect that references to individuals being "eligible" for the benefit was not the language of entitlement. That argument was, however, run unsuccessfully before the tribunal, which found that the language used in the ATOC, when referring to these travel privileges, *was* the language of entitlement. Effectively, although the case is not cited, the language was found to have satisfied the test discussed in **Keeley v Fosroc International Limited** [2006] IRLR 961 (another authority also discussed in the **Amdocs** case). Once again, this

conclusion was not challenged by any appeal or cross-appeal on the part of the respondent.

35. In his skeleton argument Mr Salter had a further line of argument, which was to the effect that the tribunal's decision could be read as having reached the conclusion that the respondent had the power to vary the provision, without placing itself in breach, by reference to two other particular provisions. The first is a provision which was found in the application form signed by the claimants when they applied for a travel card, which stated as follows:

> **"I hereby apply for leisure travel facilities as above, subject to the conditions of issue and use which can be found at [web address given]"**

36. The second is a provision appearing in a document at pages 13 and 14 of my supplementary bundle, headed: "Summary of Benefits for all Heathrow Express Employees", which begins:

> **"As a valued employee of Heathrow Express, you will enjoy the following benefits. Full details are available in the Company Intranet, 'Hextranet'.**
>
> **This is a list of current benefits. However, it is subject to change at any time."**

37. There is then a list in a table appearing on those two pages, of some 14 different benefits, including discounted leisure train travel, with, for each benefit, a brief summary in a further column of what the highlights of that benefit are.

38. Mr Salter noted, by cross-referencing page numbers given in the tribunal's decision to those of the bundle that was before the tribunal, that the tribunal had found that this two-page benefit summary itself formed part of the ATOC terms and conditions. Hence, he argued, given that the tribunal had referred at various places to that document, as well as to the application form, I could infer that the tribunal considered that this provision, stating in particular that the list of current benefits "is subject to change at any time" meant that the respondent was able unilaterally to vary the position in relation to this benefit without placing itself in breach of contract with the claimants.

39. However, this line of argument faces a series of problems. Firstly, it was not specifically raised in the answer to this appeal. Secondly, and more importantly, I am satisfied that this was

simply not any part of the basis for the employment tribunal's reasoning or decision, which wholly turned on the tribunal's finding that the withdrawal provisions of the Reciprocal Agreement were, via the provisions of the ATOC, or otherwise, incorporated into the claimants' contracts of employment. That might not be entirely clear from reading [25] alone, as the tribunal does not spell out at the beginning that it reads the reference to all of the ATOC's terms and conditions being incorporated as itself a reference to the Reciprocal Agreement. But the second part of that paragraph says that the terms are set out in a document to which the tribunal then refers, which *is* the Reciprocal Agreement, and then refers to the statement in that document that the agreement may be withdrawn.

40. That this is the tribunal's line of reasoning is also clear from the succeeding paragraphs, where it relies upon a document issued by the Rail Delivery Group in May 2019, at [26] and [27], rather than on any document issued by the respondent. It does so notwithstanding that the May 2019 document was not provided to the claimants, but on the basis of its reasoning that this does not matter, because it has already found that the terms of the contract permitted the contract to be varied and that those terms were incorporated into the contracts of employment (see [28]). This must be a reference back to the provisions of the Reciprocal Agreement providing for the possibility of withdrawal, which the tribunal had mentioned at [25].

41. The tribunal then goes on at [32] to refer in its conclusions, drawing the threads together, to the terms and conditions of the scheme, as set out in the ATOC document and the Reciprocal Agreement, having been found to have been incorporated in the claimants' contracts of employment.

