Appeal No. **EAT/0306/05/SM**

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal on
5 and 6 July 2005
Judgment handed down on
21 July 2005

Before
THE HONOURABLE MR JUSTICE BURTON (PRESIDENT)
MR J C SHRIGLEY

MR D WELCH

BRITISH AIRWAYS PLC APPELLANT

MRS JESSICA STARMER RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

Employment Tribunal entitled to find that decision by Respondent not to allow Claimant part−time working at 50% of hours (but only at 75%) was a PCP and that (notwithstanding relatively uninformative statistics) such PCP had a disparate impact within s1(2)(b) SDA and was not justified.

THE HONOURABLE MR JUSTICE BURTON (PRESIDENT)

1. It is important to state from the outset what this appeal, from the decision of the Employment Tribunal at Watford, after a hearing over six days in January and February 2005 (by a judgment sent to the parties on 21 April 2005), is not about. It is not about the validity or legality of the policy, introduced by the Respondent, British Airways plc, on 28 September 2004, and still in force, whereby no one (man or woman) who has not flown a minimum of 2000 flying hours will be transferred to part−time work that will reduce their line flying below 75% of the full−time equivalent ("the 2000−hour threshold"). The Claimant, Mrs Starmer, a qualified commercial pilot, trained "ab initio" by the Respondent, and employed since 22 May 2001 as a first officer, i.e. a co−pilot, applied for 50% of full−time ("50%") in March 2004 and was refused (being granted only 75% of full−time ("75%")), first on 25 March, then on appeal on 15 April and on review in June, and, finally, on 22 July 2004. The refusal of her request was not based upon, nor was by reference to, the (as yet unformulated) 2000−hour threshold (see paragraphs 39, 46 and 83 of the Tribunal's judgment). Hence the 2000−hour threshold is not 'on trial' in this case. The Claimant challenged, successfully before the Employment Tribunal, the decision of the Respondent relating only to the application she made to reduce from full−time to part−time, when the Respondent required that, in order to change to part−time working, she must do 75% (and refused her request to do 50%) of full−time.

2. The Respondent now appeals. The parties below were represented, as to the Claimant, by Mr Michael Ford of Counsel and, as to the Respondent by Mr Nicholas Randall of Counsel. We have had the additional advantage before us of Mr John Cavanagh QC, instructed to lead Mr Ford for the Claimant, and Mr Christopher Jeans QC, leading Mr Randall for the Respondent.

3. The Employment Tribunal found that the Respondent unlawfully discriminated against the Claimant, contrary to ss1(2)(b) and 6(2)(b) of the Sex Discrimination Act 1975 ("the Act"): the other decision of the Tribunal relating to the Flexible Working (Procedural Requirements) Regulations 2002 was and is non−contentious and is not before us. S1(2)(b) reads as follows:

"In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if −

(a) on the grounds of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but −

(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment.

S6(2)(b) simply identifies the discriminatory act in question, namely "subjecting her to any ... detriment"

4. The provision, criterion or practice ("PCP") there referred to replaced, upon the amendment of the Act resulting from the 'Burden of Proof Directive' (Council Directive 97/80/EC), the previous rubric of a "requirement or condition" in s1(1)(b); but, by virtue of the "non−derogation" provision in Article 6 of the Burden of Proof Directive, the definition of a PCP will be at least as wide as to include anything that would previously have qualified as a requirement or condition.

5. The Tribunal found that the decision above referred to, in relation to the Claimant's application for part−time working, namely the condition imposed upon the grant of such permission, constituted a PCP. It was formulated in what was suggested to be two apparently alternative ways by the Claimant, either that (paragraph 3.1 of the Judgment) "in order to continue working for them she would have to work full−time or on a 75% contract" or that (paragraph 3.4 of the judgment) "in order to continue working for them as a member of the Flight Operations Crew she was required to do so under a contract requiring her to work more than 50% hours". The Respondent's case was (page 4 of Mr Randall's closing submissions) "that the Claimant must work to a 75% contract". The Tribunal found (paragraph 57 of the judgment) that:

"although the Respondent required the Claimant to work at 75% of full−time working and wanted and expected the Claimant to revert to full−time at a future date, it did not require her to do so. We find therefore that the first PCP alleged in paragraph 3.1 of the Amended Further and Better Particulars was not applied"

but in the same paragraph that
"the Respondent imposed the alternative PCP claimed, i.e. in order to continue working for the Respondent she was required to do so under a contract requiring her to work more than 50 hours, there being no possibility of working any other variation than 100% [or] 75% of full−time."
6. Both leading counsel before us and this Tribunal have found it difficult to fathom what the difference was between these two alternatives, and why the Tribunal rejected the one and elected for the other. The fact is that, if the Claimant was to be permitted to go part−time (and thus not work 100%), given that she was refused 50% she had to do 75%. There were no other options. Thus the PCP, if it was a PCP, was that, if she was to work part−time (which she did not have to do), then she was required to work 75%: it was a requirement of more than 50%, i.e. of 75% or 100%. The Tribunal addresses this in paragraph 63 of the judgment: "The effect of the PCP is a requirement to work 75% of full−time". This of course was effectively Mr Randall's formulation.
7. The Tribunal found that:
7.1 this PCP was applied to the Claimant, and was, as was not disputed, to her detriment.
7.2 it was discriminatory: it would apply equally to a man but was such that it would be to the detriment of a considerably larger proportion of women than of men.
7.3 the Respondent did not show it to be justifiable irrespective of the sex of the person to whom it is applied.
8. The challenges before us have been as follows:
8.1 Whether there was a PCP at all. Mr Jeans QC's submission was that, contrary to the conclusion of the Tribunal, there was no PCP within the Act applied, in March to July 2004, to the Claimant. There is no doubt that the 2000−hour threshold policy, applied after 28 September 2004, is a PCP, but, as discussed above, that is not and was not in issue before the Tribunal.
This is not an argument that was run by the Respondent below, and it was taken for the first time in the Notice of Appeal and developed by Mr Jeans QC before us. There is a clear Kumchyk−point (by reference to Kumchyk v Derby CC [1978] ICR 116), but, as it is a contention which goes to the root of the jurisdiction (if there is no PCP then there can be no indirect discrimination) and requires no fresh evidence, and to argue it causes the Claimant no prejudice, we permitted it to be argued.
8.2 Whether the Tribunal erred in finding the PCP prima facie discriminatory. Mr Jeans QC challenged the validity or relevance of the statistics referred to by the Tribunal (which of course were very different statistics to those which would be relevant if the 2000− hour threshold were in issue before us), as well as the further matters upon which the Tribunal rely irrespective of those statistics.
8.3 Whether the Tribunal erred in rejecting the Respondent's case of justification. It is important to make clear that the Respondent did not refuse the Claimant's request for 50%, did not apply the PCP, by reference to safety considerations, but only to "resource" considerations. The Respondent sought before the Tribunal to rely, not only on such resource considerations, upon which it did rely at the time, but also on safety considerations, which it did not have in mind at the time. There was and is no issue as a matter of law that justification of an otherwise discriminatory PCP can be put forward by reference to consideration not in mind at the time of application of the PCP (see Schönheit v Stadt Frankfurt am Main [2004] IRLR 983 at paras 86 to 87).
The Tribunal accepted neither the resource justification nor the retrospective safety justification.
The PCP
9. The real reason which Mr Jeans QC submitted there was for the difficulty which the Tribunal appears to have found in formulating the PCP is that there was not really a PCP at all. The Tribunal sets out the background in paragraph 27 and 28 of the judgment. It describes the introduction in November 2000 by the Respondent of a "company wide policy to make part−time opportunities available to accommodate its employees' requirements with particular personal circumstances such as child care. The policy envisaged limited periods of part−time working during pilots' careers with the Respondent, pilots being expected to work full−time for the greater part of that employment. The available options for part−time work were on either a 50% or 75% of their normal full−time requirement. The policy envisaged that in some circumstances operational constraints may mean that part−time rostering was impracticable. The policy provided an inexhaustive list of criteria as follows:
(i) Training capacity on a fleet
(ii) The impending withdrawal of a fleet from service
(iii) Recency difficulties on a fleet that would be made worse through working only part−time."
10. In paragraph 28 of the judgment, the Tribunal records that in April 2003, "in response to the legislative changes providing employees with statutory rights to request flexible working in certain circumstances", a new scheme was introduced, which the Tribunal found to accord with the statutory regime, entitled "Request for Flexible Working Contract Variation".

