

ENGLAND AND WALES / JUDGMENT

Driver v Air India Ltd.

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Neutral Citation Number: [2011] EWCA Civ 830 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE QUEEN'S BENCH DIVISION HIS HONOUR JUDGE SEYMOUR HQ08X01806
Case No: A2/2010/1919 Royal Courts of Justice Strand, London, WC2A 2LL Date: 19/07/2011
Before : LORD JUSTICE MUMMERY LORD JUSTICE RIX and LORD JUSTICE LONGMORE

- ----- Between : DRIVER
- and - AIR INDIA LTD
- -----
- ----- Appellant / Claimant Respondent / Defendant Mr Brian Dye
(instructed by Zaiwalla & Co Solicitors) for the Appellant Mr Jonathan Cohen (instructed by Morgan Walker) for the Respondent Hearing dates : Friday 4th February 2011 And further written submissions of 11th and 18th February 2011
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Judgment

Lord Justice Rix : 1. 2. Mr Minoo Driver, the appellant, worked for Air India, the respondent, from 1972 until February 2007, a period of some 35 years. From 1972 until 1997 he worked in Frankfurt and then transferred to London Heathrow. For these purposes, albeit somewhat in arrears, a new contract was issued to him effective 1 December 1999 (the “first contract”). When it was agreed to extend his employment past his retirement age of 63, a further contract was made effective 1 July 2006, to carry him to final retirement at the age of 65 (the “second contract”). For reasons unrelated to this litigation his employment came to an end on 19 January 2007. In Frankfurt he had worked as manager of catering services. At Heathrow he had the title of manager catering/ cabin service London. He took over from two people who had previously performed the roles involved in his job (Mr K B Nanda, the former manager, and Mr Nanda’s assistant, Mr B Banerjee). He was the single employee in his department. He reported both to his line manager in London and, functionally, to his superior in Mumbai. He generally worked a shift from 6am to 2pm. His commencing salary under the first contract was £23,851.56 per annum plus 13th month salary plus a London weighting allowance of £1148.48 per annum. His grade was D-10. His contract provided for payment for shift work (which it appears to be common ground means working hours at other than standard 9 to 5 times) and overtime, in the following terms: “Shift Work and Payment

10. Provisions regarding shift work, payment for shift work, overtime working and payments for overtime working are set out in notices and circulars issued by Air India from time to time. Copies of current notices and circulars are available for inspection upon request to your Section Head. Hours of Work and Payment
11. Your basic hours of work (excluding meal-breaks) will normally be 37 and a half hours per week spread over any five days at such times as Air India shall determine. However, in view of the operational needs of an airline, you will be required from time to time to work overtime, both on a rostered basis and ad hoc basis. Your agreement to the working of such overtime forms an important part of this contract of service.” 3. 4. 5. An internal letter from Air India’s regional director in the UK and Ireland to the director of IFSD (in flight service department) Mumbai concerning Mr Driver’s transfer to London confirmed that he “will also be entitled to applicable overtime, reimbursement of telephone charges applicable to staff in his grade...” The principal issue in this litigation is whether Mr Driver is entitled to be paid for ad hoc overtime which he claims to have been required of him. There are also issues about payment for shift work, and travel and telephone expenses. Air India denies liability for any such claims. Indeed, Air India submits that the terms of the first contract cited above do not provide for payment for overtime or shift work: on the ground that, despite the terms of clause 10, which says that “current notices and circulars” relating to such matters “are available for inspection on request”, no such notices or circulars have come to light. Air India therefore submits that the terms of the first contract about payment for overtime and shift work are ineffective as a mere agreement to agree: and that there simply was no contractual right to payment for overtime or shift work. Despite the absence of such notices or circulars¹, Mr Driver was in fact paid for overtime and shift work. He was paid for overtime down to 31 December 2001. He was paid for shift work down to 31 December 2002. A typical payslip for July 2001 shows that overtime was paid for that month in the sum of £1328.94, calculated at 39 hours at £19.26 and 27 hours at £21.40. Shift work pay was £240.44. No explanation has been provided by Air India for either the payment of those items, or for the cessation of payment of those items, at those times. None appears from the documents or evidence. Mr Jonathan Cohen, who has appeared on behalf of Air India, was asked if there was any explanation, and he was unable to say that there was. Air India 1 If indeed there were none, a matter which is itself in dispute, for Mr Driver submits that they must have existed and have not been disclosed. counterclaimed the return of sums for overtime and other payments to Mr Driver, but the counterclaim was not pursued and was dismissed.² 6. 7. 8. 9. Following the cessation of these payments, Mr Driver began to write a series of grievance letters to Air India. His first (“grievance letter 1”) was dated 2 July 2002, and addressed to his functional manager, Mrs Mascarenhas, the director of IFSD. No written response was ever made to this or any of Mr Driver’s successive grievance letters. Grievance letter 2 was written on 3 November 2002 and addressed to his local manager at Heathrow, Ms Kulkarni, and copied to Captain Sharma, the regional director for UK and Europe. Mr Driver said that his attendance sheets from the beginning of the year were awaiting authorisation for approval and settlement. The issue of telephone and travelling expenses

