Case Number: 2308754/2007, 2307267/2012, 2309102/2007, 2309184/2007, 2311723/2010, 2313546/2007

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
1. Ms T De Mello	**v**	**British Airways Plc**
2. Mrs O Kerr		
3. Mr A Duffy		
4. Mr E Ardabili		
5. Mr V Teixeira		
6. Ms D O'Dwyer		

Heard at: Watford **On**: 19, 20, 22, 25, 27 February 2019
In chambers: 28 February and 1 March 2019

Before: Employment Judge R Lewis, sitting alone

Appearances
For the Claimants: Mr K McNerney, Counsel
For the Respondent: Ms T Barsam, Counsel

RESERVED JUDGMENT

1. The claimants' claims succeed to the extent set out in the following paragraphs of the Reasons below: 87-88, 125, 131, 135, 140, 146, 154, 162 and 167.

2. All other claims fail and are dismissed.

ORDERS

1. There will be a preliminary hearing by telephone at **10am on Tuesday 23 July 2019** to discuss all case management required to bring this matter to a conclusion. The parties should have dates to avoid for further listing to 21 December 2020.

2. No later than **4pm on Friday 19 July 2019** the parties are to send the tribunal a list of outstanding issues, and proposed directions. These should be agreed so far as possible, but if not fully agreed should clearly indicate the point(s) of disagreement.

REASONS

Glossary

1. The following terms were used at the hearing and the following abbreviations are given in this judgment:

BA	The respondent
BASSA	The claimants' section of Unite the Union
CAWTR	Civil Aviation Working Time Regulations
CFP	Contractual Flying Pay
CSD	Customer Service Director
DOA	Daily Overseas Allowance
EF	Euro Fleet
ERA	Employment Rights Act 1996
ETA	Employment Tribunals Act 1996
IFCE	In Flight Customer Experience
IMF	International Monetary Fund
MBT	Minimum Based Turnaround
MF	Mixed Fleet
NIA	Nighty Incidental Allowance
TAFB	Time Away from base
PVEG	Permanent Variable Earnings Guarantee
VA/VE	Variable Allowance/Variable Earnings
WTR	Working Time Regulations
WWF	World Wide Fleet

The background to this hearing

2. This was the hearing of claims brought for holiday pay. The concise history was given in her opening skeleton by Ms Barsam. I adopt paragraph 2 as follows:

> "The Claimants are members of Cabin Crew engaged on Euro Fleet or World Wide Fleet. Between 3 September 2007 and 10 September 2013, claims were brought by the Unite the Union on behalf of a large number of Cabin Crew, including the claimants. The claims related to 29 different allowances paid to Cabin Crew, which it was alleged should be included in the calculation of holiday pay. At the end of 2013, the claims were settled for most claimants and a new allowance regime was implemented, whereby a number of allowances were consolidated into Contractual Flying Pay. The claimants in the present claim rejected the settlement offer and persisted with their claims for unpaid holiday pay."

3. Until recently, this case proceeded at London South Tribunal, and had been managed over a period of time by Employment Judge Elliott.

4. At a preliminary hearing on 25 June 2015, she directed a listing for five days in January 2016 (85).

5. Shortly afterwards, and on Judge Elliott's instructions, the tribunal sent the parties a schedule, which identified each claim to which each claimant had been a party (91).

6. The hearing came before Judge Elliott on 25 January 2016 (Reserved Judgment 95). It was adjourned due to personal circumstances. Judge Elliott refused the claimants' application to amend claims for the period after 10 September 2013, and that date accordingly operated as the final cut-off date for the issues in this case.

7. At a further preliminary hearing on 2 February 2018 (113) the case was listed for 8 days starting on 19 February 2019. Judge Elliott was informed that there were to be five witnesses in total (in the event there were eight) and in section 2 of her order, she identified six issues (114).

8. I was grateful for the detailed procedural background set out by Judge Elliott (114-116) summarising developments between the hearings of January 2016 and February 2018.

9. The litigation history indicates that matters have been delayed or stayed pending other determinations relating to holiday pay; that so long as the claimants' claims formed part of a Union-supported multiple claim, the claimants were represented through their union by Messrs O H Parsons solicitors; but that since the claimants declined to accept the settlement offer of 2013, they have acted in person, securing the services of Mr McNerney on direct access.

10. I record my gratitude to both Counsel for their professionalism, and for their concise and effective use of time, such that only five of the allocated eight days were required for completion of the public hearing.

Case management at this hearing.

11. The parties supplied bundles totalling about 1,500 pages, and a bundle of authorities of some 400 pages. There were witness statements from all six claimants and on behalf of the respondent from Mr Geoffrey Ayres, currently IFCE Employee Relations Manager, and Mr Ian Brunton, Resource Planning Manager. Mr Ayres' evidence dealt with the allowances in issue in this case, and Mr Brunton's with the respondent's systems for planning and allocation of leave.

12. The claimants were heard first. They adopted their statements and were cross examined. In order of giving evidence, they were Ms Kerr, Ms De Mello, Mr Teixeira, Mr Duffy, Ms O'Dwyer and Mr Ardabili. The first two witnesses were cross examined longest.

13. Both Counsel provided opening and closing submissions in writing. In reserving judgment, the tribunal made provision for a telephone preliminary hearing**,** to enable counsel and the judge to discuss any further case management which might follow from the reserved judgment. The parties agreed that it would be premature to list a remedy hearing.

14. The following case management matters arose at the hearing.

    14.1 Mr McNerney confirmed that the claimants made no application to amend to introduce a claim for contractual holiday pay;

14.2 Attached to the claimants' opening skeleton was a document written by Ms Kerr, in which, in effect, she gave the claimants' explanation of each allowance (1300-1316). That was a helpful document, to which frequent reference was made;

14.3 After reading the witness evidence, I told the parties, and I record, that the task of the tribunal was not to entertain grievances, or to decide if the claimants were fairly paid; but to determine legal claims, and to decide whether their payment met lawful requirements.

14.4 The witness statements of the claimants contained material which was part of the factual background, but not relevant to the issues to be determined. In particular, while I noted their strength of feeling about the 2013 settlement, and the role of BASSA in facilitating settlement, those were not matters before the tribunal, and I make no findings on them. I advised counsel that where the witness statements contained irrelevant material, they should not consider themselves under a professional duty to challenge it in cross examination, and would not be taken to have agreed or conceded an assertion which was not challenged.

14.5 Ms O'Dwyer was permitted to introduce fresh documentation (885A) in the course of evidence. Mr Ayres was permitted to produce a second witness statement, dealing with what the respondent considered to be an allegation which it had not previously had the opportunity to answer.

15. Present in the room at this hearing were eight individuals with some 200 years of service to BA between them, most of them still in its employment. I accept that that indicates a level of dedication and experience which must be respected, but which also carries the risk of an approach to work which owes more to emotion than reason; a readiness to believe what Mr Ayres called workplace "myths and legends" over objective evidence; and difficulty in acknowledging the changes in the corporate climate which impact on the individual employee.

16. A recurrent issue at this hearing related to the evidence which was available of the claimants' working and payment patterns. As the tribunal was potentially required to make a decision about whether up to 29 separate allowances fell into the holiday pay calculation for each of six claimants over a period of six years, the tribunal was bound to have to consider the pattern and extent to which each allowance had been paid to each claimant in the relevant period.

17. It was a striking feature of all the claimants' witness statements that no claimant gave a specific instance or analysis of when he or she had received any one allowance, and instead advanced generalised assertions. Mr Teixeira, for example, repeatedly wrote that an individual item "Is a normal and regular payment and has its own line in my monthly pay slip." Ms De Mello repeatedly used the formula "This [allowance] formed part of my normal and regular pay." Portions of the claimants' witness statements

were cut and paste copies of each other, or of Ms Kerr's explanation document.

18. The respondent had given disclosure of documents which were described in the bundle as "pay slips." They were sections of the bundle of up to 80 pages per claimant (eg Mr Duffy 565-634). They were not itemised pay statements in the sense of the information provided to each claimant by the respondent on a monthly basis in accordance with its ERA obligations. They were computer generated data from the respondent's payroll system giving the internal breakdown of each month's pay. They were set out in the bundle sequentially by month number, and in reverse chronological order. The claimants challenged their accuracy, and asserted that documents entitled "Achieved Allowance Sheet" would have given the entirely accurate information about allowances earned (on a daily basis). I accept that the "pay slips" were accurate so far as they went, and the best evidence before the tribunal. The discussion about the Achieved Allowance Sheets did not assist. I accepted the respondent's evidence that they were not retained following a computer upgrade in 2017, and were not requested in this litigation until late 2018. Even if they had been available, their volume (one sheet per shift per claimant for six years) would have rendered them unusable without significant clarification. I was told that the bundles before me had been available at the original hearing in January 2016.