11. The actual making of the request is recorded in paragraph 29 of the judgment:
"The Claimant made application for a contract variation to reduce her current working pattern from full−time to 50%. Pursuant to that request, the Claimant met with her manager on 16 March 2004. The decision, notified to the Claimant in a letter dated 25 March 2004, was:
'The RTR Board has considered your written request and your comments at the meeting. Having evaluated the possible impacts on you, your colleagues and BA at this time, I have decided that I am not able to grant your request for 50%, but I am able to agree a change for the alternative option of 75% contract starting January 2005.'"
12. The business reasons, as they were described, for the decision, were given on 1 April 2004, as paragraph 30 of the judgment records:
"The business reasons were under the headings of: Burden of Additional Costs; Inability to re−organise work among existing employees, detrimental effect on quality and performance; and inability to recruit extra employees."
13. This was, submits Mr Jeans, simply a one−off decision by the Respondent to refuse permission to work on the terms which the Claimant sought, namely 50%, and to state that the only basis upon which she could go part−time was to work 75%. Such decision, he submits, was not a PCP:
13.1 It was a one−off management decision, not applying generally to others. There was no pool to which it applied, nor anyone by reference to whom the detriment suffered by the Claimant can be compared.
13.2 It was a discretionary decision relating to this particular Claimant. Permission for 50% was given to 2 pilots, both captains, being one man and one woman, who were also part of the Airbus fleet at London Heathrow, and to 21 people, being 10 men (7 captains and 3 first officers) and 11 women (9 captains and 2 first officers) in the entire flight operations crew of the Respondent [see Tables 3 and 5 set out in paragraph 51 of the judgment, and paragraph 61]. In the Respondent's reply to the Claimant's request for written answers relating to the Questionnaire under the Act, served prior to the hearing, it was said that, by reference to the records kept in respect of formal requests for 50% part−time working under the Right to Request policy in the period 1 December 2003 to 30 November 2004, there had been two applications by men, both of which were refused and five by women, one of which was accepted, three rejected and one withdrawn.
13.3 Mr Jeans also relies upon the difficulties which the Employment Tribunal had with the statistics which formed, as is regularly the case in indirect discrimination cases, the major part of the consideration for the Tribunal, presented and trawled over by the parties during the hearing. The ordinary task of a Tribunal in such a case is to compare the proportions of men and women in the 'disadvantaged' group with that in the 'advantaged' group. There is a degree of jurisprudence as to whether it is appropriate to concentrate, or concentrate first, on the one or the other, or on both (see my discussion in Cross v British Airways plc [2005] IRLR 423 at paragraphs 41.2 and 45). If the PCP in issue had been a requirement to comply with the 2000−hour threshold, then the case would have centred upon those who can and cannot comply with that threshold. The requirement here was simply to do 75% if part−time work was to be permitted: hence the Employment Tribunal was looking at different statistics, being those which the parties had provided. They looked at the Heathrow Airbus fleet (paragraphs 61 to 66) and then also at the entirety of the Respondent's flight operations crew (paragraphs 67 to 73). They considered the proportions of men and women who were working 100%, 75% and 50%. But for the nature of the exercise which is being carried out, one might have expected those who were working at 50% (having been permitted to do so) to be in the 'advantaged' group. They are however, in fact, the 'disadvantaged' group (albeit what Mr Cavanagh QC felicitously called the lucky disadvantaged) because they are to be treated as not being able to comply with the 75%. The 'advantaged' group are those working 75% or 100%, who are to be treated as able to comply with the PCP. Such, submits Mr Jeans, is the artificiality of the statistics which the parties and the Tribunal were required to address, which, as he submits, results from the inappropriateness of regarding the decision made by the Respondent as a PCP at all.
14. However, Mr Cavanagh QC points to the judgment of Sedley LJ, with which the rest of the Court of Appeal agreed, in Allonby v Accrington College [2001] ICR 1189 at 1196, at paragraph 12:
"It is for the applicant to identify the requirement or condition which she seeks to impugn. These words are not terms of art: they are overlapping concepts and are not to be narrowly construed: see Clarke v Eley (IMI) Kynoch [1983] ICR 165, 170−1. If the applicant can realistically identify a requirement or condition capable of supporting her case, as Ms Allonby did here to the employment tribunal's satisfaction, it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition."
15. It is the PCP upon which the Claimant relies which must be tested. Was the Employment Tribunal entitled to regard the decision of the Respondent relating to the Applicant, in response to her application for part−time working, as a PCP?

16. Mr Cavanagh QC submits that there is no support in the statutory language for Mr Jeans QC's submission that a one−off discretionary decision cannot be a PCP, that it is inconsistent with the spirit of the legislation, that there is no authority for it, and that not only was it not argued below (the Kumchyk point), but, as can be seen from paragraph 5 above, Mr Randall himself formulated it as a PCP more or less in the terms which were in fact adopted in paragraph 63 of the judgment.

17. We are satisfied that it was a PCP:

17.1 The decision that, if the Claimant was to go part−time it must be at 75% and not 50%, was a requirement or a condition or a provision. If it is a requirement or condition then, by virtue of Article 6 of the Burden of Proof Directive, it must also be a provision (see paragraph 4 above). It may not be a criterion or a practice, but it is quite plain that these three words or alternatives are not cumulative, and it is enough if it is a provision. It need not have been imposed/applied by the Respondent, as its decision was a discretionary one, but it was. The suggestion that a condition or requirement meant an "absolute bar" was "correctly not pursued" before the Employment Appeal Tribunal in Chief Constable of Avon & Somerset Constabulary v Chew EAT/503/00 unreported, per Charles J at paragraph 42. It is plain that a practice or a criterion can allow for exceptions to be made, and it seems to us a fortiori that a provision, which does not carry with it any similar inference of being universally applicable, certainly carries no contrary implication. Any suggestion that a similar concept to the eiusdem generis rule might be applicable so as to seek to construe a provision as being similar to, as opposed to alternative to and different from, criterion or practice, a contention which was in any event not in terms put forward by Mr Jeans QC, is plainly ousted by the need to construe provision by reference to requirement or condition, which carry within them no possible such inference.

