IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. IHQ18/0274

[2018] EWHC 1889 (QB)

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 4 May 2018

Before:

MR JUSTICE BUTCHER

B E T W E E N :

(1) BRITISH AIRLINE PILOTS' ASSOCIATION ("BALPA")
(2) NICHOLAS HEPBURN — Claimants

- and -

BRITISH AIRWAYS CITYFLYER LIMITED — Respondent

MR O. SEGAL QC and MR R. BRITTENDEN (instructed by Farrer & Co. LLP) appeared on behalf of the Claimants.

MR A. NAWBATT QC and MS T. BARSAM (instructed by Baker & McKenzie LLP) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared from poor quality recording)

MR JUSTICE BUTCHER:

1 There is before me an application by the British Airline Pilots Association, which I will refer to as "BALPA", and by Mr Nicholas Hepburn, who, collectively, I will refer as "the claimants", for an interim declaration pursuant to CPR Part 25.1 (1)(b). BALPA is an independent trade union and recognised by British Airways CityFlyer Limited, to whom I will refer as "the defendant" for collective bargaining purposes. Mr Hepburn is a pilot employed by the defendant.

2 What is sought in the claim form is an interim declaration, and I quote:

> "… that the Defendant's actions in unilaterally rostering pilots to work pre-0500 duties without the prior agreement of the Company Council is in breach of the express terms of their contracts of employment, which incorporate section 10.9 of Schedule F of the Pilot Policy Document."

3 The factual background to this is that the defendant operates domestic and European passenger services. In order to operate flights from the majority of the bigger airports in the United Kingdom to airports across Europe, the defendants, with other airlines, are allocated slots by Airport Coordination Limited ("ACL"). The defendant would prefer not to have any flights which begin before 0600, but ACL does allocate the defendant some such slots, which require pilots to report before 0500. Specifically, the defendant was allocated a number of pre-0500 slots for the 2018 summer season, as a result of which it issued a pilot roster on 10 April 2018 for flights commencing on 6 May 2018, which included a number of pre-0500 starts.

4 Pilot rostering is a subject on which there have, over the years, been extensive negotiations between the defendant and BALPA, which, as I have said, is recognised by the defendant for collective bargaining purposes. This is provided for in an agreement between Brymon Airways Limited, which is a predecessor of the defendant, and BALPA, dated 15 August 2000. That recognition agreement makes explicit reference to the "CC", which is a reference to the Company Council. That is the BALPA negotiating body which represents the interest of pilots employed by the defendants. The Company Council engages in annual negotiations with senior management of the defendant in respect of pay and conditions of service. Pilots are employed on standard form contracts of employment. Clauses 10 and 26 provide – and when this judgment is transcribed, there needs to be set out clauses 10 and 26, but I will read them in any event.

5 (10):

> "Hours of Work.
>
> "Your working hours will be in accordance with the dictates of the Company's Operation Manual and you will be required to conform with roster patterns issued in line with the CAA-approved Flight and Duty Time Limitations. In some cases your working hours and patterns may be subject to change at short notice and it is a condition of your employment that you

are able to accept these changes. These conditions may be superseded by any collective agreement made between the Trades Union and the Company."

6 (26):
7

"Collective Agreements.

"The Pilot Policy Document together with the Collective Agreements between the Company and the Trade Unions and the Company employment policies and procedures contain the terms and conditions of employment as far as applicable to you and as amended from time to time. These terms and conditions incorporated, where appropriate, into your contract of employment, save as varied by this document."

8 The BACF Pilot Policy Document referred to in cl.26 of the standard form contract of employment is a collective agreement between the defendant and BALPA. Schedule F of the Pilot Policy Document contains the Pilot Schedule Agreement. I have seen two versions of Sch.F, one dated July 2017 and one dated March 2018. The material provisions are identical in both versions. Both the 2017 and 2018 collectively agreed versions of Sch.F contain the following provisions in relation to pilots' terms and conditions of employment:

"1.2. Intent.