19. While the tribunal is familiar with the difficulties experienced by claimants who act in person, and makes every reasonable allowance for those difficulties in accordance with the overriding objective, it was striking that the claimants did not appear to have familiarised themselves with the payslips or analysed their contents. Ms Barsam skilfully put to each that selected general assertions in his / her witness statement about receipt of pay were not borne out by the payslips.

20. Even more striking was the absence of any comprehensible analysis which would have enabled each claimant to have given evidence with reference to a breakdown, drawing on the respondent's documentation, showing which allowance he or she had received chronologically. I drew to the attention of the parties that this evidence was lacking. I accept in part Ms Barsam's rejoinder that it was in principle a matter for the claimants to prepare, as the burden of proof rested on them. I accept also that in preparation for this hearing, Mr Ayres and colleagues prepared something similar, which, while not made available to the claimants or tribunal, was plainly the basis of at least some of his evidence, and of some of Ms Barsam's cross examination.

21. It will be seen from the heading of this judgment that the tribunal did not sit on Tuesday 26 February; evidence had finished the day before, and it seemed right that counsel have a full day in which to finalise submissions. Before the start of submissions, on Wednesday 27 February, the parties agreed four schedules of allowances actually paid, set out in chronological format, claimant by claimant. They constituted a handful of pages per claimant, and were in clear, intelligible format. I was told that these items were available through the diligence of Mr Ardabili, who had prepared them.

22. The position at the start of closing submissions therefore was that there was on that morning, for the first time, complete agreement on which allowances had been paid in which month to each of four of the claimants. Counsel expressed confidence that given a little more time, they could reach parallel agreement in relation to Mr Duffy and Ms O'Dwyer. I therefore agreed to their joint proposal as to how to proceed. That was to hear closing submissions that day; that by opening of the tribunal office on Monday 4 March the like schedules, if available, would be sent in relation to the last two claimants (or correspondence sent indicating the extent of agreement); and that counsel thereafter had a further seven days, ie by office opening on Monday 11 March 2019 to add written submissions in relation only to the schedules for Mr Duffy and Ms O'Dwyer.

23. In the event, on the evening of Sunday 3 March, Ms De Mello submitted, by email, the parallel schedules on behalf of Ms O'Dwyer and Mr Duffy, confirming in her email that the figures were agreed by the respondent. There were no further submissions from either party.

24. I record my gratitude to all parties, and notably to Mr Ardabili, for the work done in presenting this information in clear, intelligible form, which reduced several hundred pages of unclear, disputed documents to a handful of agreed pages. I temper my gratitude with concern and surprise that this task was not undertaken at any time since 2013, and most notably in the time available since the adjournment of the merits hearing which had been due to start in January 2016.

Outstanding points

25. While drafting this Judgment, I encountered one point on which it seemed to me fair to allow the parties the opportunity of further submissions. It is set out at paragraphs 87 and 88 below, and relates to the proportion of Meal Allowance to be counted as pay for holiday pay purposes. I have also taken a cautious view of the boundary between this Judgment (on liability), and any further hearing on remedy. My findings on pay reference period are, in each case, stated to be subject to any issue as to limitation and series. Any specific point on limitation or series in any particular case is to be decided in accordance with my general conclusions on those issues.

The issues

26. Judge Elliott defined the issues at the hearing on 2 February 2018 (114) and while I had no objection to those issues being reformulated or reduced, there was no application to amend. I proceeded therefore on the basis that by the time of Judge Elliott's order, the following matters were agreed:

    26.1 That the claimants were Crew Members within the meaning of CAWTR;

    26.2 That the claimants have been paid holiday pay based on basic pay;

    26.3 That (by the time of this hearing) it was agreed that the reference period is the holiday year (commencing 1 April) preceding the calendar year in which the leave in question is taken.

26.4 Where, in the Reasons, I refer to a holiday year, I refer to the reference period year. For that reason, I refer to leave taken between April and September 2013 as the year 2013-2014.

26.5 That (as set out at 90-93, and 335-336) the parties (with the exception of Ms O'Dwyer), have brought a succession of claims of which the earliest was on 3 September 2007; but not in the period 23 May 2008 to 19 February 2009; and for a limited period in relation to Ms Kerr. Ms O'Dwyer's claim is for a limited period, which is agreed to be in time.

26.6 That the respondent concedes that allowances other than five, which it identifies as forms of costs, are in principle capable of being the basis for holiday pay;

26.7 That the task of the tribunal may require it to reach a different conclusion about entitlement to each allowance for each claimant in relation to different periods of time. In other words, as finding that a particular allowance falls within the ambit of holiday pay does not enable the tribunal to find that it is the basis of calculation for an individual claimant, unless that individual claimant meets the appropriate threshold in relation to that specific allowance.

27. I understood that counsel would email the tribunal the final list of issues, incorporating any fine tuning carried out at this hearing, which would then have been appended to this Judgment. In the event, this has not been done.

Legal framework: Time limits

28. The claims are brought under CAWTR as claims for unlawful deductions.

29. The limitation provisions under CAWTR are set out in Regulation 18. That Regulation provides so far as material:

> "An Employment Tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning with the date on which it is alleged the payment .. should have been made; or ..within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

30. ERA s23(2) provides that a Tribunal shall not consider a complaint of unlawful deductions,

> "unless it is presented before the end of the period of three months beginning with … the date of payment of the wages from which the deduction was made..
>
> (3) Where a complaint is brought under this section in respect of (a) a series of deductions or payments.. references.. to the deduction or payment are to the last deduction or payment in the series… "

31. I cannot in CAWTR find a 'series' provision which parallels s23(3).

32. I was referred to the judgment of the EAT in Bear Scotland Limited v Fulton [2015] IRLR 15, from which I quote the headnote:

> "Since the Statute provides that a tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made, Parliament did not intend that jurisdiction could be regained simply because of later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid."

33. At paragraph 79 of the same judgement the EAT concluded that

> "Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both the sufficient factual, and a sufficient temporal, link."

34. The EAT then commented that the "legislative context" is "one in which a period of any more than three months is generally to be regarded as too long a time to wait before making a claim."

35. Mr McNerney submitted that that judgment was wrong and invited me to depart from it. The bundle contained a judgment to that effect of the Vice President of the Northern Ireland Industrial Tribunal in Agnew v PSNI 112/16. The Northern Ireland Tribunal wrote (para 264):

> "The word "series" should be given its ordinary meaning and should be judged on the circumstances of each individual case. The same approach should of course apply where the word "series" is read into the WTR."

36. In paragraph 244 it described the Bear Scotland approach as (in the absence of a statutory definition):

> "A particular and unnaturally restricted interpretation to the word "series" in this context, particularly where such an interpretation would seriously impact on the extent of any remedy available to a claimant."

37. The judgment in Bear Scotland is a judgment of the Employment Appeal Tribunal. The EAT is a superior court of record in Great Britain, ie England and Wales and Scotland (ETA, s20(3)). I understand its jurisdiction not to include Northern Ireland, which I understand to have a separate system for appeal from the decisions of the Industrial Tribunal. I understand therefore

that judgments of the EAT in Great Britain are not formally binding as a matter of law on the first-tier industrial tribunal in Northern Ireland. They are binding on this tribunal, and I do not consider myself at liberty to depart from Bear Scotland. I decline to express a hypothetical view on what I might have concluded, if that option were open to me.

38. The evidence in relation to limitation issues before this tribunal was paper evidence only, namely the tribunal's record of presented claims, and the schedule of claims presented by each claimant (respectively 95 and 335). It was common ground that throughout the period in question the claimants were represented by Messrs O H Parsons, and were claimants in large group multiple claims. There was no evidence of any claim presented before 3 September 2007; no evidence to undermine or contradict the written records; and no evidence from any claimant to suggest that in his or her individual circumstances it was not reasonably practicable to have brought a claim, such that time should be extended in any individual case.

39. My general conclusions on limitation are therefore the following:

    39.1 Any claim brought more than three months after a payment from which it is claimed deduction has been made is out of time;

    39.2 There is no evidence on behalf of any claimant to warrant any extension of time on any basis;

    39.3 It is not open to this tribunal to depart from Bear Scotland, and therefore any claim based on a series of deductions is broken if the deductions are more than three months apart or by any gap of more than three months;

    39.4 This approach applies to each claimant's claim for each allowance separately.

40. It follows from my findings on series and limitation and my acceptance of Bear Scotland, that the period of claim appears on the face of it to run to 2004 as indicated on behalf of the claimants. The schedules produced at the end of the case run, in the case of Ms De Mello, from April 2006, and of Mrs Kerr from April 2010. The others all run from April 2007. I have not heard full submissions on the point, but accepting that no claim was presented before 3 September 2007, the logic of my approach is that the tribunal has in principle jurisdiction to hear claims of deductions made in each of June to August 2007; and, applying Bear Scotland, of any deduction made in at least one of those three months and forming part of a longer series which does not have a break of more than three months, and of which there is evidence, and which is included in the ET1. There is however no evidence other than in Mrs Kerr's case of the pattern of pay in the reference year 2006-2007.