17.2 There is, as Mr Cavanagh QC submitted, no authority for the proposition that a PCP cannot be one−off, or that it cannot involve a discretionary decision (indeed the passage in Charles J's judgment referred to above can be said to be authority to the contrary in relation to the latter proposition). Mr Cavanagh QC points to a similar argument put forward by Mr Jeans QC in Allonby, which did not find favour and which, at any rate in that case, was specifically rejected by Ward LJ in paragraphs 82 to 83 at 12D−G, albeit in relation to a submission he was there making in relation to a requirement or condition that was not, on its face, one−off (being a requirement or condition that an employee, in order to acquire continuous employment, had to have been employed effectively full−time):

"82. Mr Jeans submits that the college was not applying to her any requirement or condition but merely implementing a decision about the way in which to run its business. He submits that the indirect discrimination provisions are addressed to cases where, for example, an employer stipulates that certain criteria must be met in order that a person can be appointed to a post, e.g. the erstwhile minimum height required to work in the police force, or a requirement that a person have a degree in a particular subject. He submits the law should not be contorted so that every commercial decision can be described as applying a requirement or condition. The tribunal rejected that submission dealing with the problem of good business reasons under the issue of justifiability. It concluded: "the changes namely the requirement that hourly paid contract workers would in future only be employed through ELS was the application of a requirement or condition."

83. In my judgment, they were fully entitled so to regard it. The reality is that the college told its former employee that it was no longer willing to accept her back as a part−time lecturer unless she came either on a full−time basis or through ELS. Although the imposition of that threshold may well have been the implementation of a commercial decision forced upon it by changes in the law, it none the less was a threshold for her to cross and it was in that sense a requirement or condition which they applied to her when considering upon what terms she would be permitted to resume her teaching. I see no error in their approach and like Sedley LJ and Gage J I reject Mr Jeans's submissions."

17.3 In fact Mr Cavanagh QC draws to our attention cases which support his proposition that there is no such limitation on what an employment tribunal can conclude to be a PCP, where decisions are made which appear clearly to be one−off. In Watches of Switzerland Ltd v Savell, [1983] IRLR 141 an employment tribunal dismissed a claim of direct discrimination by reference to a subjective promotion procedure followed by the respondent. The tribunal appears to have had a similar difficulty in formulating the requirement or condition to that which this Tribunal had (see paragraphs 17 to 20). It was eventually formulated and accepted before the EAT as being (paragraph 17) that "in order to be promoted in a London branch of the employer's organisation, she had to satisfy or comply with a promotion procedure .... which does not provide any or any adequate mechanisms to prevent subconscious bias unrelated to the merits of candidates or prospective candidates for the post of manager". The Appeal Tribunal adopted the words of Browne−Wilkinson P, subsequently approved in Allonby as referred to in paragraph 14 above, as to not giving the words requirement or condition a narrow construction, and indeed stated that (paragraph 23) "the statutory words should be given a liberal interpretation in order to implement the object of the legislation". A

clear case is that of Briggs v North Eastern Education and Library Board [1990] IRLR 181, where the tribunal found a case of indirect discrimination by reference to a requirement that the claimant, an assistant science teacher, should hold badminton practice after school. The Northern Ireland Court of Appeal (per Lord Hutton CJ), applying legislation identical to the Act, upheld that decision (also adopting the dicta of Browne−Wilkinson P). Finally Mr Cavanagh points to British Telecommunications plc v Roberts [1996] ICR 625, where the EAT, while allowing an appeal by the respondent in respect of a finding of direct discrimination, remitted an alternative claim of indirect discrimination back to the tribunal for further consideration where (paragraph 632H per Tucker J) "the condition imposed upon the applicants was that, if they worked full−time, they could work Monday to Friday [but] if they wanted to work part−time then they would have to work on Saturdays and other unsocial hours".

18. In our judgment there is no necessity for the impugned PCP actually to apply, or be applied, to others, as would for example be the case if it were the 2000−hour threshold that was in issue in this case, as it is not. What is required in order to test the question of whether the PCP is discriminatory or not is to extrapolate it to others; i.e. the reference under s1(2)(b) is not simply to a "provision ... which he applies equally to a man" but also to one which he "would apply equally to a man". The creation of a pool constitutes, in our judgment, a similar test to the approach to a comparator in cases of direct discrimination. S5(3) which provides that "a comparison of the cases of persons of different sex ... under s1(1) or (2) ... must be such that the relevant circumstances in the one case are the same, or not materially different in the other" applies to indirect discrimination cases under s1(2)(b) as it does to direct discrimination cases under s1(2)(a). Similarly, in our judgment, whereas the detriment under s1(2)(b)(iii) to be assessed is the claimant's own detriment, the detriment to be considered under s1(2)(b)(i) is and can be that of the hypothetical comparator pool. Of course it may well be that there will be some one−off provisions, such as (to borrow and adapt an analogy from other European jurisprudence) one of specialised knowledge of the Mongolian language, which may fall at the initial hurdle. But that may be rather because it is impossible to show that it is discriminatory rather than that it is not, at least potentially, a PCP.

19. If the particular nature of the PCP creates a difficulty or an anomaly in the creation or collection of relevant statistics (and these were after all provided by the Respondent and at the instance of the Claimant), then that may simply mean that it may be the more difficult to show that the PCP is discriminatory.

20. In our judgment the best way for an employer to avoid the problem which may be caused by a one−off PCP is to establish and operate a non−discriminatory and/or justifiable generally applicable PCP. That is what the Respondent sought to introduce by way of the 2000−hour threshold, 3 months or so after, and, it seems, as a direct result of, the problem caused by and for this Claimant.

Disparate Impact

21. As set out in paragraph 13.3 above, there was considerable discussion and analysis of the statistics in this case. Statistics are always addressed in indirect discrimination cases: so much so that in the most recent analysis by Mummery LJ in Secretary for State of Trade & Industry v Rutherford No2 [2005] ICR 119 at 190 (paragraph 25), when he was addressing the vexed question as to whether the approach is to concentrate on the advantaged or disadvantaged group, his consideration was addressed solely to the question of statistics:

"The primary focus is on the proportions of men and women who can comply with the requirement of the disputed rule. Only if the statistical comparison establishes a considerable disparity of impact, must the Court then consider whether the disparity is objectively justifiable."

22. We agree with Mr Jeans QC that nothing much can be gained from the statistics in this case:

22.1 The group of those working 75% is, as we understand it, to be treated as advantaged. However they plainly include some who are disadvantaged, namely such as the Claimant, who has asked for permission for 50% and has been refused. We have no idea how many of those working 75% are doing so because they either asked for permission and were refused in the period prior to that for which records have been retained, or were discouraged from asking for permission.

22.2 As to the group of 100%, also regarded as advantaged, there may be some amongst them who are, in fact, finding it difficult to comply with full−time working.