"The intent of these rules is to permit BA CityFlyer predictable manning of its operation and provide crews a stable roster with which to plan their flying and domestic lives. Any variance to these rules will require agreement of SCC for an alleviation.

"Early Start: A Duty Period commencing during the period 0100 to 0659 UK local time.

"Rostered Duty: A Duty Period, or series of Duty Periods, with stipulated start and finish times, notified by the Company to a pilot in advance."

9 The March 2018 version which I have seen contains the following further conditions in section 10, at section 10.7, as follows:
10

"Consecutive Early Duties

(a) It is recognised that it is desirable where possible to limit the number of consecutive early duties to no more than 4. This matter will be subject to on-going review in conjunction with the Scheduling Committee.
(b) Should the company deem it necessary to roster 5 consecutive early duties in accordance with the Company FTL Scheme then where so rostered no duty period shall exceed 9 hours.
(c) Should a pilot voluntarily work a day off (WDO) then the pilot's roster may reflect the EASA legal limits as per OMA Section 7.
(d) Accepting a DP does not allow the pilot to be rostered to work outside 10.7(a) & 10.7(b)."

11 And at 10.9 as follows:

"Night Duties

"(a) No pilot shall be rostered a night duty which would require the pilot to be on duty for any period between the hours of 0200 Local and 0459 Local without the express agreement of BALPA and SCC.
(b) Such agreement would require adequate rest to be planned either side of the proposed duty or duties.
(c) SCC will public a list of night duties agreed between BALPA and BACF."

12 What the claimants contend is that no provision permits the defendant unilaterally to depart from s.10.9(a), and that, without the express agreement of the CC, the defendant has no entitlement to roster pre-0500 starts. While, as I understand it, before 2016, the defendant unilaterally rostered pre-0500 starts, the issue of pre-0500 starts was the subject of negotiation with BALPA in 2016. The claimants say that this was a recognition of the fact that the defendant was not able, unilaterally, to roster such starts. The defendant says that its conduct rather evidences its good industrial relations practices rather than an acknowledgement of the lack of contractual entitlement to roster such starts.

13 The issue of pre-0500 starts was again the subject of negotiation in 2017. In that year, it arose in the context of pay negotiations which were taking place, and during the negotiations of that year there occurred the following exchange – and here there should be set out the exchange of communications which are referred to in paras.21 to 25, as follows:

"During that period of negotiations, on 6 July 2017, Adam Carson (Managing Director) wrote to Brian Strutton stating:

'Schedule F

'You requested that I engage in reviewing the Balpa proposed changes to Schedule F. We agree that whilst BALPA could not support any removal of items in Schedule F, likewise BA CityFlyer could not agree to any suggested changes that were new to how we currently operate and would create additional cost or restrictions. The teams are already working together on this and I suggest we set a deadline of 21 July 2017 to have the new document signed and published to our pilots.

'Early Starts

'You confirmed that BALPA and the Company Council would support our interpretation of Schedule F and our decision to roster pilots to start prior to 05.00L.

'Future Engagement on Changes

'Throughout the pay talks the Company has looked for ways to improve pilot productivity. Yesterday when we met, you said that it was your intent that BALPA would positively engage in discussions with us about such changes in the future, but could not do so as part of these pay talks. As we look for growth opportunities for the business this engagement will be important to us.

> ‘Please could you confirm your understanding of these matters by signing and returning one copy of this letter before you ballot your members on the pay offer?’

“Similar correspondence was sent by Adam Carson to Brian Strutton on 7 July 2017.