was also raised. On 10 December 2002 a meeting was held in London, involving Mrs Mascarenhas and Captain Sharma but also Air India's then managing director, Mr Gogoi, and others. Mrs Mascarenhas drew up an office note of the meeting dated 28 January

2003. The meeting considered other matters, but also Mr Driver's claims. As for overtime, the note recorded: "As regards the outstanding overtime claims raised by Mr. M Driver it was agreed that a small Committee comprising Airport manager, London and a representative of the IFSD Department should be set up to examine the issue in detail and make recommendations thereon."³ The recommendation to set up a committee to examine Mr Driver's claims was never fulfilled.⁴ As for telephone expenses, the note stated that it was "agreed...he should be provided with the same facility as that extended to other Officers in the same grade". He never was. The problem arose because Mr Driver had to make and receive calls to and from India which involved him in personal expense. As for car expenses ("conveyance allowance"), it was "agreed to settle for a fixed conveyance allowance of £100 per month. IDFS was to put up a proposal to Headquarters on these lines." The problem arose because Mr Driver's office was 7 miles from the airport. None of these agreed matters was actioned. It was not for nearly another three years, during which Mr Driver had written a further 7 grievance letters (grievance letters 3-9), none of which was answered or denied, that his case came to the attention of Mr Thulasidas, the then chairman and managing director ("CMD") of Air India, who clearly appears to have requested Mr Amod Sharma, the then director of IFSD, (and to whom the latest two grievance letters had 2 The counterclaim for overtime was only for the period of September/December 2001 inclusive, and not for the previous period. The counterclaim was expressed to be on the ground that in those months overtime had been claimed without the certification of the regional director. 3 The note went on to record the managing director's advice to seek to avoid "the need for overtime" by granting Mr Driver "offs on a regular basis". It is not clear how the one could avoid the other, unless the "offs" were intended as non-monetary compensation in kind for the payment for overtime. 4 Unless perhaps Mr Amod Sharma's investigation referred to in his memorandum of 5 October 2005 (see below) amounted to such a committee. I do not think it did. The December 2002 decision to set up a local committee was water under the bridge, and what happened in 2005 was a new initiative. been addressed) to investigate. On 5 October 2005 Mr Sharma wrote as follows to Mr Thulasidas: "This has reference to CMD's notings with regard to letter dated April 07, 2005 addressed to the undersigned from Mr M. R. Driver, Catering Manager, London, forwarded to us for our views.

2. We have examined the issues raised and our comments are as follows:... ii) Mr. Driver has proved to be an effective Catering Manager and through his efforts has effected several savings in costs in Europe/UK region. iii) Overtime: London is one of the busiest stations on our network with several flights operating via London. Mr. Driver, being the sole representative of IFSD at Heathrow is often required to work overtime beyond his rostered hours. Under these circumstances, Mr. Driver may be paid the applicable overtime as regulated and certified by the Airport Manager-Heathrow. iv) Conveyance: The vehicle

assigned to IFSD in London has been surrendered as a result of which the Catering Manager has to use his personal vehicle for official work. Mr Driver may therefore be paid the Conveyance (Kilometric Allowance) as applicable for use of his vehicle for official purpose, duly regulated and authorized by the Airport manager-Heathrow. vi) Communication: The catering-Manager-London is being reimbursed land line charges which are applicable to all staff in the grade D-10 in UK. Due to the nature of his assignment, Mr. Driver has to use his mobile phone for official calls. It is recommended that in addition to the reimbursement for land-line charges, the Catering Manager may also be reimbursed mobile phone charges for official calls on production of itemized bills. The same can be regulated and authorized by the Airport Manager-Heathrow. vii) Shift Allowance: Applicable Shift Allowance may be paid in line with the entitlement of other staff in the same grade...