22.3 The group of those working 50% are treated as disadvantaged (Mr Cavanagh's lucky disadvantaged). However, it is not clear necessarily that those who are working 50% required to do so for child−care reasons. There may have been those who made requests and were permitted to do such part−time work on other grounds, and who could perfectly well have complied with the condition of 75% if such permission had not been forthcoming.

22.4 There is, in any event, a very small differential, even using those statistics and ignoring the above problems. The Tribunal adopts, in paragraph 62, the formula contained in University of Manchester v Jones [1993] ICR 474:

"Using those same figures, the percentage of men working 75% [or] full−time is 99.816% and the women who work 75% [or] full−time is 96.15%. The difference is 3.66%. Expressed as a proportion of one to the other it is 1:0.97%."

Although of course there are other calculations which the Tribunal adopts, which are less straightforward or simplistic, and may show a different ratio, the proportions referred to in paragraph 62 are similar to those in R v Secretary of State for Employment ex parte Seymour−Smith and Perez (No 2) [2000] IRLR 263 at 269 which would not have been regarded as "a considerably larger proportion of women than of men", but for the additional features which the House of Lords there found.

23. The Tribunal is however allowed to look at such additional features. Lord Hutton CJ in Briggs said as follows at paragraph 33 of his judgment:

"It is unnecessary for us to express a concluded opinion on whether a tribunal, in the absence of agreement by the parties, can make a decision ... by relying on their own knowledge and experience without any evidence being adduced before them on that point. But we are in agreement with the approach taken in the English cases that a tribunal is not debarred from taking account of its own knowledge and experience (see Price v Civil Service Commission [1977] IRLR 291 and Clymo v Wandsworth London Borough Council [1989] IRLR 241 at p 247 para 43 to p248 para 44) and that it is most undesirable that, in all cases of alleged indirect discrimination, elaborate statistical evidence should be required before the case can be found proved: per Browne−Wilkinson J in Perera v Civil Service Commission [1982] IRLR 147 at p151 para 29."

24. Hence the "flexible approach having regard to the circumstances of the given case", following from the judgment of Potter LJ at paragraphs 22 to 24 in London Underground v Edwards (No 2) [1999] ICR 494 at 504 to 505, described and exemplified by Charles J in Chew paragraph 36(9) to (14). It was in this context that Simon Brown LJ in Edwards at 510G said:

"The approach to section 1(1)(b)(i) must, I conclude, be more flexible ... Parliament has not, be it noted, chosen to stipulate, as it could, just what difference in proportions would be sufficient. Once, then, one departs from the pure mechanistic approach contended for by the employer, and has regard to other facts beside merely a comparison between 95% and 100%, the applicant's argument becomes compelling."

25. The Tribunal moved on from statistics in paragraph 74 of its judgment as follows:

"Statistics are important but they are not the sole means of determining whether the PCP is such that it is to the detriment of a considerably large proportion of women than of men. We were referred by the parties to a number of authorities, in particular the guidance in ... Edwards ... in particular the dual purpose of ... s1(2)(b)(i) as the ability of the Tribunal to have regard to matters other than raw statistics; Rutherford ... in particular the judgment of Mummery LJ at paragraph 35 regarding the means ... which tribunals must adopt to assess whether there has been disparate adverse impact in the particular case."

26. We refer first to a passage in paragraph 58 of the judgment, which is, on the face of it, striking, but upon which the Tribunal does not appear to build:

"We bear in mind s5.3 of the Act, the evidence of Mr Warner, which we accept, that if Mr Starmer [the Claimant's husband who was also employed by the Respondent, as a Captain] had applied for the 50% working as a captain, it would have been granted.

It appears to be common ground before us that we should in fact pay no attention to that matter, as it seems did not the Tribunal, as arising in context of a discussion of resources, and of Mr Starmer being a captain and not a co−pilot.

27. The Tribunal however listed a number of matters which it did take into account, which we number below:

27.1 Of those actually working at 50%, there is a higher proportion of women than men in the total workforce of the Respondent. This of course is capable of being two−edged. More women than men have been granted such permission, albeit that the Claimant was unsuccessful. Nevertheless:

"71. Of those flight crew who work at 50% of full−time, 10 out of a total of 152 women do so, i.e. 6.58%, and of the men 11 out of a total of 2,780 do so, i.e. 0.44% a ratio of women to men of 16.45:1.

72. These figures indicate that within the flight crew generally as a proportion of their gender considerably more women than men work either at 75% or 50% full−time.

73. Of the women Flight Crew 134 as against 152 expressed as a percentage work full−time, i.e. 88.16% and of the men 2726 as against 2780 expressed as a percentage i.e. 98.06% work full−time. The difference is 9.89%. Thus for every one man who works full−time 0.89 women do."

27.2 The Tribunal continues in paragraph 74:

"Between April 2003 and June 2004, the split of Right to Request Applications was 80% female and 20% male ... This was the policy under which the Claimant applied. Right to Request Applications can be made by "parents or partners who are living with the parent, who have a child under 6 years old or under 18 years

if the child is disabled" amongst other conditions. The total number of those applications was 424 of which 280 were successful, either immediately or upon appeal. The Right to Request policy ... and those figures apply to applications within the Respondent company and thus include but are not limited to applications from flight crew."

27.3 The next point is in paragraph 75:

"During the period 9 February 2004 to 29 March 2004 there were five applications for part−time working from flight crew within the Heathrow Airbus fleet of which 4 were from women who applied for a contract variation to 50% and one from a male to 75%. As we have found, one of the four women had her application granted and three, including the Claimant, were granted 75%. The man had his application refused. Four requests for contractual variations were for child care reasons."

27.4 The Tribunal then turns to more general considerations. There was the inevitable dispute as to how far general considerations about the role of women, mothers, single parents, child carers etc can be material and/or determinative in relation to such cases; and this is a question which arises, not only at this stage of the argument, but again when it comes to the weighing exercise on justification, although of course at that stage the onus of proof has shifted to the Respondent employer. It is plain that such general argument risks being too simplistic: as appears from paragraph 77 of the judgment, the Respondent drew the Tribunal's attention to paragraph 44.1 of my judgment in Sinclair Roche & Temperley v Heard [2004] IRLR 763 at paragraph 44:

"44.1 It appears to be common ground that the Tribunal was not entitled to conclude that it was "not disputed that by and large women have the greater responsibility for childcare in our society and that as a consequence a considerably larger proportion of women than men are unable to commit themselves to full−time working", certainly if this was intended to be a relevant finding as to the issue with regard to men and women solicitors or men and women working in high−powered and highly paid jobs in the City. There was no addressing by the Tribunal of what was on any basis disputed (paragraph 8.3.2(ii) of the Submissions) namely as to whether a considerably larger or any greater proportion of female than male [solicitor] partners is unable to commit themselves to full time working."

As will be seen, the Tribunal took care to distinguish that position from this case. It is plain that a Tribunal is entitled to take into account, where appropriate, a more general picture than is specifically displayed by statistics put in evidence. Potter LJ in Edwards at 505 para 24 said: "An industrial tribunal does not sit in blinkers. Its members are selected in order to have a degree of knowledge and expertise in the industrial field generally. The high preponderance of single mothers having care of a child is a matter of common knowledge." Mr Cavanagh QC in particular relied upon the judgment of Sedley LJ in Allonby:

"8. The employment tribunal was entitled to have in mind, as a matter of common knowledge in their field, that the substantial imbalance between men and women on hourly−paid part−time contracts with the college in 1996 reflected the national picture in the United Kingdom, where part−time work is overwhelmingly done by women."