“On 12 July 2017 Brian Strutton replied to Adam Carson by email as follows:

> ‘… I’m told that our teams have pretty much sorted out Sched F and that therefore we should amend your offer letter to say –
>
> > “The updated version of Schedule F has been agreed and will be signed off before this offer goes to ballot. This will include all previous agreements (including the night flying framework and payment).”
>
> ‘In addition I will reply to your side letter as follows –
>
> > “I can confirm that BALPA will support this offer and strongly recommend it to members for acceptance.
> >
> > “I can also confirm that we will not object to the reasonable use of early rosters, we will engage genuinely and positively over productivity and we support the growth ambitions of CityFlyer. We also support pilot remuneration commensurate with that growth.”
>
> ‘If this is all okay, please email across the slightly amended offer letter, we want to get a member comm out today and start the voting on Friday.
>
> ‘Look forward to hearing from you and hopefully wrapping this up.
>
> ‘Best wishes’

“The agreed, updated version of Schedule F referred to is (if not identical, then materially the same as) the one which was published in August 2017. The ‘side letter’ referred to by Brian Strutton was, I believe, the letter from Adam Carson dated 6 or 7 July 2017.

“Adam Carson replied to Brian’s email of 12 July 2017 that evening:

> ‘Hi Brian – just picking this up. Agree, very close on schedule F, so in anticipation that completes I will send amended offer letter in line with your wording below and send over very first thing tomorrow morning.
>
> ‘Thanks for your reply to side letter.

'Regards
'Adam'"

14 The defendant's offer in relation to pay in that year was accepted after a ballot of BALPA members. For 2018, there have been discussions between the defendant and BALPA in relation to pre-0500 starts which did not lead to an agreement. Notwithstanding that no agreement had been reached, on 10 April 2018, the defendant issued rosters to pilots. Some of these contained pre-0500 duty starts. The claimants say that this caused considerable concern amongst BALPA's members.

15 A letter before action was sent to the defendant on 23 April 2018, to which the defendant replied on 27 April 2018. On 30 April 2018, the claimants issued their claim form. As I have already set out, it sought an interim declaration that the defendant's actions (unilaterally rostering pilots to pre-0500 duties) was a breach of their contracts of employment. The claim form further stated:

> "Given that this claim concerns the lawfulness of the pre-0500 duties rostered by the defendant with effect from 6 May 2018, the Claimant applies for an interim declaration pending a speedy trial."

16 It also stated:

> "The claim is limited to interim and final declaratory relief."

17 By a separate application notice issued on the same day (30 April), the terms of the order sought were set out. These included, firstly, an interim declaration until trial or further order, one, that the defendant's actions in unilaterally rostering pilots for work pre-0500 duties without prior agreement of the BALPA Company Council was in breach of the express terms of their contracts of employment, secondly, that any pilot member of the first claimant is contractually entitled to refuse to work any such rostered duty and, secondly (sic), that the defendants might apply to court at any time to vary or discharge the order on notice. There was also an application for directions for a speedy trial.

18 In support of their application, the claimants, on 30 April 2018, served a twenty-page witness statement from Tim McKay, Vice Chair of the Company Council, and a short witness statement from Mr Hepburn. On 3 May 2018, or at least dated 3 May 2018, i.e. yesterday, the defendants served a thirty-eight page witness statement from Mr Alan Taylor, Chief Operating Officer of the defendants. The defendant stated in that witness statement that it had been produced under a great pressure of time and that if the matter were to proceed to a full trial, the defendant would adduce additional witness and documentary evidence. A second witness statement of Mr McKay was served yesterday as well, though I saw that only this morning.

19 The claimants' position on this application is that the matter is straightforward. What is said is that s.10.9 of Sch.F to the Pilot Policy Document is unambiguous; it precludes the defendants from unilaterally rostering p re-0500 flights. The claimants say that the facts are not materially in dispute. They say that the pilots need to know the correct legal position urgently because they need to know whether they may reasonably decline to obey a management instruction to report for a night duty in the present circumstances and not be at risk of discipline or dismissal. Accordingly, they say that the present case is a paradigm one for the grant of an interim injunction.