42. It is clear, therefore, that it was the withdrawal provisions of the Reciprocal Agreement upon which the tribunal specifically and wholly purported to rely; but, for reasons I have explained, it erred in doing so and could not properly have done so. The fact that the tribunal referred elsewhere to the provisions of the ATOC and the application form does not show otherwise. It referred to

different provisions of those documents, and to make different points, including, in particular, in relation to the ATOC, points that were in favour of the claimants. The point that the tribunal seems to have regarded as in favour of the respondent, arising from the wording of the application form, was that it contained a reference to the provision being operated by Rail Staff Travel Ltd; but, for reasons I have already explained, that is not sufficient to support its decision.

43. A further difficulty with this line of argument is that it does not appear to me to have been run in the tribunal. It was not in the grounds of resistance. It was not specifically advanced in the skeleton argument. Mr Salter was not able to demonstrate to me that it was run in any other way. Further difficulties are that the reference in the application form to a web page does not, by itself, demonstrate what would be found on that web page, nor was Mr Salter in a position to say that the tribunal was given any evidence about that, as such. If, as might be inferred, what was to be found on the web page was simply the ATOC terms, then that would, by itself, take the argument no further.

44. A yet further potential difficulty is that it is not immediately obvious that the two-page summary of benefits is, in fact, part of the ATOC terms and conditions document. I note in this regard that the ATOC terms and conditions document is specifically all about privilege leisure travel arrangements for Heathrow Express employees. Every page of it, up to and including the appendix listing the participating train operating companies, is concerned *solely* with that benefit and that subject. It also has the Heathrow Express logo at the foot of the page. The summary of benefits, by contrast, is a summary of some 14 different benefits available to Heathrow Express employees, of which discounted leisure train travel is just one. It is also not obviously part of the same document in as much as it does *not* have the Heathrow Express logo and appears to be in a different style.

45. When I raised this with counsel, I was told that these two pages did appear in the tribunal's trial bundle in sequence immediately after at least one copy in the bundle of the ATOC terms and

conditions, although Mr Patel told me there were other copies elsewhere in the bundle where these two pages did not follow. Mr Salter, again checking the numbering and page count and cross-referencing, submitted that the tribunal had made a finding of fact that this summary of benefits formed part of the ATOC terms, even if that was an erroneous finding. He referred, in particular, to [24], at the end of which the tribunal referred to pages 133 to 134, which he said was those two pages, albeit that the words that the tribunal put in quotation marks were actually a blend of words found partly on page 133, the first page of the benefits summary, and partly on page 134, the second page.

46. However, this is not a happy foundation for Mr Salter's argument. Although he may say that the EAT cannot go behind the finding of fact that appears to have been made at [24], that this summary formed part of the ATOC agreement, I note that, in any event, the tribunal did not rely upon the particular wording found in this summary upon which Mr Salter relies. Indeed, it relied upon this document in support of its conclusion that, overall, the ATOC agreement conferred an entitlement that was contractually enforceable upon the claimants, which, if the EAT cannot look behind this finding of fact, the respondent cannot itself challenge.

47. For completeness, I should say, however, that it seems to me that the tribunal was, in any event, even if it erroneously relied on these pages at [24], fully entitled to conclude that the language, in particular of clauses 3 and 4, to which it referred at [20], as well as the opening words of the ATOC terms to which it referred at [19], was the language of entitlement. To repeat, that conclusion, as such, has not been challenged by the respondent in the EAT.

48. Finally on this aspect, to repeat, it does not appear to have been argued before the tribunal that this specific wording in the benefit summary meant that the respondent was free to curtail this benefit in the way that it did without placing itself in breach of contract. Had that been argued, and had it been identified, possibly, that the benefit summary was a separate document, further issues would have arisen as to whether the inclusion of that sentence in that document defeated the

claimants' claims and, indeed, further such issues would have arisen, even if the tribunal was correct to find that it formed part of the ATOC document, given the other earlier provisions in the ATOC document on which the claimants and the tribunal itself relied.