The following were the conclusions of the Tribunal:

"76. The Claimant's case was that other pilots had left the Respondent's employment or had difficulty working for them because of childcare commitments. Reference was made by the Claimant's witnesses to the difficulties which certain other named women have in working full−time for the Respondent. Karen Atherton and Helen Osmaston were referred to. Those women were pilots prior to the introduction of the 2000 policy on part−time working. As a consequence of introduction of that policy Ms Atherton had a contractual variation to 50% of full−time. Ms Osmaston subsequently left the Respondent's employment for health reasons. Whether those parties threatened litigation or not is irrelevant to the issues before us ... A pilot Maggie Risley left for child−care reasons. We know no more. Mr Moore gave very generalised evidence that women pilots wanted to work part−time for childcare reasons but that he was only aware of one male pilot, the Claimant's husband who had applied to work part−time for child care reasons. His evidence was based on his general experience. We heard no evidence to the contrary but having regard to his evidence and the results of the Equal Opportunities Commission questionnaire to which we will refer below, we find that to be the case.

77. The Claimant invites the Tribunal to accept that part−time employees are likely to be female because women tend to have primary responsibility for child care. In support of that submission the Claimant produced results to a survey carried out by the Equal Opportunities Commission ... That questionnaire revealed that of women part−time employees 54% worked in that capacity either because: they wanted to spend more time with their family: had domestic commitments which prevented them working full−time; or felt there were insufficient childcare facilities available. More than 4/5ths of part−time employees are women. 98% of part−time workers who cited family or domestic reasons for working part−time were women. We find that survey unremarkable and accept that women in our society generally have the day−to−day primary responsibility for child care. In support of that view we note that in this case the Claimant referred to

her husband being able to work 50% yet he had not applied to do so. We also find that unremarkable. We were referred by the Respondent to Sinclair Roche ... at paragraph 44.1. The Claimant as a full−time employee received a basic salary of £38,155 and from the commencement of her 75% of full−time working on 1 November a salary of £28,606.25. In this case the Claimant had the primary care role for the family's child. We do not find that this salary was such as to make her situation exceptional ...
80. We considered the facts found. Considering the statistics on their own shows that a larger proportion of women than men within the pool work part−time, that the disparity in the proportions increases the further one journeys from 100% to 50% of full−time. Most applications for part−time work within the Respondent's workforce are from women, which reflects the EOC statistics and the other facts found. Applications by women pilots are generally for childcare reasons, women generally having the primary childcare responsibility. For these reasons we consider that the figures show that the PCPs are to [the] detriment of a considerably larger proportion of women than of men."
28. We have already indicated our agreement with Mr Jeans QC that the detailed consideration of statistics in this case is of no great value. Nevertheless, there are some simple statistics upon which the Tribunal did, and was entitled to, place reliance, such as those in paragraphs 71 to 73 of its judgment cited in paragraph 27.1 above and summarised in paragraph 80 of the judgment. The Tribunal does not in terms say that it finds the rest of the statistics unhelpful. If there is any implication from the words with which it begins its consideration of what one might call non−statistical matters at the outset of paragraph 74 of its judgment, it is that it places some reliance upon the statistics: "statistics are important but are not the sole means of determining whether the PCP is such that it is to the detriment of the considerably larger proportion of women than of men".
29. We are satisfied both that there was evidence, over and above the limited statistics, upon which the Tribunal was entitled to and did reach its conclusion in paragraph 80 as to disparity, and that, insofar as it may have relied upon statistics more than we would have done, such reliance in no way flaws its conclusion, which remains soundly based on the matters we have set out in paragraph 27 above.
30. The effective determination of this Tribunal was that, taking into account all the evidence, the provision applied to this Claimant, requiring her to work 75% if she wished to do part−time working, was one which "would be to the detriment of a considerably larger proportion of women than of men". This was a conclusion to which it was entitled, on the evidence before it, to come. As we have emphasised above, this conclusion relates only to the application of this one−off provision to this Claimant. It would in no way bear upon any issue as to the validity of the 2000−hour threshold, or, indeed, any other across−the−board policy which the Respondent might have.
Justification
31. We turn to justification, upon which the onus rests with the Respondent. There was understandable concern by the Respondent at its being called upon to satisfy this onus, because it has, justly, been proud of the way in which it has, seemingly, set out determinedly to increase the number of women pilots (and more so it seems than its competitors), and also of its being early in the field of offering part−time and flexible working. Nevertheless, it must justify the PCP in question in this case in relation to this Claimant.
32. Justification involves a weighing exercise, in which the detriment to the Claimant and, in this case, the hypothetical detriment to others, is put on the scales. Mr Cavanagh QC accepts that, even though it is a one−off PCP, the Respondent is entitled to rely upon the knock−on effects, i.e. that the financial and business consequences are not limited to those caused by simply not applying the provision to the Claimant, but embrace the same widespread institutional consequences as if a generalised PCP were being addressed. Mr Jeans QC complains of the brevity with which the Tribunal dealt with the issue of hypothetical detriment (paragraph 82 of the judgment), but we are satisfied that the nature of such detriment is clear from the Tribunal's conclusions on disparity. However Mr Jeans does not take issue with the legal test which the Tribunal stated it was applying to the issue of justification:
"81. We considered whether the Respondent had justified the PCP irrespective of the Claimant's sex. From the authorities and, in particular, Allonby at paragraphs 20 to 30, we recognise that we must apply an objective test to the issue of whether the Respondent's actions were justified, but the reasons must not be tainted with sex, whether the Respondent's objectives were legitimate, whether the means chosen for achieving those objectives are appropriate to achieve them and are reasonably necessary for that end. This involves a consideration of the disparate impact on women including the Claimant and whether the reasons, if established, outweigh the seriousness of the disparate impact. The more serious the impact the more cogent must be the [justification]. We had regard in particular to the judgment in Gerster v Freistaat Bayern [1997] IRLR 699 and the concerns expressed in Nimz v Freie und Hansestadt Hamburg [1991] IRLR 222 regarding the need for objective criteria when considering length of service and the acquisition of a certain level of knowledge. We consider that those concerns are equally relevant in respect of the attainment and retention of skills or of ability."

33. The test is thus objective. The decision of the Respondent and its business reasons will be respected, but they must not be uncritically accepted (see Barry v Midland Bank plc [1999] IRLR 582 at 587, Allonby at paragraphs 27 to 29, Cadman v Health & Safety Executive [2004] IRLR 971 at para 31 and, most recently, Hardys & Hansons plc v Lax [2005] EWCA Civ 846 per Pill LJ at paras 19 to 34, Thomas LJ at 54 to 55 and Gage LJ at 60).