20 The defendants say that that analysis is wrong. In the first place, they say that there are a series of issues as to whether Sch.F has the effect for which the claimants contend and, in summary, they contend that these issues are eight-fold.

21 Firstly, there is the question, as they put it, as to whether Sch.F is legally enforceable; secondly, whether s.10.9 was apt for incorporation in the various pilots' contracts of employment. It is said that this will require a consideration of the words used against their factual matrix, and reference was made to *Malone v British Airways plc* [2010] EWCA Civ 1225. On any view, the defendants say that it is not appropriate for a determination at an interim hearing. Thirdly, there is an issue as to the construction of s.10.9 viewed against its appropriate factual matrix, fourthly, as to whether any contractual requirement to obtain the agreement of the CC was subject to an express term that BALPA would not withhold such agreement, or that the agreement contained in Sch.F was varied to have that effect, and reliance in that regard is based upon the email from Mr Strutton of 12 July 2017. That, it was said, evidenced an agreement by BALPA to the reasonable use of early rosters which constituted an express term of the July 2017 Sch.F Agreement. Fifthly, that there would, in any event, by an implied term to the effect that consent to rostering pre-0500 starts would not be unreasonably withheld by BALPA. Sixthly, if there was the implied term I have just mentioned, whether BALPA did unreasonably withhold that agreement, seventhly, whether cl.10 and cl.26 of the pilots' contracts of employments permit the defendants unilaterally to roster pre-0500 starts without the express agreement of BALPA a nd CC and, eighthly, whether the rostering of pre-0500 starts on 10 April 2018 amounted to a reasonable change in accordance with the terms of the individual pilots' employment contracts.

22 The second broad aspect of the defendant's case on this application is that they say the claimants do not have standing to seek a declaration in relation to the individual contracts of employment of the other pilots to which they are not a party or as to the entitlement of other individuals who refuse to work under their contracts of employment, and the final aspect is to the effect that the present case is unsuitable for the remedy of an interim declaration. I will consider that matter in more detail shortly. Three particular matters should, however, be mentioned at this stage. First, the defendants say that it would be inappropriate to grant an interim declaration because that would give the claimants the same benefits (an interim injunction) without the risk of liability on the undertaking in damages which would be a condition of an injunction. It is said that it is significant that the claimants have not made an application for an injunction, though one was threatened in the pre-action protocol letter. And they say that it is also significant that no cross-undertaking in damages has been proffered.

23 Secondly, it is said that I would be unjust to the claimants (sic) for there to be the grant of an interim declaration in that the evidence of adverse impact on the pilots of the rostering is weak. By contrast, it is said that if an interim declaration were granted there is a real possibility that the defendants will suffer extensive damage which it would be impossible adequately to quantify. In particular, there is the possibility that the defendants will lose the slots currently allocated by ACL, or would be late for such slots, leading to a breach of the Airline Slot Allocation Regulations 2006, with the potential for serious sanctions being imposed by ACL. That would lead to a loss of revenue and have an adverse effect on the defendant's reputation and operations. There might also be fines, and if pilots refuse to work pre-0500 starts, flights might be delayed, or possibly cancelled, leading to an entitlement of customers to refunds and possibly compensation. Accordingly, there would be a significant adverse effect on the defendants, as well as on third-party customers.

24 The third aspect in this connection is that the defendants say that there has been serious delay by the claimants, in that BALPA waited thirteen days before issuing its letter before action, and the application for an interim declaration was issued shortly before 4.00 p.m. on 30 April 2018, thus the application is being heard on 4 May, giving the defendants only Saturday, before the early flights are due to commence on 6 May 2018, to address repercussions should the court grant the order.