The claimants

41. I heard no criticism of any aspect of the performance or conduct of any claimant. I here need record only the length and pattern of service of each, and the fleet to which each was attached.

    41.1 Mr Ardabili is an employee of BA whose service dates from 2004. In the period with which I was concerned, he worked on EF only until November 2008, and thereafter on WWF only, in both cases full time.

    41.2 Ms De Mello is an employee of BA whose service dates from 1989. In the period with which I was concerned, she worked on EF only, and (apart from maternity leave) was full time.

    41.3 Mr Duffy was an employee of BA from 1990 until 2015. In the period with which I was concerned, he worked on WWF only, and was full time.

    41.4 Mrs Kerr is an employee of BA whose service dates from 1998. In the period with which I was concerned, she worked on WWF only, and was full time.

    41.5 Ms O'Dwyer was an employee of BA from 1999 until 2017. In the period with which I was concerned, she worked on EF only. She was full time until 2007, and thereafter in the relevant period was 75% fractional.

    41.6 Mr Teixeira is an employee of BA whose service dates from 2005. In the period with which I was concerned, he worked on EF only. He was full time until 2010, since when he has worked fractionally.

The annual leave system

42. It was common ground that the organisation of the respondent's rosters is a complex task. Mr Ayres wrote (WS13):

> "Rostering the work of thousands of employees and many hundreds of flights is an extremely complex task, involving different aircraft licences, different aircraft types, over 12,500 crew, over 125 routes."

43. I was told of a large number of factors and variables which must be taken into account in rostering, including (but certainly not limited to or in order of priority); individual membership of a particular fleet; whether the individual works full time or fractional and, if so, which fraction; general contingencies which affect employees, such as sickness; the specific contingencies which affect aviation, such as weather disruption, or events en route or at destinations; the crew member's training and licencing; and adherence to the regulatory frameworks. The respondent's operation operates every day of the year, and Cabin Crew therefore have the potential to work on any day of the week.

44. Witnesses also touched on more human issues, including the need for an overtly fair system; the desirability of rewarding long service, while maintaining even handedness; the human and operational need of flexibility;

and the balance between maintaining an even-handed system, while at the same time avoiding the potential damage of a competitive system. All of that is to be operated within a human framework where Cabin Crew, like the rest of the public, may wish to have home time at weekends, and take holiday with families at the most popular times of the year.

45. I do not underestimate the scale and complexity of the task; or that it is a recurrent issue, which is never solved; or that it is bound to cause disappointment; or its potential for triggering bitter, divisive conflict; and that there is within BA, its unions and long serving employees historic memory of industrial conflicts.

46. Drawing this together, cabin crew such as the claimants have an inherently unstable working pattern, in which there is no set pattern. They work according to rosters, and cannot be guaranteed to work Monday to Friday with a two-day weekend.

47. In that setting, the respondent allocates compulsory off-days per month to EF Crew, which are 9 in February and 10 every other month. They are 119 days a year, the equivalent of Saturdays and Sundays for conventional workers. I accept that the equivalent system for WW Crew is known as MBT, which means Minimum Base Turnaround, and constitutes compulsory non-working days after a long-haul return to base. I accept Mr Brunton's evidence that they would be 120 to 130 days per annum. Annual leave days are in addition to off days and/or MBT days.

48. Mr Brunton described a system of bidding and allocation of annual leave days. Salient points are that the working year is split into two seasons, so as to ensure that crew spread annual leave across the year; and that where an employee has not bid for that season's leave, the respondent may exercise the right (and in practice does so) to allocate annual leave. In lengthy evidence about systems, I noted that Mr Teixeira commented that "BA imposed leave if I'd not taken the minimum".

49. Crew who are familiar with the system (and the claimants all had very long service) are able to arrange annual leave around off days and MBTs, so as to create periods of extended absence. The table in Mr Brunton's witness statement gave four examples for each claimant (except Ms O'Dwyer, for whom it gave five), of periods of annual leave having been increased by double or more. No criticism is made of any party for achieving this, which is seen as perfectly proper.

50. I accept that Mr Brunton's evidence of the outcomes of applying for leave may not capture the burden of the application process, which claimants described as stressful, uncertain and last minute.

51. I am nevertheless confident in finding that no claimant has been restricted or impeded from exercising his or her right to leave, although, as in every workplace, there have no doubt been occasions when for a specific operational reason an individual has been unable to take specific leave on a specific occasion. I find that the system which I have described is accepted

and operated as a combination of good and bad, but overall as part of the reality of the work of the respondent and each claimant.

52. I was referred to a number of documents. The respondent's policy EG401, of August 2000, dealt with annual and statutory leave, and remains in force (123-126). The EF Cabin Crew manual of February 2004 (145) dealt with leave entitlement (177). It set out the outline of the bidding procedure. It is notable that it provides a classification system "to ensure a fair system" for all Cabin Crew, and specifies, "There is no ability to forfeit leave" (177).

53. The World Wide Annual Leave Agreement of November 2006 (273) should be read in full (274-275). Mr McNerney emphasised that it stated: "WT leave entitlement, which for a full-time Crew Member is 28 days in a leave year.."; that a section called Entitlement opened "Based on a seven-day week including days in lieu of statutory holidays.." but a section headed "Legislation" which referred to CAWTR said: "Entitles all Cabin Crew to a minimum of four weeks paid annual leave. By contract type, four weeks annual leave is as follows: 100% contract, WTR leave 28 days." (274). In describing the bidding system, it referred to bidding windows, and stated that when the window closes "the following 28 days will be used by scheduling for WTR leave allocation." The section entitled Summer Leave stated, "Cabin Crew may take up to 16 days of their entitlement in the summer season, but must ensure that WTR leave is discharged"; the same obligation verbatim appeared in the winter leave section.

Designation

54. Two questions arose from this. The first was whether the respondent was entitled to, and did, designate the first tranche of leave taken by each individual in each leave year as statutory leave taken under WTR, or whether the claimants were each entitled to take their first tranche of leave as contractual leave. Ms Barsam drew attention to paragraph 82 of Bear Scotland, in which the EAT rejected the tribunal's view that it was a matter of choice for the claimant.

> "In the absence of detailed contractual provisions the power of an employer to exercise control, which is inherent in every contract of employment, means it is entitled.. to direct when holiday should be taken. It therefore has the power to direct when, within the leave year, [statutory] holiday should be taken."

55. Mr McNerney submitted that there was "no credible way" of assigning or designating a particular day as one or the other, as nobody had been told at a particular time that leave was designated as contractual or statutory. Ms Barsam in reply stressed that the respondent is rightly prescriptive in the grant of holiday rights, and indeed that parts of the claimants' case and grievance has been about the degree of prescription. She submitted that the hierarchy of obligation to which the respondent was subject began with the obligation to grant statutory leave. Perhaps unfairly, I asked counsel in closing whether either had ever in practice encountered a situation where an employer had expressly designated a specific period of leave as statutory or contractual, and neither had (I add that I am in the same position).

56. I respectfully adopt the above reasoning of the EAT. In so doing, I note two further factors in particular. While CAWTR and WTR create rights for workers, they impose obligations on employers. It is for the employer to fulfil its obligation to grant leave by allocating and designating leave as appropriate. Secondly, I take the quotation from the World Wide Agreement as stating at three separate points that WTR leave has priority and, indeed, imposing on crew the obligation to "ensure the WTR leave is discharged." While I accept that I have been shown no precise parallel wording for EF, I do not accept that the respondent discharged the same obligation differently to the two fleets. I conclude therefore that the respondent was entitled to designate the first tranche of leave taken as statutory leave.

Days per week

57. The second question is whether the leave week is 5 days or 7, such that the WTR basic is 28 days pa rather than 20.

58. In opening, Mr McNerney submitted that:

> "To provide compensatory rest for a 7 day work regime where a week is 7 days for which the claimant is required to take annual leave for 7 days. If an employee is at risk of being rostered for a full 7 days then logically the period of rest or annual leave from such a work pattern requires 7 days."

59. That proposition in those terms would apply not just to Cabin Crew but to many public service employees, as well as others in industries such as transport, security, catering and entertainment. Mr McNerney also submitted that the respondent had written in the World Wide Annual Leave Agreement that a four week leave entitlement constituted 28 days. He also relied on an email from Mr Francis, Head of IFCE, undated but evidently written in about 2013, which contained the following (285):

> "**What is holiday pay**?
>
> All cabin crew already receive their basic salary while on up to 36 days of annual leave. However, in a recent Supreme Court judgment it was confirmed that in addition to basic pay, crew should also receive certain elements of their variable earnings but only for the period of statutory leave which is just 28 days holiday per year for EF and WW Cabin Crew."