34. Although, as Pill LJ makes clear in Lax at para 34, "the power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate court to scrutinise carefully the manner in which its decision has been reached", nevertheless the test for interference by an appellate court will still be one of perversity. In Allonby the Court of Appeal interfered on the grounds that the tribunal had failed to carry out any critical evaluation of the justification put forward by the employer, after concluding per Gage J at para 70, that: "for my part I accept the submission that the tribunal's decision should not be approached with an over−fastidious eye, but that does not mean that clear errors can be ignored and the failure to demonstrate a correct approach to the legal principles involved glossed over." In this case, we are asked to interfere on the basis that the Tribunal carried out too critical an evaluation. Mr Jeans QC asks a number of rhetorical questions. If the resources argument was not sufficient in this case, when will it ever be sufficient? Although the Tribunal recorded properly in paragraph 11 that "it is not the Tribunal's function to establish policies either for the Claimant's Trade Union or the Respondent. We do not do so", what alternative course is it suggested that the Respondent should have taken than that which it did? At the extremes there is, on the one hand, open to the Claimant the argument that any restriction on part−time working is bound to impact on those with child−care responsibility. On the other hand, it is pointed out that the Flexible Working (Procedural Requirements) Regulations are intended to be facilitative and not mandatory: they impose no obligation on an employer to allow whatever part−time working is requested.

35. The Tribunal records first the resource considerations upon which the Respondent relied in rejecting the Claimant's request:

"34.1 The first headed "burden of additional costs", was in two parts. The first part being the additional training costs of employing more than one pilot to carry out a full time role, the training costs for each pilot being the same, the second part being the detrimental impact on the Respondent's reserves. Full−time pilots provide reserve cover for such day to day operational eventualities as sickness, lateness, or annual leave, part−time pilots do not. It was not disputed that as the Respondent offered the Claimant 75% [of full−time] she would be out of the pool of pilots available to provide reserve cover. The Respondent's position was however that the removal of a full time pilot from the pool of available cover inevitably increased the frequency with which those remaining within that pool would be called upon, the cover had to be allocated in periods of time determined by flights and could not be averaged out on a minute by minute basis as the Claimant referred to in evidence. We agree with the Respondent's position.

34.2 The costs incurred should the Claimant's application be granted were stated by the Respondent to be: £5000 for recruitment of additional pilots; £40,000 for the conversion course; recruitment training of £5000; annual costs of lost time during recurrent training for a second pilot £2000; annual costs of additional uniforms manuals etc £1000. The Respondent had pilot resource difficulties.

34.3 Although doubt was expressed by the Claimant regarding the sums for increased costs and we note the round nature of the figures, in the absence of any other evidence we accept them as broadly accurate. Having agreed the Claimant working 75% of full time however there would be a need for a further co pilot and thus these figures may be reduced depending on the number of applications for part−time working agreed and the effect of that on recruitment. On a simple basis, however, once there was a need for a full−time pilot and the Claimant's application for less than that has been agreed, which it [was], there is a need by the Respondent to incur those costs or a large proportion of them as a consequence.

34.4 Co−pilots were flying at or near the maximum of the agreed capped figures. Requests for contract variations were dealt with on a fleet by fleet and status by status basis. The Respondent's need for flying capacity was increasing due to pilots retiring, pilots moving away from the fleet (the Respondent has a practice of allowing, so far as possible, pilots to transfer between its fleet), and by the acquisition of new aircraft during late 2004 and late 2005, those aircraft being acquired pursuant to contractual options entered into some years before but exercised comparatively recently.

36. The Tribunal addressed the other considerations in the following paragraphs:

"35. The second head, "inability to re−organise work among other existing employees etc", related to the Respondent's employment of sufficient staff to meet its needs. The Respondent's position was that it did not have spare staff, that while it wished to help those flight crew who so wished move to part−time paid working it could not meet all requests and that if there was reduction of staff numbers there could be a consequential detrimental impact upon customer service caused by the period it would take to begin a

recruitment exercise to the time that new pilots could begin line flying. In additional there would be a time lag between recruitment and the appointment of a full−time worker.
36. The third head, "inability to recruit extra employees", referred to the Respondent's then freeze on external recruitment, which had been in place for some time together with the fact that the Respondent was acquiring new aircraft with the consequence that all its training resources were occupied until either October or November 2004.
37. In considering the Claimant's application for 50% working on behalf of the Respondent, Mr Warner was of the view that had the resources been available there was no reason why 50% part−time should not be granted. Mr Warner considered the application on the basis of a reduction to 75% of full−time. He did not consider the Claimant's experience in relation to working 50% as this was not a possibility for budgetary reasons. In considering the application Mr Warner had regard to the fact that a number of requests by other pilots on the Respondent's Airbus fleet had previously been granted, the effect of which would be that some pilots would begin work on a part time basis later in 2004. Further, he did not wish to grant all applications for part time work on a 'first come first served' basis wanting to retain the ability to grant some part time work throughout the year. As the Respondent's (pilot resource) budget for first officers did not allow for 50% working, safety was never considered as an issue.
38. At about the same time as the Claimant's application was being considered (9 February to 29 March 2004) two other applications made by first officers were granted for contractual variations both from full time, to 75% effective from January 2005, as opposed to the 50% requested in each case. In respect of one of those consents (not the Claimant), there was a requirement for the pilot to consolidate on a full−time basis for 6wo months of longer at the airbus fleet manager's discretion before going part−time the requirement being for competency reasons (based on lack of experience on the type of aircraft and her total flight time). An application from a woman pilot to work at 50% of full time was granted, effective from 1 May 2004. The Respondent's budget allocation for 2004/4 [sic] for the Airbus fleet at Heathrow made (limited) provision to accommodate applications from flight crew to work on a part−time basis.
39. The Respondent has been recruiting increasing numbers of women pilots for some years making particular efforts to do so. It had the policies to which we have referred in respect [of] part−time working. Captain Warner is an experienced pilot and manager. Mr Douglas's view was that if there had been a policy on whether it was safe for a pilot at the Claimant's stage of her career to fly before being employed on a part−time basis, safety considerations would have been flagged up. There was no such policy however. We are satisfied that those charged by the Respondent at the time of consideration and ultimately refusal of the Claimant's application for part−time work at 50% as requested did not have any concerns regarding her suitability to work competently as a First Officer on a 50% basis and that the reasons for refusal of the application did not concern safety in any way. The reason was resource as stated in reasons for refusal, and principally, people resource.
37. The Tribunal gives its conclusions in relation to the resource considerations as follows:
"85. The reasons put forward by the Respondent relate to resource including economic or safety interests. We consider all to be legitimate. There was no dispute between the parties that the costs reasons put forward could be considered as part of the whole."
38. The quarterly results are then set out. These show substantial losses in the latter half of 2001, with only a very slow recovery, although in the relevant quarter in which the refusal of the Claimant's application was made, the Respondent was in the black.
39. The Tribunal continues:
"87. Whatever the size of the Respondent, the costs involved in training new pilots are appreciable, whether the whole or a proportion of the costs referred to in those reasons would be incurred. The costs must be considered however in the context of the Respondent's business. We were given no other figures to those to which we have referred. While the reason relates to a legitimate objective in the absence of other information we do not consider the increased costs incurred by the Respondent to make up the 25% (between 75% and 50% of full time) such as are reasonably necessary or to justify the PCP. We arrive at that finding recognising that the Respondent will have necessarily to incur extra costs should it be necessary to recruit and or train a pilot to fill the 25% of full time that it has agreed the Claimant need not work.
88. There will be an impact on reserve. The approval of 75% working for the Claimant removes her from the pool of pilots able to work in the capacity. The result is that it makes no difference to the number of pilots within the reserve whether the Claimant or the pilots to whom the PCP applied work 50% or 75%. We heard no evidence ... therefore we do not make any findings on the cumulative impact of such approvals.
89. The number of flying hours being flown by flight crew was over or at capacity. The Respondent had however had a number of retirements and movement of pilots off the fleet. The Respondent has a practice of allowing pilots to transfer to other fleets when possible. Further, the Respondent had been increasing the