25 The form of relief sought on this application is an interim declaration. There is no doubt that the court has the power to grant interim declarations (CPR r.25.1(1)(b)). It is a very different question as to whether it is appropriate to grant an interim declaration in this case. The difficulties of an interim declaration include, at least, the following: one concern is that it can be said to amount, effectively, to seeking to circumvent requirements of a summary judgment application by bringing this matter on at considerable speed and asking the court to determine, at least for the present, that there is no answer to their case without having complied with the safeguards and requirements which would be a part of an application for summary judgment. This is the same concern as was enunciated by Auld J in *Jakeman v South West Thames RHA*, paras.36 to 37 and 41. The dangers of this course have been borne out by this hearing, which has involved, at very short notice, points being deployed in witness statements, no proper joining of issues, skeleton arguments which, to a large extent, did not deal with the same points as the other and had to be expanded and an unrealistic time estimate to deal with the points raised on the merits. Furthermore, the basis of an application for an interim declaration is that the determination is only interim and provisional. Nevertheless, the claimants contend that the ordinary safeguards which are applicable to most interim measures, for example, injunctions, do not apply or do not apply to the same extent. Certainly they contend that because they are applying for an interim declaration and not an injunction, they need not satisfy the balance of convenience test which is an integral part of the *American Cyanamid* and its progeny, or at least do not need to satisfy it in the same way that it is applied in those cases.

26 I consider that an interim declaration in relation to the contractual rights of parties to a private law contract must be a very exceptional remedy, and I consider in that regard that it is significant that I have been shown no case in which an interim declaration has been granted in a private law dispute relating to contractual rights. Indeed, it appears that an interim declaration is an exceptional remedy even in the public law context (see **Le wis on Judicial Remedies in Public Law**).

27 The court does not ordinarily take an interim view of contractual rights. The rights contended for either do or do not exist. The court needs ordinarily to declare that and to do it finally, albeit it might do it summarily. To take an interim view of the parties' private law contractual rights, with effects on the parties which depends on that interim view, may give rise to a merely and explicitly provisional view creating adverse effects on the parties with no compensation to them if it is wrong. Furthermore, were an interim declaration to be available in this case, it is difficult to see why it would not be available pre-pleading and without an application for summary judgment in many cases of disputes as to contractual rights.

28 I was referred to recent consideration of interim declarations in the case of *NCA v N and Royal Bank of Scotland plc* [2017] 1 WLR 3938. In particular, I was referred to paras.81 to 91.

29 Paragraphs 81 to 91 read as follows:

"CPR 25.1(1)(b) provides that the court shall have the power to grant an interim declaration.

"It was introduced following recommendations made in Law Commission Report No 226: Administrative Law: Judicial Review and Statutory Appeals. Paragraph 6.21 of that Report stated as follows:

> '6.21 Interim Declarations*:* The advantages of these are that they are not coercive, they specifically address the interim position and are better suited to clarify the position of third parties. There is no reason why they should not be granted on the same basis as interim injunctions. In New Zealand there is provision for interim declaratory relief in judicial review proceedings against the Crown in lieu of injunctive relief which is not available, and such relief is more generally available in Canada. Such declarations would refer to a right or obligation that exists prima facie and are not therefore illogical. In making a merely interim declaration, the judge reserves his or her right and admits an obligation to re-examine the question after a substantive hearing at the trial. In our view this consideration also meets the argument that a declaration in an interim form may inappropriately suggest that the court has already made up its mind as to the likely grant of final relief.'

"In **De Smith's Judicial Review** 7th Edition at para.18 to 021 it is said that the courts are gradually making greater use of interim declarations in judicial review proceedings. *R (on the application of AM) v DPP* [2012] EWHC 470 (Admin) and *G v E & Others* [2010] EWCA Civ 822 are cited as examples of cases where the remedy was granted.

"Although CPR 25.1(1)(b) is not limited to applications for judicial review we have not been referred to any case in which such a declaration has been granted outside the judicial review context.