60. In reply to my question whether the reference to 28 days might refer to the WTR entitlement of 20 days annual leave plus 8 statutory days, Mr McNerney pointed out that CAWTR did not have the benefit of the WTR regulation 13A amendment, and therefore did not of itself encompass the public holiday days, which are included within WTR.

61. Ms Barsam submitted that I should attach relatively little weight to the World Wide Agreement, which deals with contractual leave entitlement, whereas the issue under WTR is of statutory entitlement.

62. In closing, Ms Barsam submitted that in the absence of any definition of 'week' within any Regulations, I should accept that the correct approach is that the respondent applies an averaging system, so that even if a claimant

may work on any day in the week, that does not import an obligation to work seven days in a row (even if that might occasionally happen), and that applying a representative averaging approach, it is clear in practice that leave has been granted and taken on the basis of 20 working days. She pointed out, with reference to the table in Mr Brunton's witness statement referred to above, that this system appeared to work not only generously and beneficially for the claimants, but also ensured that they were able to make best use of their 20 days entitlement. She pointed, by way of illustration, to the period September to December 2009, in which Mr Teixeira had a total of 29 days off, of which only 15 were booked annual leave.

63. I prefer Ms Barsam's submission, because the proposition that entitlement to leave should correspond to the representative average working week seems plain and self-evident. I do not accept the wording of the World Wide Annual Leave Agreement, on any fair and reasonable reading, to convert a system based on averaging into a system based on the inflexibility which seemed to me to underpin Mr McNerney's approach.

64. In my judgment therefore, the working week for CAWTR purposes is 5 days, and the respondent may designate the first annual leave taken as statutory leave.

Allowances: general principles

65. I was grateful to counsel for their meticulousness in presenting summaries of the relevant legal principles, and for a bundle of a large number of authorities. It would not be helpful if I were to try to distil what has been said better and at length by many others. In the survey of authorities to which I was referred I have found most helpful British Airways v Williams (CJEU) [2011] IRLR 948; Williams v British Airways (Supreme Court), 2012 UKSC 43; Lock v British Gas [2014] IRLR 648 and 2016 IRLR 946; and Dudley MBC v Willetts [2017] IRLR 870. The headnote in Dudley (dealing with a local authority employer and therefore an emanation of the state) is a particularly helpful statement of principle, although I note that Ms Barsam submitted that its conclusions on "intrinsic link" are not correct.

66. The question for me is whether, in law, and on what basis, each of the allowances in play in this case (a total of 29 within the respondent's systems, although I am not called upon to make decisions about all of them) are pay for the purposes of CAWTR. I take the following points of general principle: -

    66.1 The right to paid leave is a matter of fundamental importance of EU law;

    66.2 Holiday pay should be calculated in a way to make sure, so far as possible, that the worker is not deterred from exercising a right to paid leave by reason of any financial disadvantage which might be suffered;

    66.3 The level of holiday pay should therefore correspond to normal remuneration;

66.4 What is normal may be decided by taking a representative averaging approach;

66.5 That approach is more likely to include payments which are broadly regular in a temporal sense (Ms Barsam suggested payments every four to five weeks as an instance of regularity);

66.6 It may also include payments which represent a form of pattern and regularity, excluding exceptional contingencies;

66.7 An intrinsic link between payments and performance of the contractual tasks is critical (decisive, in the word of the EAT in Dudley);

66.8 Ms Barsam submits that the EAT is wrong in Dudley to state that intrinsic link is a sufficient criterion, and submits that it is necessary, but it is also to be linked to payment "with sufficient regularity to constitute normal remuneration". That submission is recorded here, but is not for me to decide.

66.9 Certain payments are excluded, such as (quoting the Advocate General in Williams, cited in Dudley): "Components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance";

66.10 The assessment by the tribunal must be carried out on the basis of an average over a representative reference period, agreed in this case to be the period of one year starting 1st April in the year preceding payment.

67. I add the following general findings:

67.1 The burden of proof rests on each claimant individually to show that each allowance is part of his or her normal pay;

67.2 A judgment or concession as to whether an individual allowance is capable in principle of being normal pay does not determine each claimant's claim for that element of pay, at all, or in any stated period;

67.3 The perception of the claimants, no matter how honest, is not a satisfactory criterion: the assessment of what is normal, or regular, is an objective matter for the tribunal.

67.4 Mr McNerney submitted that the claimants' remuneration was a "mosaic" of individual elements, and that the tribunal should consider the allowances cumulatively or compositely. I cannot accept that approach, which logically opens the door for a claimant to state that inclusion of any VA in holiday pay opens the door to inclusion of all VAs. I approach the matter on the basis that each individual VA is a separate item, requiring separate consideration and adjudication.

67.5 It was common ground that in 2013, as part of a settlement of long running disputes with staff unions, the respondent consolidated a number of the VAs with which I was concerned into CFP. Ms Barsam invited me to attach no weight to what she called "an industrial settlement." Mr McNerney submitted that incorporating a particular VA into CFP was a tacit admission that that VA constituted pay.

67.6 I prefer Ms Barsam's approach, and find that the question of whether an individual VA has or has not been consolidated into CFP does not greatly assist me. I accept that in settlement of dispute, the respondent and unions were entitled to cut what deals they thought were right, on the understanding that the deal might well produce some who do better out of it than others, strength of feeling on both sides, and a future pay structure which might leave some worse off than they were before, or worse off than colleagues whom they saw as peers. Likewise, both BA and staff unions were in principle entitled to put their proposals to a ballot and to accept the outcome of the ballot. The claimants were both bound by the ballot, and entitled to exercise their right to continue with these proceedings.

67.7 A similar argument was raised about PVEG, about which I reach the same conclusion. PVEG was a form of interim payment made in the period 2011 to 2013, and abolished when CFP was introduced. PVEG was intended to guarantee staff earnings during a period of organisational change (in this case transition of routes from EF and WWF to Mixed Fleet, to which crews were recruited on terms and conditions less generous than those enjoyed by longer term staff). I accept the summary given by Mr Ayres (WS9):

> "The agreement under which PVEG was introduced was not an acknowledgement that variable pay represented a fixed part of crew members' wages but more as part of an industrial solution to a long-standing dispute."

67.8 Discussion about meal allowances led Ms Barsam to stress, more than once, the importance of the tribunal focussing on intention not effect. While that correctly states the law indicated by the CJEU, I accept that it is also something of an artificial construct to examine the intention of a corporation in introducing an allowance which goes back to the 1960s (if not before). I accept the point of principle, which is to be sure to understand intention and effect separately. In the same context, there was reference to the involvement and view of HMRC, on which Ms Barsam referred me to the judgment of the Supreme Court in Williams, that that was the view of an independent third party considering matters which were not before the tribunal.

67.9 The only submission on proportionality was advanced by Ms Barsam in relation to commission payments. I deal with the point in the specific context of commission.

67.10 There were finally two matters of common sense which were alluded to briefly in evidence. I call the first the question of industrial peace. I accept that some items in BA's terms and conditions are more

generous than those offered by other airlines (or indeed by BA itself to its more recent recruits). I accept that there is a history of dispute between BA and cabin crew. I note that the terms and conditions which preceded 2013 included items which BA management regarded as no longer justified, but which were not worth the risk of industrial conflict which might follow from trying to modify or remove them. I take that choice to be a reasonable exercise of management discretion.

67.11 I call the second the flat rate point. I accept that faced with the choice between paying cabin crew a fixed flat rate sum for a particular item, or verifying claims and receipts (potentially for thousands of items each day), BA management, in the exercise of its discretion, took the reasonable choice of the former. It was reasonable to operate a flat-rate system, which may prove more generous than reimbursement, if the alternative (receipt-based reimbursement) would be disproportionate and burdensome in work, and potentially damaging to goodwill and morale.

Costs not pay

68. Ms Barsam submitted that five of the claimed allowances fell within the exception for intended ancillary costs. They were Daily Overseas Allowance (DOA); Nightly Incidental Allowance (NIA); Telephone Allowance; Ten percent in charge allowance; and Meal Allowance. I deal with the first four relatively briefly. In doing so, I am grateful to Ms Kerr for her "descriptions" document which in many respects clearly set out common ground.

68.1 DOA is a payment for every night spent on duty overseas and therefore away from home. It is paid to all staff at the rate of £10.00 per night. It is not taxed. Mr Ayres added that it has not been consolidated into CFP. It was common ground that it was notional reimbursement for minor sundry items which might have to be paid for away from home; the recurrent examples were a cup of tea or a newspaper.

68.2 NIA is the equivalent of DOA for a working night spent away from home, but in the UK. It is also tax free and has also not been consolidated into CFP. It was common ground that its purpose was likewise notional reimbursement of minor sundries.

68.3 Telephone allowance was paid until July 2011 to members of both fleets. It was slightly over £100.00 per year and was taxed. It was paid to crew who were required to keep in telephone contact with a BA office to find out about assignment of duties, or other work-related matters.