number of aircraft within the fleet but had maintained a self imposed recruitment freeze (we do not doubt that the recruitment freeze when imposed was other than for proper business reasons). The re−allocation of the work that the Claimant would not be performing if her hours were reduced by 25% could not be averaged out among the other flight crew, first officers or otherwise, on a minute by minute basis but would have to be allocated in respect of whole flights or numbers of flights. The Respondent had been aware of the new aircraft which it had ordered and maintained a recruitment freeze. We consider this to be a self imposed constraint. No details were provided in respect of retirements or movements of pilots off the airbus fleet. On that basis we take it that the retirement (or at least the majority of them) could be foreseen by the Respondent. In respect of the movement of pilots off the fleet we have no reason to find other than that was a matter within the Respondent's control. We therefore find that the reasons put forward by the Respondent in respect of its inability to re−organise work among other existing employees or inability to recruit extra employees while relating to legitimate objectives are not such as are reasonably necessary or justify the PCP. Insofar as pilots were flying the maximum agreed flying hours, this was a voluntary agreement between the Respondent and the relevant trade union and no more. On occasions, pilots flew in excess of these agreed hours. Insofar as the Respondent could deal with this by means of recruitment we have dealt with this above. We do not accept on the facts found that had the Respondent granted 50% of full time working to the Claimant there would have been a detrimental impact on customer service or performance. We do not consider that any impact [on] customer service [or] performance justifies the PCP."

40. So far as the last paragraph is concerned, the Respondent complains of the fact that the Tribunal apparently pays little attention to the existence of the "recruitment freeze" because this was a "self−imposed constraint", and yet it has already concluded that it was imposed "for proper business reasons". Equally the Respondent criticises the Tribunal for referring to the "maximum agreed flying hours" as resulting from a "voluntary agreement between the Respondent and the relevant trade union and no more", as if a collective agreement could simply be disregarded.

41. As can be seen, the Tribunal considered the resource considerations separately as a justification, although it then returned, after consideration of the safety questions in paragraph 91, to look at "all the reasons put forward together". We have carefully considered Mr Jeans' arguments. The Tribunal was weighing up all the justifications put forward by the Respondent, as against the particular PCP applied to this Claimant, and it was not persuaded that the Respondent had satisfied the onus, leaving aside the question of safety. We do not believe that this Tribunal was underestimating the requirements of the Respondent, both to impose a recruitment freeze for proper business reasons and to comply with its collective agreement with the unions, but we see no basis upon which we can conclude that, applying as it did the correct legal test, this Tribunal was acting perversely in reaching the conclusion it did, or was under any such obligation as Mr Jeans QC submits to suggest alternative methods by which the Respondent's aims could have been achieved, which would have avoided the detriment to the Claimant. The Appeal Tribunal has the duty, which Pill LJ referred to in Lax, carefully to scrutinise the manner in which the employment tribunal reached its decision. We can find no flaw in this regard so far as concerns its approach to the non−safety considerations.

Safety

42. The Tribunal understandably considered the question of safety separately, because the Respondent, as set out above, did not take safety into account when it imposed the PCP and refused the Claimant's request for 50%, as was made clear by the evidence before the Tribunal from Mr Warner and Mr Glover for the Respondent and, as set out in paragraphs 1 and 8.3 above. Although there was an issue raised by the Claimant before the Tribunal, the Tribunal had no difficulty in resolving it in favour of the Respondent by reference to Schönheit and Cadman:

"84. ... we are satisfied that, to quote the headnote in Cadman, "there is no rule of law that justification must have consciously and contemporaneously featured in the decision−making process of the employer"."

43. Safety considerations can, and therefore must, be considered as part of the Respondent's justification; and of course, as is done by the Tribunal in the judgment at paragraphs 90 and 91, they must be taken together with all the other justifications to see whether, in the totality, the Respondent has satisfied the onus, even if it would not have satisfied the onus on the resource considerations alone. However:

43.1 Whereas respect is obliged to be given to a business decision taken by the Respondent at the time, in the course of the critical evaluation to be carried out by the Tribunal, that would not apply where, as here, safety did not form part of that decision at the time.

43.2 Hence the test will be entirely objective, always applying the "broader understanding of the needs of business", to which Pill LJ refers in paragraph 34, but without even the glimmer of the argument which, in any event, did not find favour with the Court of Appeal in Lax, namely the "margin of discretion" for the employer. Of course there must be the temptation for a tribunal in such a case positively to take into account that the Respondent itself did not consider safety at the time, such that it could be argued not to

have been a burning issue. But, in fact, this Tribunal eschewed such thinking and accepted the argument in paragraph 37 that, "as the Respondent's (pilot's resource) budget for first officers did not allow for 50% working, safety was never considered as an issue".

43.3 Centrally, although safety considerations thus fall to be considered, the 2000−hour threshold is still not the point in issue. What is in issue is whether questions of safety override, or tip the balance in overriding taken together with other matters, the detriment, in the weighing exercise. Non−compliance with a then non−existent threshold is obviously a matter for consideration as part of the picture, but is in no way determinative. It is for the Tribunal to decide how far questions of threshold are of relevance.

44. There was a good deal of evidence before the Tribunal about the appropriateness of a threshold, in particular of a threshold of 2000 hours, both given by the Respondent's witnesses, particularly Captain Douglas, but also Captains Gray and Sheterline, and accepted in cross−examination by the Claimant's witnesses, Captain Morris and Captain Applegarth. At paragraph 47 of the judgment, the Tribunal records that:

"The evidence of Mr Douglas was that, post−conversion course, newly qualified pilots consolidate their experience at different rates, depending upon the amount of flying they do, their personal discipline and commitment. Further, as pilots gain experience, their ability to deal with flight operations and unexpected events increases. Similarly when a pilot's rate of exposure reduces, the opposite is true. This was a generalised statement which we accept."

45. The crucial nature, so far as the Respondent is concerned, of the threshold is revealed by a powerful passage in Mr Jeans QC's skeleton at paragraph 12(vi):

"The ET did not question the evidence of Mr Douglas about the need for a minimum hours threshold and its appropriateness (and indeed claims to have given particular weight to his evidence, because he had the "main responsibility" for safety on behalf of the employer [see paragraph 23 of the judgment]) and claimed to "recognise" the "Respondent's legitimate need to avoid risk". In baldly rejecting the defence, it failed, however, to address BA's case that flying hours were a recognised benchmark within the industry; and that the question how many flying hours were required by a person of particular experience on particular aircraft with particular flying 'frequency' was one of judgment which could neither be demonstrated as a scientific truth nor be left to a process of 'trial and error'. The Tribunal's unreasoned rejection of this defence has caused profound concern in BA and throughout the industry."

