Malone & Others v BA Plc – crew complements dispute

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The Court of Appeal has recently found in favour of BA Plc ("BA") in the crew complements dispute.

Miss Elizabeth Anne Malone was selected as one of three lead claimants' on behalf of 5000+ claimants', all cabin crew workers from Heathrow, who brought breach of contract claims against BA -hence the Malone title.

Those claims were considered in the High Court by Sir Christopher Holland in February this year. The claimants' argued that BA's decision to unilaterally reduce the crew complements on its aircraft in October 2009, below the levels which had been agreed through collective bargaining between the employer and the employees' trade union (Unite), amounted to a breach of contract. They sought declarations as to their contractual terms, injunctions requiring BA to comply with the crew complement levels in operation before the unilateral reduction, damages and costs.

The claimants' alleged that the collective agreement which stipulated crew complement levels had been incorporated into their individual contracts of employment and was enforceable by them on an individual basis. BA argued that, even though some collective agreements negotiated between it and Unite were incorporated into the employees contracts of employment, the particular provisions relating to crew complements were not; and that these terms were not intended to be included in the individual contracts ("*the incorporation issue*"). BA raised an alternative defence that the employment contracts of about 60% of the claimants' contained a clause which entitled BA to make reasonable changes to the terms, and in light of the company's "*parlous financial position*", the reductions in crew complements were reasonable changes which could be made unilaterally ("*the reasonable changes issue*"). The High Court accepted the submissions of BA and dismissed the claims. Malone, and others, then appealed that decision.

In the Court of Appeal Lady Justice Smith opined that the relationship between BA and the trade union branches' representing the cabin crews was, "*rather unusual*"; and that issues which might usually be regarded as falling within the sphere of management are the subject of bilateral negotiation resulting in collective agreements.

It was noted that there are several collective agreements between BA and the trade unions which cover almost every aspect of the cabin crew working terms and conditions; although none of those collective agreements was enforceable between BA and the trade union as in none of them is there any express intention recorded that the agreement should be enforceable – which is a requirement of section 179 of the Trade Union and Labour Relations (Consolidation) Act ("TULCRA") 1992.

Lady Justice Smith emphasised that it had been difficult to decide the aptness of the incorporation of the crew agreements, and that the various relevant considerations "*point in both directions*", for and against incorporation; and that even within the same

section of the agreements there are enforceable and unenforceable provisions within the same section.

BA's QC argued that if section 7.1 of the Worldwide Scheduling Agreement (WSA) were to be individually enforceable, individual crew members could, with impunity, refuse to fly with a reduced crew complement which, as Lady Justice Smith noted, would have "*disastrous consequences*" for BA if the term were to be individually enforceable – described as being "*so serious as to be unthinkable*".

However, Lady Justice Smith did not share Sir Christopher Holland's view (obiter) that even if he had found that section 7.1 was individually enforceable he would not have granted injunctions requiring BA to reinstate their former cabin crew complements; commenting that the main issue (when considering whether there should be a permanent injunction after a full hearing) is whether damages would be an adequate remedy for the claimants; and it was clear that damages would not be an adequate remedy for the claimants' in this case. However, this was hypothetical as it was found that there was no breach.

Dismissing the appeal Lady Justice Smith held that the true construction was intended as an undertaking by the employer towards its cabin crew employees collectively, intended to be binding "*only in honour*".

The Malone case reiterates the need for clear drafting of collective agreements (and perhaps negotiator training), specifically the status of those agreements; and highlights the up hill struggle which trade unions will face when trying to argue that provisions of collective agreements are suitable for individual incorporation into employment contracts.