68.4 The In Charge payment was paid where, for operational reasons, EF crew remained at an overseas destination without the Captain who had flown them there. The allowance was payable to the senior member of the cabin crew notionally in charge of his or her

colleagues, and was intended to cover any additional incidental expenses which might be incurred as a result of being in that role. Mr Ayres suggested that those costs might for example include porterage and some tips.

68.5 Ms Kerr wrote that the sum was "10% of all the allowances of that trip"; Mr Ayres wrote that the percentage was "of the amount that would have accrued to the person receiving, ie his or her individual allowances." The difference may be just a matter of drafting, and while I make no specific finding, Mr Ayres' clarification sounds more plausible than Ms Kerr's, which sounds like a windfall.

69. I accept Ms Barsam's submission in relation to all four of these items. Having regard to their designation and purpose, the outline history which I was given of each, and the common factual ground about them, I conclude that they do not represent pay. I find that each was clearly intended exclusively to cover costs incurred, and therefore was not capable of constituting pay for the purposes of holiday pay. I find also that each was in isolation a minor, insignificant element in the pay of each claimant. I therefore need make no further decision about any of them.

Meal allowance

70. The discussion of meal allowances had areas of common ground as well as areas of dispute.

71. An entitlement to meal allowance is triggered when a member of cabin crew is on duty at any mealtime. The trigger is being on duty at the time, not eating the meal. The relevant time may be any of the base time, or the destination time, or the time according to the location of the employee. Ms Kerr submitted that time differences could trigger two allowances for the same meal.

72. The trigger time may occur at a time when the employee is unable to spend money on a meal, eg if on board a flight, or during a turnaround when there is insufficient time to leave the aircraft. The allowance is nevertheless payable.

73. The allowance is payable even though food for crew is always available on board, or if the member of cabin crew has brought their own food on board (as I was told was not unusual in practice).

74. The meal allowance is also payable in respect of meal times during rest at an overseas location. A long-haul flight involves, for example, two nights in a hotel at the destination, and the meal allowances are triggered according to the local time at the crew hotel.

75. The allowances are fixed, flat-rate amounts. They are reassessed each year with reference to worldwide consumer price data from the IMF, and overseas rates are set, not for a country but for a destination, so that different destinations in the same country may have different rates. Meal allowances were frozen between 2008 and 2012. Meal allowances were

not within CFP, and although inclusion within CFP does not seem to me a matter of great importance, exclusion from CFP for the stated reason, that the element is not pay but is subsistence, is a factor for consideration.

76. Meal allowances are set by the respondent for overseas destinations in consultation with the unions, and by reviewing the cost of meals in the hotel used by Cabin Crew when overseas. The formula for calculation is for a generous full meal, described as including, for example, a seven-course dinner. The respondent reviews these rates from time to time to ensure that they maintain their value, as costs may change according to the value of currency, and similar factors. The process is undertaken by consideration of menus, and the same processes are initiated when, for example, the respondent initiates a new long-haul route and selects a crew hotel.

77. The respondent does not, at any time, require an employee to produce a receipt or proof of having spent the allowance on food. It is perfectly open to an employee to be paid the overseas rate for a seven-course dinner, and make other arrangements for his or her meal.

78. HMRC does check crew members' receipts on a random basis, and I understand that Cabin Crew are advised by the respondent to keep receipts for overseas meals. There has been a protracted process by which HMRC reviews payments, and assesses a percentage of them to tax, on the basis that the HMRC assessment is that a particular proportion of the meal allowance is an emolument from employment which is liable to tax. The 2009 HMRC audit set the taxable proportions as 35% for WWF and 46% for EF.

79. Ms Barsam's submission was that the tribunal must attach no weight at all to the effect of meal allowance. In other words, if I find that it contains an element of windfall (which seems inescapable) that should attract far less weight than might appear. She attached particular weight to the language of the CJEU in Williams, quoted by the Supreme Court (paragraph 11 of the latter, incorporating paragraph 25 of the former):

> "The components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the task which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave"

80. It was perhaps with reference to the emphasised words (emphasis added) that Ms Kerr wrote:

> "Meal allowance was historically introduced as a cost-effective way for both the company and the crew to have an increase in pay. There would be savings to both the employee and BA via the tax regime."

81. Mr Ayres gave evidence that the meal allowance arrangement was negotiated with the unions in the 1970s, has not changed, and that reforming it is one of the things that "are best left undone". In his witness

statement he wrote that meal allowance was "introduced to pay for food and drink while staying in hotels down route or away from home."

82. A glance at the agreed schedules shows, not surprisingly, that meal allowance was paid apparently to every claimant for every month within the period of this case. That is hardly surprising: given the length of a working day, it would be inconceivable that any claimant worked a rostered day as crew without triggering at least one meal allowance. Clearly, the allowances meet any test of regularity and pattern. I accept that they are intrinsically linked to performance of duties, because without having eaten the meal, Cabin Crew could not perform their work, or perform it to a satisfactory standard of passenger safety and service.

83. In setting the meal allowances, the respondent, in its own word, has been generous. Faced with a choice between generosity, versus staff working hungry, it has erred on the side of generosity. It cannot be faulted for doing so. It has done so accepting that a receipt based reimbursement scheme would be hugely burdensome to operate, and would generate administrative work and ill will in equal measure. It is in keeping with BA's own rationale and logic that meal allowance has been excluded from CFP, because flying duties, and payment for them, are not affected by the requirement that crew have the opportunity to eat at meal times.

84. I find real difficulty in the quoted language of the CJEU above. Individual intention is difficult enough for a judge to gauge, let alone the intention of a long-established corporation. As Ms Barsam rightly pointed out, none of the claimants is in a position to know what British Airways intended. The intention of meal allowances (whenever they were introduced) may have been one thing in the past, but may have changed or developed. It is, in theory, perfectly possible that meal allowances were introduced with the exclusive intention of reimbursing costs at a generous level, but with the passage of time, retaining them has accrued the additional intention of (as the claimants asserted) topping up basic pay; and (as Mr Ayres hinted) keeping a quiet industrial life.

85. The Supreme Court in Williams went on to deal further with the TAFB element of pilots' pay (emphases added):

> "The claimants submit that the Supreme Court can and should without more conclude that the pilot's remuneration includes 18% of the sums paid by way of TAFB. But the 18% is no more than the percentage which HMRC regards as taxable. The revenue's attitude for tax purposes is presently irrelevant. It amounts at best to a third party's view on an issue to be determined independently by the Employment Tribunal. Even if the Revenue's attitude for tax purposes were relevant, it is not in any event clear on what basis the Revenue arrived at its attitude, or by refence to what consideration.
>
> In contrast, BA relies upon the test stated by the Court of Justice, which excludes from remuneration relevant to the calculation of holiday pay, components of pay "which are intended exclusively to cover costs." BA stresses the words "intended" within such components the Court of Justice expressly included "costs connected with the time that Pilots have to spend away from base". … It must be for the Employment Tribunal to consider and

> determine upon what basis TAFB was agreed and paid during any relevant period." As to the precise test, the concept "intended exclusively to cover costs" requires attention to be focussed on the real basis on which the TAFB payments were made. If they were payments that were made genuinely and exclusively to cover costs, that would, at least prima facie, be the end of the matter. The claimants' case appears to be that, although they were designated as being for the exclusive purpose of covering costs, they were in fact more than some or all Pilots might actually need for, or spend on, costs, and that the revenue has, in effect, seen through the description to a reality which the Supreme Court, or an Employment Tribunal, should also recognise.
>
> As Counsel for BA accepted, there could be no doubt, a point at which it was obvious that payments nominally made to cover costs were not going to be required, in their entirety, to match actual costs. An employer who in such circumstances continued to make such payments in their full amount could then no longer maintain that they were genuinely and exclusively intended to cover costs. But, in using the phrase "intended exclusively to cover costs", it does not appear that the Court of Justice contemplated any detailed evaluation of the precise need for or reasonableness for payments which were so intended. What matters is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. It is on that the Employment Tribunal should, in my opinion, focus. On this basis, I would also remit the issues relating to TAFB to the Employment Tribunal…"

86. Applying that reasoning and approach, I add that it seems to me self-evident that the burden of proving exclusive intent rests on the party who asserts it, which in this case (as probably in every other case) is bound to be the respondent. I find that it has failed to discharge that burden.

87. I conclude therefore that meal allowances in principle are included within the allowances which are to be considered as part of pay for holiday pay purposes.