46. It is perhaps understandable that the Respondent should be concerned at the sceptical approach of the Tribunal (reflected in paragraphs 46 to 47 of the judgment) to the importance of the threshold. The Tribunal was plainly influenced, as it said it was in paragraph 81 of the judgment, by the judgment of the European Court in Genster where (admittedly in relation to a tax official rather than a pilot), the Court raised a question mark as to the necessary inter−relationship of experience and skill:

"39. In Nimz, moreover, the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain length of knowledge and experience, since such a claim amounts to no more than a generalisation concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principal to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of certain number of working hours."

47. However, the issue here was indeed the question of safety in the particular circumstances in the decision in relation to this Claimant. Mr Jeans submits that there must be, and are certainly in the case of a pilot, two elements in any question of safety, skill/training and experience/habituation. This comes powerfully out of the evidence of Captain Douglas, whose importance the Tribunal did indeed recognise:

"23. Many of the witnesses had various responsibilities in respect of training and testing pilots. The Respondent is the Claimant's employer and it is for the Respondent to establish its standards. This it has done, its safety standards being more stringent than the minimum set by the Civil Aviation Authority. The witnesses for the Respondent all shared the view of Mr Douglas. The employer has the ultimate contractual responsibility as far as the safety is concerned. The Respondent's submission was that it had to take a cautious approach and could not adopt one of trial and error. While many of the witnesses had responsibilities for training and examination, because of the employer/employee relationship and responsibility for safety we gave more weight to the evidence of Mr Douglas, who had the main responsibility on behalf of the employer."

48. However, the Tribunal had other evidence apart from Captain Douglas'. Leaving aside the evidence of the Claimant herself, there was evidence from Captains Fielding, Morris and Applegarth, all of whom considered that there was no risk to safety if the Claimant, who in their opinion was a skilful pilot, had been allowed to work at 50%. Captain Fielding referred to the Claimant's excellent history and training

record, and to the Respondent's performance policy and its detailed monitoring. Captain Morris, who as a training captain had personal experience of the Claimant, also spoke highly of her ability and opined that she would "easily maintain the required standard if she were permitted to work 50%". Captain Applegarth also referred to the checks and balances that the Respondent has in place to ensure operation to a high standard, also spoke highly of the Claimant's performance and particularly pointed out her experience in relation to short haul flights, and, in particular, at paragraph 11 of his statement:

"Most importantly, the most demanding part of the flight for pilots from the perspective of safety are take−offs and the approach and landing phase ... On short haul as a minimum a pilot will be doing about 34 take−offs and landings a month, so that on a 50% contract she will be doing approximately 17 of them. Her flight experience as a 50% pilot on short haul would therefore be more demanding than a full time pilot on long haul. It would certainly be better than a 75% long haul pilot. This is another reason why the situation of each pilot must be assessed individually."

49. The relevant findings of the Tribunal are as follows:

"42. ... The Respondent has a system for maintaining and checking its pilots' competence. This involves flight simulator checks with a training captain every 6 months, and an annual routes check, i.e. a flight accompanied by a training captain for the purpose of monitoring performance. In addition the captain of an aircraft is responsible for it, and, if necessary, would be under an obligation to report concerns relating to pilot competence. If a pilot shows signs of poor performance, the Respondent has a policy providing a scheme to address it. The Respondent has used this system when appropriate.

43. When pilots return to work from long periods of absence, e.g. due to sickness or maternity (pilots being unable to fly in the capacity of pilots while pregnant) they are required to undertake refresher and consolidation training. The consolidation period is normally two months. In the Claimant's case the consolidated period was reduced by 12 days. After returning from maternity leave the Claimant passed her refresher training without any difficulty, there having been 19 months between the date of that training and when she had last flown.

44. Differences of view were expressed by the witnesses regarding the quality of shorthaul experience and in particular vis a vis longhaul experience. There was no dispute however that other than in exceptional circumstances, the most challenging parts of pilot's duties were during take off, ascending, descending and landing. On a day by day basis shorthaul pilots undertook considerably more of these duties than longhaul pilots. The danger of rustiness in this area for longhaul pilots was specifically recognised and referred to in the 2004 policy. That does not detract however from the need for experience for the period in the air when aircraft are neither ascending or descending as demonstrated by the Claimant's own experiences when she was involved in mid−flight engine failure.

90. In respect of the safety issue, this did not cause those using the Claimant's application any concern. We accept that it causes Mr Douglas some concern. The Respondent has trained the Claimant and she has flown to the required standard. The Respondent has mechanisms for dealing with poor performing pilots which it has used. We are prepared to give some weight to the notion that after training a pilot (or for that matter a worker in any skill) benefits from a sustained and concentrated period in performing her job. We find however that the Respondent has not given any cogent evidence as to why it would be unsafe or in any way unsuitable for the Claimant, or other pilot, to fly at 50% of full−time. We recognise the Respondent's legitimate need to avoid risk. The Respondent trains pilots and maintains their training. The Respondent is an airline which has employed over many years pilots of varying levels of experience. If the respondent has evidence that the PCP is justified on safety reasons it has the resources to produce it. The Respondent has not done so. While the reason put forward related to a legitimate objective we find that the PCP has not been justified on the grounds of safety."

50. We are concerned about one matter in paragraph 90 of the judgment which we have recited above, namely the additional words "or other pilot" in the sentence "we find ... that the Respondent has not given any cogent evidence as to why it would be unsafe or in any way unsuitable for the Claimant, or other pilot, to fly at 50% of full−time." We are not, as Mr Jeans QC urged us to be, concerned about the use of the word cogent, which appears to us to recognise no more than the fact that the onus of proof is upon the Respondent, and in any event is taken directly from Lord Nicholls in Barry. But we are concerned that, by the addition of those words "or other pilot", the Tribunal is diverging beyond the task before it. What was required was for the Respondent to justify the PCP in relation to this Claimant. It is clear that, in the light of the very obvious concern of the Respondent to defend its subsequent threshold policy, and to emphasise the importance of safety considerations, albeit that in fact they had not played any part in the decision in relation to this Claimant, a great deal of the evidence ranged over the justifiability of thresholds. But we emphasise again, that it was not the task of this Tribunal nor of this Appeal Tribunal to judge the appropriateness of the threshold. What it had nevertheless to do, of course taking into account the arguments of the Respondent that proper retrospective consideration of safety in relation to this Claimant

required an assessment of the impact of this Claimant's lack of sufficient flying hours, was to consider whether this PCP was justified by safety considerations. It concluded, and we are satisfied that it had evidence upon which it could conclude, that "the Respondent has not given any cogent evidence as to why it would be unsafe or in any way unsuitable for the Claimant ... to fly at 50% of full−time". Insofar as the Tribunal's conclusion went further than that, it was expressing an opinion not relevant in this case and indeed highly unlikely to be of any relevance in any future case. But, in our judgment, the expression of such further view does not flaw the conclusion to which it came in relation to this Claimant and this PCP.

51. In these circumstances the appeal is dismissed.