3. The above issues are pertaining to the allowances that are due to Mr. Driver and have been pending since long without any justification.
4. Mr. Driver is a conscientious officer and depriving him of his legitimate dues may have a demoralizing effect on his performance. It is therefore requested that the allowances due to him may be reimbursed as per the company's policy and within the framework of our rules and regulations in this matter.
5. Enclosed is the Office Note...dated January 28, 2003 signed by the then Director-IFS wherein a decision on most of the issues raised were taken...
6. CMD's kind approval is requested for clearance of his dues as recommended in para 2 above. Based on the approval received, we will advise the RD-UK accordingly." [Emphasis added]
10. It seems to me to be plain upon these recommendations that: (1) Mr Driver's complaints and claims had at long last been properly investigated, and that at least in principle they had been acknowledged and approved, subject to Mr Thulasidas' decision. (2) Mr Driver was accepted as an honest and indeed conscientious employee, who had been both effective and an efficient costs-saver in his role. (3) Mr Driver's claims were regarded as justified. He was being deprived "of his legitimate dues", which required "clearance", by means of the reimbursement of what had "since long without any justification" been withheld.
11. Mr Thulasidas made his decision in a document dated 28 December 2005 which on 2 January 2006 was copied to all relevant officers, including Mr Driver himself, with the comment that it was "self-explanatory" and that the addressees were to "take necessary action accordingly".
12. Mr Thulasidas' decision was as follows: In line with what was decided at the meeting on 10 December 2002 in London when the then MD had indicated on office note No. IS/256 dated 28 January 2003, the following may be communicated to Mr. Driver:
 - a. Conveyance Allowance: A fixed conveyance allowance of £100 per month to enable Mr. Driver to use his personal car.

- b. Overtime: At that meeting it was decided that a Committee comprising the Airport Manager – London and representative of the Inflight Service Department should examine this issue. As recommended, applicable overtime may be paid to Mr. Driver, regulated and certified at all times by the Airport Manager – Heathrow.
- c. Shift Allowance: Applicable shift allowance may be paid in line with the entitlements of other staff in the same grade.
- d. Communication: As regards Mr. Driver's monthly telephone bills he should be provided the same facility as that extended to other officers in the grade. However, on account of the nature of his assignment, reimbursement for mobile phone charges for official calls may also be permitted on production of itemised bills duly regulated and authorised by the Airport Manager – Heathrow.” 13. It is accepted by Air India that this decision, communicated as it was to Mr Driver, amounted, potentially at any rate, to an amendment to his first contract; but, Air India submits that, for the same reasons as the first contract had given Mr Driver no right at all to payment for overtime or shift work, Mr Thulasidas' decision failed to create that right for the first time, for there was simply nothing “applicable” to which it could give effect. However, Air India also submits that, if it amounted to a variation to the first contract, it only did so prospectively and not retrospectively, which on the material which I have set out above appears to me to be a most difficult argument. 14. 15. 16. 17. 18. It may be observed that in certain respects Mr Thulasidas went beyond Mr Sharma's recommendations. Thus Mr Sharma recommended that Mr Driver be allowed a per kilometre allowance for company use of his personal car: however, Mr Thulasidas preferred a clean £100 per month allowance (as had already been recommended in the January 2003 office note). As for telephone expenses, Mr Sharma had recommended reimbursement of land-line and mobile costs: but Mr Thulasidas had approved a two- fold allowance: the standard allowance available to other officers in his grade, but also itemised mobile costs (presumably if greater than any applicable allowance). It may also be observed that in certain respects, viz overtime and the reimbursement of mobile telephone bills, Mr Driver's claims were to be “regulated and certified” (overtime) or “regulated and authorised” (mobile costs) by the airport manager at Heathrow. I do not think that a difference was intended between those expressions. A question arises as to what they mean. Air India submits that Mr Driver was in any event entitled to nothing unless it was authorised in advance. An alternative construction would be that the payments or allowances were authorised by Mr Thulasidas (to the extent that they were not already a matter of entitlement under the first contract), but that the detail of them was under the supervision of the airport manager (“regulated”), who was also required to sign them off (“certified”). Did that mean that certification was a condition precedent to entitlement? Air India submitted that it did. Mr Driver submitted that it gave the airport manager a discretion which he or she had to exercise reasonably (in the sense in which that word is used in *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 at para 66). Following Mr Thulasidas's decision about Mr Driver's longstanding claims, Mr Driver went to his airport manager, who in 2006 (and since August