88. I have not heard submission on the precise question of whether the whole meal allowance is to be taken into account; or, if not, what proportion and how it is to be calculated. I consider that those points must be adjourned to a further hearing. The precise arrangements for managing that hearing (which in my view can in principle be conducted by written submissions) are for further discussion (unless agreed between the parties). I formulate the question as follows, although I do so as an invitation for counsels' comments: "*Given the finding that meal allowance is, in principle, to be counted as pay in the calculation of CAWTR pay, what is the correct approach by which the relevant calculation to be made?"*

Commission

89. The factual basis on which commission arises can be shortly stated. Cabin crew were required to sell Duty Free goods in flight. I was told that the selling task was neither desirable nor well regarded, and often fell upon the most junior member of cabin crew. I was also told that some routes, notably routes to parts of Africa, are accepted to generate higher commission than others. Duty Free sales generate commission payments in a relatively straightforward way: 10% of the takings on each flight were available as commission, to be shared out among all the cabin crew on the flight,

whether or not they have taken part in the selling. My understanding (I may have misunderstood the detail) was therefore that if there were say nine cabin crew on the flight, the commission was divided into ten shares, of which two went to the CSD and the remainder was divided equally among the rest of the cabin crew. That model left the CSD with commission of 2% of takings, and the other members of cabin crew with 1% each.

90. It was common ground that barring some unforeseen contingency, commission was paid and earned on every EF and WWF flight. Commission is paid monthly in arrears and is fully taxable. Commission has not been consolidated into CFP, and continued in the period 2011 to 2013, from which I take it that it was not part of PVEG. Commission payment is a separate item in pay information (Code 419).

91. Mr McNerney's submission was that selling was part of the claimants' role, as accepted by the claimants and not challenged in evidence by the respondent. It was therefore intrinsically linked to performance of tasks. In submission Mr McNerney commented that the respondent has since 2013 agreed with the unions that holiday pay includes payment in respect of commission. I had no clear evidence of such an agreement, and even if I did, I would give it limited weight.

92. Ms Barsam in reply submitted that commission was not directly linked to performance of the claimants' contractual duties. Her opening submission put the point plainly:

> "The payment of commission is not provided for in either the relevant collective agreements nor the claimants' individual contracts of employment. Cabin Crew are engaged to ensure that flights are safe and passengers are comfortable. Sales are entirely ancillary to the duties of the claimants..."

93. She also submitted,

> "There is no realistic prospect that the exclusion of commission from the calculation of holiday pay would deter Cabin Crew from exercising their rights to annual leave."

94. Mr McNerney replied that there is no requirement in law for an intrinsic link between an allowance and performance of the contract. He relied on the discussion and analysis at paragraphs 30 to 44 of Dudley, which, in reply, Ms Barsam submitted were wrong, because inconsistent with the judgments of the CJEU and Supreme Court in Williams.

95. At paragraph 41 of Dudley, the EAT said in discussion about voluntary or compulsory overtime:

> "If there is an intrinsic link between the payment and the performance of tasks required under the contract that is decisive of the requirement that it be included within normal remuneration. It is a decisive criterion but not the only decisive criterion".

Pausing there, I respectfully interpret that as relating to tasks required under the contract. I accept that wholly voluntary overtime (to take a matter not

before this tribunal) is by definition voluntary and not required under a contract. I understand Ms Barsam's submission to be that as the contract makes no mention of Duty Free sales, the same approach applies.

96. The EAT continued in Dudley:

> "The absence of such an intrinsic link does not automatically exclude such a payment from counting. That is supported by the fact that payments that are personal to the individual ... also count for normal remuneration purposes even though they are not necessarily linked to performance of tasks the worker is required to carry out under the contract of employment.."

97. It was perhaps with that restriction in mind that Ms Barsam's submission read:

> "Cabin Crew are engaged to ensure that flights are safe and comfortable."

98. I agree with Ms Barsam that there is no true comparison or assistance to be drawn from the case of Lock. Mr Lock's job title included the word Salesman; and selling was the principal, if not the only, task which he carried out: which no doubt explains why commission generated up to 60% of his income.

99. I agree with Ms Barsam that the fundamental role of an airline and cabin crew is to transport passengers from one place to another, and to do so comfortably and safely. But that bald summary disregards the reality of an industry which is regulated, economy-responsive, high profile and competitive. I accept that it could be argued that the provision of refreshment or Duty Free sales is ancillary to the task of transporting passengers from departure point to destination. I find that taking the service as a whole, it is right to consider what the respondent's acronym calls in-flight customer experience. That experience seems to me to encompass a whole range of factors: width and pitch of seats, in-flight catering and entertainment, Duty Free and the like. It seems to me more realistic to draw all of those potentially ancillary matters together, and to find that in so far as they relate to work done by the claimants, they are intrinsically linked to the performance of their tasks. In principle I consider that commission may count towards holiday pay.

100. I refer to my findings above about the calculation and distribution of commission. I accept that there may have been the rare occasion when commission generated a windfall (although there was no evidence of it ever having done so in practice). I find that for each claimant, commission earnings were a very minor part of the pay package, and certainly not a significant element in pay. I find that the sums involved were such that it is highly unlikely that their exclusion from holiday pay had, or would have had, any deterrent effect in taking annual leave; and there was in any event no evidence to that effect**.** For avoidance of doubt, the same findings apply to Mr Duffy, even though as CSD his commission was more than that of cabin crew.

101. It follows that I conclude that commission earnings are not to be counted as part of pay for holiday pay purposes.

Other allowances

102. I approached the remainder of this judgment on the understanding that every other allowance claimed is agreed by the respondent to be capable of constituting pay, if it is shown to have been paid on a basis such that it constitutes normal remuneration. I therefore proceed to deal with each of the remaining allowances, in alphabetical order, drawing on the agreed schedules showing actual payments made and received.

103. I understand my task to be to find, whether on the basis of the agreed schedules, each claimant separately has discharged the burden of showing temporal normality and regularity of pattern, subject to limitation and 'series'.

104. Given six claimants and eleven allowances, it follows that I might make at least 66 adjudications. I have considered whether to approach this by allowance, by claimant, by fleet (because some allowances were available in EF or WWF but not both); or numerically by pay code. I cannot claim that there is any single right method. My preference has been to consider the allowances alphabetically, and within that heading to consider each claimant alphabetically.

105. The allowances, with their pay codes, are the following:

- Back 2 Back 234
- Base Early 253
- Destination 323
- Excess Time 316
- Extra Time 312
- Long Day 306
- Long Range Diversion 266
- Long Range 334
- Rest Day (No code stated)
- Short Turnaround 319
- Training 301.

106. The agreed schedules contain items entitled Unknown Allowance or Unknown Payment; it was common ground that I am not asked to make any decision about those. The schedules also refer to Employee Reward, which it was also agreed is not part of this determination.

General approach

107. While I think it desirable to set out a general approach, the difficulty I have in doing so is a form of the difficulty identified at this hearing by both representatives. The issues are multifactorial, and the same issue can be approached from a number of perspectives. The language of the authorities is consistent in its use of imprecise language. The point was perhaps well illustrated when Ms Barsam put to Ms De Mello that an allowance paid two or three times a year could not be called usual or regular, to which the witness answered, "It's usual and regular to me". While that exchange in part illustrates the encounter of an objective question with a subjective reply,

it also illustrates the imprecision of the language before me. I am also alive to the scale, variability and complexity of the payment system which I am to consider.

108. I repeat that the burden of proof is on each claimant to prove entitlement to each allowance claimed. If he or she fails to discharge that burden, that part of the claim fails.

109. I repeat that I approach each allowance separately. Likewise, I largely exclude from consideration at this stage how the individual allowance has been dealt with under PVEG and/or CFP.

110. I find that the claimants' witness statements, no matter how honestly and sincerely stated, are of limited evidential value at this stage. The reason is that the claimants repeatedly used a form of words in their witness statements to incorporate a claim to all allowances. They did this without reference to a single year, month, destination, payslip, document in the bundle, or extrinsic event. Their witness statements in their entirety consisted of general assertions. Ms Barsam put to each a sample of questions about a sample of allowances which illustrated the unreliability of the statements. It was not surprising that witnesses were unable to address these questions satisfactorily. It would be absurd if, in tribunal in February 2019, a witness claimed to have detailed recollection of how her payslip, of say February 2010, had been made up. What was striking however was how little preparation each witness appeared to have given to the task of giving evidence, and how little each focussed on the discipline of the issues before this tribunal.

111. While I have commented above on the value of the agreed schedules prepared by Mr Ardabili, they have their limitations. They go no further than demonstrating agreement that a particular allowance was paid at least once in a particular month. They may incorporate any human error that found its way into the pay records, and they do not as schedules distinguish between an allowance earned once in a month and an allowance paid many times in the month. They are nevertheless the best available evidence, and they are agreed.

112. I understand that I must consider regularity of the payment, as a matter of fact and degree. I should consider whether the payment is broadly regular and predictable, as opposed to exceptional (Hein, paragraph 47) and whether the corresponding pay constitutes a significant element of total remuneration.

113. Ms Barsam reminded me that I should consider usual and normal in a temporal sense and that I should consider predictability as a pattern for the individual. Ms Barsam suggested in submission that regular pattern required an occurrence of every four to five weeks, though I am cautious of translating ordinary English words into numbers in accordance with that submission.