"On behalf of N it is submitted that the interim declaration operates in much the same way as an interim injunction. It is both provisional and suspensory in nature, making a temporary declaration as to the state of the law or a party's rights whilst leaving the state of uncertainty to be determined at a full trial. Just as with any other interim remedy, whilst it is provisional in nature, actions carried out while it is in force will enjoy its protection for all time. Thus it will be an abuse of process to prosecute a party who has acted with the protection of an interim declaration, notwithstanding that the declaration is subsequently set aside. It is submitted that the remedy is essentially pragmatic in nature and that considerations of "justice and convenience" should lie at the foundation of its availability.

"In the *Amalgamated Metal* case an interim declaration was sought that the funds held were not the proceeds of criminal conduct. As Tomlinson J observed at para.10:

> '… It remains to be worked out what are the circumstances in which it might be appropriate to resort to this new jurisdiction. For my part I find it difficult to conceive that the court would ever be prepared to grant an "interim declaration" of the type here sought. Either the relevant sum is the proceeds of crime or it is not. Whilst the question

could only be decided as between the parties before the court, and on the basis of such evidence as they chose to place before it, the court would surely only be prepared to pronounce upon the question, if at all, on a final basis, not upon the basis that whatever is the position today may by further or different evidence tomorrow be shown to be different.'

"Tomlinson J commented further at para.27 as follows:

'27 … it was never in my judgment appropriate for AMT to seek as against the police a declaration that the moneys are not the proceeds of criminal conduct. It was never an issue between those parties whether the moneys were such proceeds, and there was and is no occasion for the creation of a *lis* between them directed to determination of that point. The only question which the police ("the constable" in the language of the statute) were asked was whether they consented to the payment being made. Had they given their consent, AMT would have a defence under section 93A. The Act is however silent as to the basis upon which consent is to be given or refused. The provision would manifestly be unworkable if the constable could only justify the withholding of consent if he could demonstrate his satisfaction, to whatever might be the appropriate standard, that the funds are in fact derived from or used in connection with criminal conduct. It seems clear from the section as a whole that the existence of a suspic ion is sufficient to ground a proper refusal of consent. It is important to note that there has here been no public law challenge to the propriety of the exercise by the constable of his discretion. It would surely be odd if a legitimate withholding of consent which can be justified on grounds of suspicion were to lead to the situation in which the police must defend (and perhaps pay the costs of) proceedings directed towards determination of a question wholly different from that which they were asked, viz the ultimate question whether the funds are *in fact* derived from or used in criminal conduct. I cannot think that either Parliament or the Court of Appeal envisaged that this would be the procedure to be followed consequent upon a proper withholding of consent. Such a procedure places an undue and inappropriate burden upon the police, effectively requiring them to litigate at public expense what are in truth private disputes between financial institutions and their customers. The arising of such disputes is one of the ordinary commercial risks which any financial institution faces. I also think it most unlikely that the Court of Appeal can have had in mind that the court would in such circumstances grant interim declaratory relief on the ultimate substantive question whether the funds are derived from criminal conduct. Such a question only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof. Finally the granting of declaratory relief on this ultimate question as against the police whether on an interim or a final basis could prejudice future criminal prosecutions.'

> "It can equally be said that here the question of whether the Bank would commit any criminal offence in making the transactions and whether the Bank was obliged by the criminal law to make disclosure were substantive law questions that only permit of a final rather than a temporary answer. For all the reasons given by Tomlinson J I have real difficulty in seeing how it could be appropriate for the court to give an interim answer to such questions. The declarations sought were in determinative rather than advisory terms.
>
> "Assuming, however, that such an answer can be given, it would be necessary to consider the degree of confidence which the court must have in the applicant's entitlement to a declaration before such relief could be granted. In my judgment the most appropriate evidential threshold in a case such as the present is the high degree of assurance which is generally required before mandatory injunctive relief will be granted. The need for a close consideration of the merits is particularly important in a case in which the grant of the interim declaratory relief is likely to be determinative of the issue, as in this case. The relevant potentially criminal acts here were the carrying out of the specified transactions and/or failing to make prior disclosure. Once the monies had been irrevocably paid over without further disclosure under the protection of the interim declarations there could be no criminal liability.
>
> "The judge did have a high degree of assurance since he considered that the prospect of criminal liability was 'fanciful'. For reasons already given, however, that was not borne out by the evidence or the judge's reasoning. If a high degree of assurance was required, on the limited evidence before the court the judge could not have such assurance.
>
> "In my judgment there is substance in all three grounds of challenge to the decision to grant an interim declaration and I have no doubt that no such declaration should have been made. To be fair to the judge the principled objections now advanced were not developed before him. At that stage the parties appear to have been content for a pragmatic rather than a principled approach to be adopted."