2003) had been Mr Mike Joseph, to ask him to sign off his monthly schedules of overtime. Mr Driver had been keeping such monthly schedules over the years, and I will have to say something more about them below: but the essence of the matter is that over the years some of them had been presented to his line managers but most of them had simply been accumulated by Mr Driver himself on a monthly basis. They were all before the trial court. It might have been thought that at this stage matters would have been promptly and satisfactorily settled. After all, it is reasonably clear from the personal interest taken by Mr Thulasidas in Mr Driver's case, and in the strong suggestions in both Mr Sharma's recommendations to Mr Thulasidas and in Mr Thulasidas' decision, with each of them referencing the years' old decision of the previous managing director evidenced by the office note dated 28 January 2003, that it was high time that Mr Driver's claims were dealt with justly so as to lead to the "clearance of his legitimate dues". It seems however, for reasons which are not readily apparent, that things did not go smoothly for Mr Driver. There is a gap between the communication to Mr Driver and others of Mr Thulasidas' decision, as of January 2006, and the time when, in November 2006, on the eve of Mr Joseph's departure from London, Mr Joseph signed Mr Driver's monthly overtime sheets. What happened in that time? 19. One thing that happened was that Mr Driver reached his 63rd birthday on 18 June 2006, at which time his first contract provided (by its clause 28) for his retirement. However, Air India wanted Mr Driver to continue in his post until he was 65, and as a result a new contract was made dated 1 July 2006 (the "second contract"). This second contract dealt with overtime differently from the first contract, namely as follows: "5. Hours of work 5.1 The Employee's hours of work shall be 40 hours per week from 9 am to 6 pm and which can be enhanced to 48 hours at the discretion of the employer. Air India based on its requirements will notify the Employee with the starting and finishing times. 5.2 The Employee may from time to time be required to work such additional hours as may be necessary for the proper performance of his duties. Subject to working in excess of 48 hours per week, overtime may be paid at Air India's discretion and in accordance with the provisions set out in the Air India Overtime Guidelines in force from time to time." No such Overtime Guidelines have been disclosed by Air India. 20. The second contract also dealt expressly with "Expenses" in its clause 17: "Air India shall reimburse to the Employee such travelling, hotel and other out of pocket expenses as shall from time to time be reasonably and properly incurred by the Employee in the course of his employment, subject to the Employee complying with such guidelines or regulations issued by Air India from time to time in this respect and upon the Employee submitting to Air India on request satisfactory information and evidence of the same." 21. The second contract as it turned out lasted for only some six months, and therefore Mr Driver's claim under it is not nearly as significant as his claim under the first contract. In any event there is no longer any claim for shift work (not mentioned in the second contract), and the claim for overtime is subject to the more narrowly drawn provisions that contemplated overtime only above 48 hours of work in a week, and then put payment for it in Air India's discretion.

22. What else happened, however, between January and November 2006? The judgment, of His Honour Judge Richard Seymour QC, sitting as a judge of the High Court, tells us nothing of this period. There are, however, a number of further grievance letters from Mr Driver. In a letter dated 28 April 2006 he complained to Mr M B Lokur, regional manager UK & Europe, that he was being victimised and harassed by local management, and asked how else it could be explained that the decision of Air India's chairman with regard to his claims for overtime, shift allowance, conveyance allowance and communication expenses still remained unsettled. Certainly that question has never been explained in this litigation. In a further letter dated 29 April 2006 addressed to Mr Amod Sharma, director IFSD Mumbai, he raised the same unanswered question. In a still further letter dated 10 August 2006, again addressed to Mr Sharma, Mr Driver quantified his claims for shift work, conveyance allowance and telephone expenses. He claimed shift work payments at £61.37 per week from 1 January 2003 to 1 July 2004, and at £65.48 from 1 July 2004 to 30 June 2006, a total of £11,596.78. As for conveyance allowance, he said that it had been paid until August 2001 but not since then: however, at £100 per month, as allowed under Mr Thulasidas' decision, his claim amounted to £5,800 for 58 months. As for telephone expenses, they had been paid likewise until only August 2001, whereas £34 per month had been paid to other staff in his grade, giving a claim for £1,972 (plus mobile bills, which he was investigating). He ended by reminding Mr Sharma that overtime had not been paid for the last 54 months. 23. It was only in November 2006, shortly before Mr Joseph was posted back to India, that Mr Driver managed to get him to sign the documents which he, Mr Driver, had prepared on a monthly basis and had accumulated for the period of Mr Joseph's tenure at Heathrow from August 2003. Mr Joseph's last day in post was 17 November
2006. The documents in question show the following. For each month Mr Driver had prepared a "Signing in Sheet" and a "Statement of Overtime and Shifts Worked". The Signing in Sheet gave the hours of Mr Driver's work on a daily basis. He was working a shift from 6am to 2pm. Where he worked until 2pm or 2.30pm he made no claim to overtime. Where he worked longer hours, or worked on a rest day, he would enter an explanation under a column headed "Reason for Overtime": for instance, typically, to attend the departure or arrival of a flight, which he would identify by its flight number and time of arrival or departure; or, in the case of a rest day, for instance "Came on duty due Menu Change". His separate statements would then provide detail of the financial consequences. Thus weekly hours of overtime would be itemised either under overtime rates of 1½ times normal or 1⅔ times normal. Shift work payment was itemised at £61.37 per week. These figures are consistent with the payslip referred to above for July 2001.
24. Mr Joseph signed these documents as follows. On those relating to July 2003 he wrote: "I am unable to certify the overtime as I only took charge in Aug '03". He dated that "02/09/03". On those relating to August 2003 through to October 2006 he simply signed and appended his stamp ("M. V. JOSEPH Manager-London Airport Air India"). He dated the document with a date shortly after the time frame of the relevant document, eg the August 2003 documents were dated in his manuscript "11/09/03". The November 2006 documents he signed and