49. For all of these reasons, I conclude that Mr Salter's argument, based on an alternative reading of the route that the tribunal itself followed to its outcome, is not sustainable, because the tribunal relied solely on what it found was the incorporation of the withdrawal provisions of the Reciprocal Agreement. Given all of the points I have made – in particular, that reliance on this particular provision in the summary of benefits does not appear to have formed part of the respondent's case before the tribunal – this is not a line of argument that the respondent can now seek to introduce in the EAT or for the first time, nor upon remission to the employment tribunal, if I conclude that the matter must be remitted to it. The time to run this argument was first time around.

50. I turn to grounds 6 and 7. These are included on the basis (although Mr Patel says this is not clear) that [29] to [33] of the tribunal's decision might be argued to provide a different alternative route to its conclusion, being to the effect that the claimants had, through some route, during the course of the redundancy consultation process, implicitly if not explicitly, agreed that they would not continue to receive this benefit, so as to constitute some form of variation of their contracts. Ground 6 contends that if the tribunal did mean to so find, this was an error, because no such argument was raised during the course of the tribunal hearing. Ground 7 contends that this was an error, alternatively or additionally, because there was no evidence sufficient to support such a conclusion.

51. In relation to these grounds, counsel before me, both of whom appeared in the tribunal, agreed a number of points that were distilled in a note before me. These included that the claimants' evidence to the tribunal was that they did not agree to give up the benefit of privileged travel facilities – there is a reference to a paragraph of a witness statement – and that such evidence

was not challenged. In addition, it was not put to the claimant who gave evidence, Mr Cobb, that by accepting the terms of the redundancy package, he agreed to the removal of any right to privileged travel facilities.

52. It is also common ground that neither party made submissions regarding whether, if there was a contractual right to privileged travel facilities, the claimants had, nevertheless, agreed by variation, waiver or otherwise to its removal. It is also agreed that, prior to giving judgment, the judge did not invite comments from either party as to whether there had been some bilateral agreement involving the claimants agreeing to the removal of their right to privileged travel facilities. I note also that those matters are all borne out by the lack of any such issues being explored in the written skeleton arguments that were before the tribunal.

53. There are potentially, perhaps, two strands in the tribunal's reasoning, supporting its conclusion at [33]. The first is that the tribunal may be drawing on the claimants having been told, during the course of the redundancy consultation process, that they would not be eligible to receive the travel discount after their redundancies took effect. The second relates to the tribunal's finding that the letters giving the claimants notice of redundancy included a statement that, apart from payment in lieu of notice, any other benefits would cease on 30 June, and that each claimant "accepted the terms of the redundancy package".

54. I do not read the latter remark as being a reference to the settlement agreements and payments of £750. It does not refer to those matters and, although it appears they were mentioned in evidence, I would not have expected the tribunal's decision on this occasion to make any finding about that, as it was specifically not included in the issues to be determined at this particular preliminary hearing.

55. Having regard to the common ground before me concerning what was and was not argued and/or put to the claimant who gave evidence at the tribunal's hearing, I do not think that the

findings at [30] and [31] could, by themselves, properly support a conclusion that the claimants had, in the course of the redundancy process, agreed to a variation of their contracts, in which they gave up the contractual right to continue to receive these benefits following termination by redundancy and prior to signing a settlement agreement providing for a further payment to them.

56. For all of these reasons, I uphold grounds 6 and 7.

57. Ground 8 postulates that the tribunal erred in finding there was no jurisdiction to hear the claims, because the judge was wrong to find that the claimants' contracts were varied so that they were no longer entitled to the benefits in question. This ground is correct, as the finding that the claimants were not any longer entitled contractually to receive the benefit following termination on grounds of redundancy was specifically the thing relied upon by the tribunal in support of its conclusion that there was no jurisdiction. However, because it reasoned in this way, the tribunal did not consider or determine the question of whether, had it found that the claimants had a contractual right, there would or would not have been jurisdiction, depending on whether they were bringing claims within Regulation 3 *arising or outstanding* on termination of employment.