30 I consider that the present issue is one of substantive law, which, to use Hamblen LJ's language in para.88, only permits of a final rather than a temporary answer. I have real difficulties in seeing how it can be appropriate for this court to give an interim answer to the question of the construction, variation or implied terms of a contract between the parties. On that basis, I would refuse to grant an interim declaration. However, even if that point is wrong or too absolute a position, I do not consider that the present is a case for an interim declaration because I am not satisfied with the high degree of assurance which would have permitted the grant of a mandatory injunction, and which is the test which Hamblen LJ considered would be applicable, assuming that an interim answer could be given. I should say that I consider that that test can hardly be different, or not markedly different, from the question of whether there should be summary judgment.

31 Because I am not going to grant an interim declaration, I do not consider that it is appropriate to go through the various different arguments which have been advanced by the defendants. That will be a matter for another day and a preliminary view by me is not going to assist. Some of the arguments carry more conviction than others and the first supposed

issue to which I have referred is agreed is not actually in issue at all, but I do consider that the points raised as points 2 to 8 in what I have referred to, as supported by the evidence of Mr Taylor's witness statement, have more than a fanciful prospect of success, and certainly I do not consider that I can be satisfied, given the procedure which has been adopted and by which these matters have come before me that they would not have such a prospect of all the material which might have been deployed on a summary judgment application or at trial had been deployed. Put another way, I do not have a sufficiently high degree of assurance that the claimants are correct that I consider that it is appropriate to proceed to make an interim determination as to contractual rights.

32 In any event, I consider that it must be the case, when considering the grant of an interim declaration that the court has to have regard to the balance of justice or injustice to the parties, and indeed that was considered to be the case even in the authority which Mr Segal relied on (*The Secretary of State for Education v National Union of Teachers*, see in particular para.35). Whether that exercise is properly called the "balance of convenience" may not matter greatly; it is necessary to consider what degree of prejudice the grant or refusal of the interim remedy would impose upon each side, bearing in mind that, being interim, any remedy granted may turn out to have been wrongly granted. Here, I consider that the balance of injustice, if that is the right form of words, is heavily in favour of the defendants. The evidence of impact on pilots of being rostered to work pre-0500 starts is, in my judgment, weak. A pilot's usual working pattern would include a mixture of report times. In two of the five cases, weekly, the reporting is scheduled for 4.55 a.m., a difference of only five minutes. The maximum amount of time which a pilot may have to attend early is twenty minutes. There are only 110 pre-0500 starts which are rostered and, subject to ACL approval to a slot improvement, there may only be ninety- four, which would be 0.24 per cent of flights. Further evidence of the limited impact is set out in Mr Taylor's witness statement. On the other hand, there is the potential of real injustice to the defendants, who will suffer the potential of considerable financial losses for which there may be no possible compensation as Mr Segal made it clear that he was not offering a cross-undertaking in damages. That appears to me to be a relevant consideration in the present case. On that basis, I would also have declined to grant an interim declaration.

33 For those reasons I refuse the interim declarations applied for. What is required are directions for a speedy trial.

CERTIFICATE

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This transcript has been approved by the Judge