114. I must bear in mind that the temporal sense is to be approached through separate reference periods of one year from April onwards. A claimant who,

for example, received a particular allowance every month from November to March may have received that allowance for a minority of the reference period, but still meet the test of normal and regular; a similar point can be made about the period April to September 2013. While I should not aggregate receipts between say February and June, because they fall into separate reference years, it is possible that they represent part of a wider working pattern. I also bear in mind the working patterns of each claimant: a claimant working a fractional 40% may receive an allowance only 2 months out of 12, yet still meet the test of normal and regular. I only had information about the first half of 2013-2014, and I must approach that information with the caution that I must consider whether it is representative of the whole year, bearing in mind, in light of the burden of proof, that I have had no evidence about the rest of the year.

115. Finally, I must not lose sight of the overarching purpose, which is that the individual worker should not be deterred from taking annual leave by exclusion of the individual allowance from holiday pay. There was no specific evidence on that question. I have tried to approach it through common sense.

Back 2 Back

116. Mr Ayres summarised this as "A fixed payment made to each member of cabin crew working on a particular roster which involved two trips to the East Coast of the USA." Mrs Kerr said it was introduced in 1997, and Mr Ayres said it was consolidated into CFP in 2013. As I understood it (and the details may not matter) this was an agreed payment for crew who undertook two successive three-day trips to certain destinations on the East Coast of the USA, with a night in London in between.

117. Mr Ayres wrote that Mr Ardabili "seems to have received this payment in less than half of his time up to November 2008, but slightly more regularly since then." I appreciate that that was written without the schedules which were before me. Mr Ardabili became eligible for this VA when he moved to WWF in November 2008; he received it that month, and again in January and March 2009. I have considered whether that establishes regular pay for the year 2008-2009. I can see that he was not eligible for it for the first 7 months of the pay reference year; but that as soon as he became eligible, he received it every other month. It seems to me that I must look at the pay reference year as a whole, not just at the last 5 months. On that basis, I find the claim not made out for 2008-2009. In the year 2009-2010, Mr Ardabili received 5 payments, with a 3 month gap in the November to January period. in the 3 ½ years from April 2010, Mr Ardabili received this payment, annually, in respect of 6, 7, 8 and 3 months respectively, subject to a 3-month gap in the period July to September 2010.

118. I find that these figures indicate that Mr Ardabili received payments on a normal and regular pattern from the year commencing April 2009 onwards, that the allowance counts towards his pay based on those years, subject to submissions on the effect, if any, of the 3 month interruptions. I reject his claim in respect of 2008-2009, in which, as a whole, he received only 3 payments.

119. Ms De Mello received one payment in 2013 only and advanced no such claims.

120. Mr Duffy's claim was problematical. Mr Ayres wrote that his payments had been "much less regular" than half since 2007-2008. Mr Duffy gave an explanation of how the payments operated in his witness statement, but said nothing about how they were paid to him. Ms Barsam cross examined him on the evidence of the pay slips (not the schedules) which he could not challenge.

121. The schedules show that in the 2 years 2007-2009 Mr Duffy had respectively 4 payments then 3. There were no payments between that of October 2008 and June 2009. In each of the 3 years 2009-2012 he had 5 payments, with gaps in payment of November 2008 to May 2009 inclusive; January 2010 to August 2010 inclusive; and a 3 month gap in 2011-2012. In the year and part year since 2012 he has had respectively 4 payments and 2.

122. The pattern of Mr Duffy's receipts was sporadic and irregular. The pure figure of 5 months out of 12, in isolation, does not assist me to find any discernible pattern other than randomness. I appreciate that there were 2 short periods when he seems to have received these payments almost every month for a few months (June to August 2009 and December 2010 to March 2011). I do not find that this constitutes regularity within a reference period, and his claim fails.

123. Ms Kerr claimed for a shorter period, and in the 3 ½ years since April 2010 her payments per year were 4, 5, 4 and 3. The only period showing anything approaching regularity was that in 2011, when she was paid Back 2 Back in 4 months out of 5 (May to September). I find that the payments to her were neither usual nor regular in any period or reference year. I do not find that the payments in May to September 2011 met the requirement of regularity in the reference period 2011-2012. The claim fails.

124. Ms O'Dwyer's schedule shows the code for Back 2 Back payments but I can find no evidence of any payment at any time.

125. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the reference periods stated, subject to submissions on limitation and series:

    125.1 Mr Ardabili: 2009-2014.

Base Early

126. Base Early payment was described by the claimants as an EF payment of a fixed rate payable to crew who reported early at base. According to Ms Kerr, that meant before 7am. Mr Ayres' witness statement agreed the definition, although he stated that the trigger time was 8am.

127. Mr Ardabili was paid it 8 times in 2007-2008, and after that when he transferred to WWF, only in May 2008 but never again. I find that it was part of his normal regular pay for 2007-2008 only.

128. Ms De Mello received it consistently from April 2006 until March 2013. I note a 3 month gap in July to September 2006 and another after June 2013. Her claim succeeds for the period 2007-2013. She received payments in April and June 2013, on which basis I do not find that it was normal or regular in the year 2013-2014.

129. Ms O'Dwyer's pattern of receipt indicates usual and regular pay from May 2007 until September 2010. The payments after then are intermittent, and I cannot call them usual or regular. At its high point, I note in 2012-2013 payments in May, July, September and January. The claim therefore succeeds in the period up to March 2010. In the year 2010-2011 she received this VA for five months in succession only, May to September inclusive. That poses the difficulty of whether that pattern constitutes normal and regular payment for the year 2010-2011 as a whole. I conclude, with misgivings, that that has not been proved. I cannot find that the half year with the VA is any more representative than the half year without: the situation seems to me distinguishable from the evidence about 2013-2014, on which the tribunal does not have evidence either way about the second half of the reference year.

130. Mr Teixeira's schedule was the only one which, very helpfully, gave running totals per reference year, from which I could readily see that in 78 months in question, he received the payment 75 times. He is not mentioned in Mr Ayres's witness evidence. Mr Teixeira has received these sums almost as frequently as monthly basic pay and his claim succeeds. Indeed, it is almost impossible to understand any basis on which it was resisted.

131. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the reference periods stated, subject to submissions on limitation and series:

131.1	Mr Ardabili:	2007-2008
131.2	Ms De Mello:	2007-2013
131.3	Ms O'Dwyer:	2007-2010
131.4	Mr Teixera:	2007-2014.

Destination payments

132. I was told that for operational reasons certain destinations were regarded by cabin crew as undesirable. Those mentioned at the hearing were Dallas, Miami and Bangalore. The respondent noted that crew attendance for flights rostered to these destinations was affected by high levels of absenteeism and sickness. Destination payment was offered to incentivise attendance on flights rostered to undesirable destinations.

133. I do not accept Ms Barsam's submission that this was not a payment which was intrinsic to performance of the contractual duties. I accept that it was

not made because of any aspect of the task of being a member of cabin crew. But as it was made to ensure attendance at work, so as to carry out contractual duties, it was closely linked with contractual performance; payment such as anti-social hours allowance would be analogous.

134. Mr Ardabili received this VA 7 times in each of the two years 2009-2011, but with a 4 month gap of September to December 2010 inclusive. Other than in those two pay reference years, his payments were infrequent and sporadic. Ms De Mello received it once in the entire period in question. Mr Duffy received in infrequently and sporadically in every year except 2008-2009 and 2009-2010. In the former, he received it 5 times, including August to October inclusive; and in the latter, 6 times, including June to October inclusive. I struggle to find pattern or normality in those findings. They indicate that for some operational reason (possibly related to summer scheduling) Mr Duffy received this payment in two short spells each summer, and that apart from that, it was at best sporadic. It seems a distortion to call that normal and regular across the pay reference year. Not without misgivings, I reject his claims. Mrs Kerr received it intermittently, at most 3 times a year, and her claim fails.

135. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the reference periods stated, subject to submissions on limitation and series:

    135.1 Mr Ardabili: 2009-2011.

Excess Time / Extra Time

136. As I understood it, these were payments made to EF and WWF crew when duty lasted over 12½ hours. There seems to have been some muddle about terminology: in his statement, Mr Ayres distinguished between Excess Time payments, which was a WWF payment, and Excess Time Premium Payment, which was the EF parallel. I noted above that they were separately coded. I accept that the principle was the same, which was that either was payable if duty exceeded 12½ continuous hours. They have been consolidated into CFP. Ms Kerr's designation of them as overtime is perhaps not helpful.

137. The patterns for the claimants, except Ms De Mello, indicate that there were periods when one form of this allowance formed usual and regular pay. Between November 2008 and July 2013 Mr Ardabili was paid it almost in every month in which he worked. Mr Duffy was paid in a similar pattern in the period April 2007 to September 2013. I note for example that from September 2007 until May 2009 inclusive, he received it every month. He seems to have received fewest payments in 2011-2012, when he received 7. In the case of Ms Kerr, I find that she was paid the usual and regular pattern from April 2010 until July 2013.