58. Pausing there, the result of the conclusions that I have reached on these grounds of appeal is, firstly, that the tribunal's finding and conclusion that the claimants had incorporated into their contracts a right, as employees dismissed on grounds of redundancy with five or more years' service, to continue to enjoy this benefit post-dismissal, stands.

59. The only bases identified by the tribunal for its finding that, what might have been that extant right, at some point ceased to be effective, because it had been varied without any breach on the part of the respondent, have been overturned by me. I have concluded that there was no basis on which the tribunal's reasoning in that regard could properly have been sustained. For reasons I have given, it is also not open to the respondent now to open a new flank of argument as to an alternative basis on which the tribunal might have properly reached the same conclusion.

60. The matter must therefore now potentially return to the tribunal to deal solely with two issues. The first is the issue of jurisdiction that was actually raised before it, being whether, correctly analysed, the claimants have brought claims within the scope of Regulation 3, arising or outstanding on the termination of employment. The second is whether their rights to continued enjoyment of this benefit were compromised by settlement agreements in which they each received payments of £750.

61. No one has suggested that the EAT would be in a position to determine the second issue, which plainly it would not, as no findings of fact have been made about that matter by the tribunal at all. Mr Patel, however, submitted that I could determine the issue relating to jurisdiction, on the basis that the necessary facts have been found and that applying the law to those facts could lead to only one answer. That would be that the respondent was, at the point when the dismissals took effect, in either actual or anticipatory breach, because it had made clear that it did not consider that the claimants were any longer entitled to these benefits after their employments ended. So, these were therefore claims arising or outstanding on termination. Mr Salter submitted, however, that that issue is something that I must remit to the employment tribunal as the fact-finding body.

62. As to this, there is *some* material in the tribunal's findings that might be said to be relevant to this issue. In particular, it has made findings at paragraph 30 about what was stated in certain emails that were sent during the redundancy negotiations, in terms of the respondent's position on this subject. There are also some matters in the agreed note before me relating to the state of the evidence before the tribunal, that might be said to be relevant to this issue. However, I am not satisfied that the EAT has before it *all* of the evidence that was presented to the tribunal that might be said to be relevant to this issue. Indeed, in any event, the EAT could only deal with the matter if satisfied, over and above that, that the tribunal had made all the necessary *findings* of fact.

63. I do not have before me a record of all of the witness evidence given on this topic. As to

documents, to take just one example, I see there was a reference in the claimants' skeleton before the tribunal, to an email telling them that they would have to return their travel cards when their employment ended, about which I am not sure that the tribunal has made a specific finding of fact. Further, the findings that it did make, for example, at [30], do not appear to have been made specifically with this issue in mind.

64. I therefore consider that this issue must return to the tribunal so that it can make whatever further findings it considers necessary and relevant, as well, of course, as considering relevant legal argument, in order to reach a conclusion as to the jurisdictional issue relating to whether these are claims within the scope of Regulation 3 *arising or outstanding* on termination of employment, as well as to deal with the issue relating to whether any such claims were compromised by a settlement agreement and payment of the sum of £750 to each claimant pursuant thereto.

65. Having given my principal decision, I have heard further argument from counsel as to what further direction I might give in relation to remission. Both counsel are agreed, as am I, that it would be desirable for the jurisdiction issue that remains outstanding to be considered by Judge Apted, if available, bearing in mind, in particular, that he may consider that he already received last time around all relevant evidence on that subject, although I will not tie his hands as to case management directions. I would accordingly direct that remission of that issue be for rehearing by him, if available.

66. The question of which judge deals with the other issue, which is outstanding for consideration – being the settlement agreement / £750 payment issue – is not within the scope of what I am remitting. It is simply a piece of unfinished business in the tribunal. That said, both counsel have unsurprisingly indicated that they will be inviting the tribunal to list one hearing before one judge to deal with both matters, although plainly it is anticipated that some further case management directions will be needed at least in relation to marshalling of evidence for the purposes of that second issue.