138. By contrast, Ms O'Dwyer appears to have earned ETP sporadically, such that I find it was not usual nor regular at any point before July 2012, and that after that it was usual and regular until August 2013.

139. Mr Teixeira's schedules enable me to find that for the entire period April 2007 until September 2013 it was both usual and regular except in the reference year 2009-2010, in relation to which year his claim does not succeed. I repeat my earlier comment: it is difficult to discern any basis upon which his claim was resisted.

140. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the reference periods stated subject to submissions on limitation and series:

140.1	Mr Ardabili:	2008-2014
140.2	Mr Duffy:	2007-2014
140.3	Mrs Kerr:	2010-2014
140.4	Ms O'Dwyer:	2012-2014
140.5	Mr Teixera:	2007-2009, 2010-2014.

Long Day

141. The parties agreed that this was an allowance payable to EF Crews in respect of time rostered in excess of 10 hours per duty, and up to 12½ hours (after which ETP was triggered). It has been consolidated into CFP.

142. Mr Ardabili received 8 such payments in 2007-2008 and none thereafter, when he moved to WWF. I find that for the year 2007-2008 only it formed part of his usual and regular pay.

143. Ms De Mello's schedule indicated usual regular payments of LDP, usually of about 8 times a year, from the period April 2006 until June 2013 and her claim succeeds in relation to that period.

144. Ms O'Dwyer received usual and regular payments from April 2007 (with a 3 month gap between December 2008 and February 2009 inclusive) until October 2010, resuming in July 2012. I find that the pattern between July 2012 and September 2013 was one of usual regular payment.

145. Mr Teixeira's meticulousness showed that in the 78 months in question he received LD 75 times. I repeat my earlier finding and comment: that claim succeeds.

146. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the periods stated, subject to submissions on limitation and series:

146.1	Mr Ardabili:	2007-2008
146.2	Ms De Mello:	2006-2014
146.3	Ms O'Dwyer:	2007-2011, 2012-2014
146.4	Mr Teixera:	2007-2014.

Long Range Diversion Payment

147. I understood this payment to be coded as 266, and not to be confused with Long Range Payment, coded as 334. It was described by Ms Kerr as a financially generous payment made where a two-sector long range trip diverted to an unplanned destination. In his witness statement, Mr Duffy explained what the system was. In cross examination, Mr Duffy was asked if these payments were rare, and answered that he could not recall the number, but remembered at least two occasions, a diversion on a flight to Cairo and a flight to Singapore which diverted to Turkmenistan. He said than emergencies were not as unusual as might have been thought. That evidence was given a few days before I was given the agreed schedules.

148. Working from the schedules, I find that Code 266 appears only in Mr Duffy's schedule for 2011-2012, where it is described as "Unknown allowance" and shows one payment in the year. It appears once more with the same designation in Mr Duffy's schedule for the following year, a total therefore of two payments in the 6 ½ years in question. The 266 Code appears, properly designated, in Ms Kerr's schedules, but with no record of any payment at any time. I cannot find the Code or correct title appearing anywhere else, and I dismiss any claim based on the payment. It was hugely exceptional. The agreed evidence shows that there were two payments to one claimant in the entire period of these claims.

Long Range Payment

149. This allowance, Code 334, was available to WWF, and was also known as "Box" payments. The descriptions given by Mr Ayres and Ms Kerr are in substance very similar. I adopt Mr Ayres' pithy summary: "If a sector involved being on duty for 12 hours at night, or 12 .5 hours during the day, each crew member received a premium payment." I was told that these payments first began to be made when BA introduced non-stop flights from London to Singapore, replacing flights which had had stops with crew changes.

150. Mr Ardabili received them in the vast majority of working months from November 2008 onwards. For the avoidance of doubt, I find that he received them albeit for only 5 months in 2008-2009, because he then started on WWF. Thereafter until July 2013 he received them 9 times in 2009-2010, 12 times in the following year and 11 in the year after that; 10 times in 2012-2013. His claim succeeds across the entire period.

151. Ms De Mello started on WWF in May 2013. She received only one payment in the period with which I was concerned. Her claim fails.

152. Mr Duffy's claim succeeds for the entire period of claim. Starting in April 2007, by each refence period, he received payments in the following number of months: 10; 12; 10; 9; 7; 9 and 6. There was a 3 month gap between November 2011 and January 2012 inclusive.

153. In 2010-2011, Ms Kerr received the payment 7 times; 6 times in each of the next two years; and twice in the period of 2013. There have been gaps January to May 2012, and October to December 2012.

154. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the periods stated, subject to submissions on limitation and series:

154.1	Mr Ardabili:	2008-2014
154.2	Mr Duffy:	2007-2014
154.3	Mrs Kerr:	2010-2013.

Rest Day Working

155. This allowance was paid to EF Crew, who voluntarily offered to work on a rostered rest day. I understood it to be offered only when operational contingencies required. I understood also that it was offered without any form of management pressure for acceptance.

156. In those circumstances, I find that it was not intrinsically linked to performance of the employment contract. It was a form of wholly voluntary overtime, and not part of normal pay.

Short Turnaround

157. The summary given by Ms Kerr, compared with that of Mr Ayres, showed almost no factual differences, but underlying differences in interpretation. The allowance was paid where crew had restricted time, and therefore restricted opportunities for freedom of movement, between landing from one flight and taking off on the next. It was an EF payment, and formed part of CFP. I note that Mr Texeira's schedules designated it as code 266, but that the correct designation is 319.

158. Mr Ardabili was paid it 8 times in 2007-2008 and I find that it formed part of his usual regular pay in that period.

159. I find that it formed part of Ms De Mello's usual regular pay in 2007-2008 and thereafter it was at best intermittent, with the next greatest frequency being 5 occasions in 2011-2012 and long periods without any such payment. Her claim can only succeed for 2007-2008.

160. With the exception of the period November 2010 to June 2012 inclusive, I find that it formed part of Ms O'Dwyer's usual regular pay and therefore her claim succeeds in relation to every year except for 2011-2012. In 2010-2011 I find payments made in every month from April to October except May, in other words within the reference period payment for, first for 6 months of the first 7, and then no payments. For the period 2012-2013 there were payments in 7 of the 9 months between July and March. It seems to me that however unusual, those patterns of payment nevertheless constituted usual, regular pay in the reference periods as a whole. Within those years, there was a gap in December 2008 to February 2009.

161. The schedule shows that Mr Teixeira received STP payments in 53 months out of 78. In 2010-2011 he received 7 and 2012-2013 only 6. There was one 3 month gap, which was September to November 2009. While I take each reference period separately, as I am obliged to do, I do not in the 2 least years (2010-2011 and 2012-2013) see reason to depart from the view that this was usual and regular payment. Accordingly, his claim succeeds for the entire period.

162. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the periods stated subject to submissions on limitation and series:

162.1	Mr Ardabili:	2007-2008
162.2	Ms De Mello:	2007-2008
162.3	Ms O'Dwyer:	2007-2011, 2012-2014
162.4	Mr Teixera:	2007-2014.

Training Allowance

163. Training allowance was claimed by Ms De Mello only. The claimants put the point very simply: it is a daily rate payable to flight crew who deliver training, and are rostered to do so as part of their normal duties, to compensate for the loss of variable earnings on the days when they are training, not flying. Ms De Mello's description of it as "skill payment in lieu of meal allowance", captures two elements: reward for a particular skill, and compensation for loss of a potential reduction in earnings. Mr Ayres simply described it as a daily rate payment, reviewed each year. It is not part of CFP.

164. The schedules show that Ms De Mello received this allowance sporadically except in three periods; in the year 2008-2009, it was paid in five months out of the seven between August 2008 and February 2009. In the year starting April 2009, it was paid three times, between April and August. In the year 2012-2013, it was paid five times.

165. In my judgment, it was plainly intrinsically linked to the performance of Ms De Mello's duties as Trainer. I can see no reason to separate that from the duties of her employment as Flight Crew; she trained incoming Flight Crew to reach the level of her skill and competence which she had achieved. I find that it was normal and regular payment in the reference period starting April 2012 and therefore for that year. I make the same finding in relation to the year 2008-2009. I do so on the basis that payments made in both reference years were made in five months out of twelve, which seems to me to achieve a common sense understanding of what was normal and regular in those years. There was no gap of more than three months in either of those years.

166. I add for the avoidance of doubt that although Mr Ayres wrote in his evidence that Mr Duffy claimed training payment, I could find no such claim or record of payment in Mr Duffy's schedule.

167. My conclusion is that this allowance has been shown to be part of pay to be taken into account in the calculation of holiday pay by the following claimants in respect of the periods stated subject to submissions on limitation and series:

    167.1 Ms De Mello: 2008-2009, 2012-2013.

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Employment Judge R Lewis
1st May 2019
Date: ……..
10 May 2019
Sent to the parties on: .....

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For the Tribunal Office