added in his manuscript: “To all concerned. O/T certified by me only up to 17 Nov ‘06”, ie his last day in post. He was succeeded as manager by Mr K S Balsaraf, who also signed the November 2006 documents, and dated his signature “14/XII”, presumably 14 December 2006. 25. At that point, at any rate for this period of August 2003 to November 2006, and subject to the change of regime introduced by the second contract from July 2006 (and subject also to what on the face of it is the threadbare submission that Mr Thulasidas’ decision was only prospective), it might seem that Mr Driver’s claim for overtime had reached a resolution. Mr Thulasidas, the chairman and managing director of Air India, had said that Mr Driver was entitled to overtime and that the matter should be regulated and certified by the local manager at Heathrow. That decision was arrived at after an investigation at the highest level which had (belatedly) sought to make amends for Air India’s failure to put in place the investigative committee which had been recommended as far back as at the meeting of 10 December 2002. The local manager, Mr Joseph, had signed off Mr Driver’s detailed schedules which evidenced his claims to overtime. He had done so indicating that he was approving and certifying the same, for he had written “certified by me only up to 17 Nov”, ie they were certified up to that date. 26. 27. Nevertheless, there was still no settlement of Mr Driver’s claims. It is difficult to understand what the difficulty was. At trial, nearly four years later in June 2010, there was a dispute as to the effect and circumstances of Mr Joseph’s signing off of these documents. I will have to consider that dispute below, for the judge found that Mr Driver had been motivated by “fraudulent intent” (para 82). This was no doubt a critical finding for the judge, but it came despite the fact that no case of fraud had been put in cross-examination to, Mr Driver. It is sufficient at this point to state that at trial Mr Joseph repudiated his signature as having any significance. The judge found: “He intended, by his signature, only to indicate that Mr Driver had shown the statement in question to Mr Joseph” (at para 80). It is also important at this point to state that at the hearing of this appeal Mr Cohen, who had also appeared for Air India at trial, very fairly made it clear, in answer to the court’s specific question, that there was no positive case of dishonesty against Mr Driver. Aside from any contractual questions of Mr Driver’s entitlement, Air India’s case against him was the negative one of putting him to proof. This was despite the fact that Air India’s defence referred, but without any particularisation, to Mr Driver’s “false claim” (at para 24). But what happened on the ground, as it were, following these events in November 2006? It is almost impossible to say. No part of the judge’s narrative extends beyond November 2006. It appears, however, that following Mr Driver’s institution of these proceedings on 12 May 2008, Mr Joseph was required to appear before a vigilance inquiry conducted by Air India’s Vigilance Department. In effect, as I infer, Mr Joseph was being held to account, in the face of Mr Driver’s litigation, for his certification of Mr Driver’s overtime statements. One can perhaps sympathise with Mr Joseph becoming embroiled in this dispute in this way. The nature of the accusation against Mr Joseph is not clear, but some light is thrown on it by an exchange of emails initiated on 20 February 2009 between “Manager – Vigilance” and Mr Balsaraf, who it will be recalled succeeded Mr Joseph as manager at Heathrow and signed Mr Driver’s November 2006 overtime statement. The vigilance manager’s email stated: “Please find attached overtime statement of Mr Minoo Driver for the month of November

2006. The overtime claim for the period 18.11.06 to 30.11.06 has been certified by your office. You were kindly aware that the then CMD vide letter dated 28.12.05 had ordered that a Committee will examine the issue of the overtime of Mr Driver. In light of the above you are requested to furnish the reason for certifying the overtime of Mr Minoo Driver for the period 18.11.06 to 30.11.06 before the appointment of the Committee.”

28. Mr Balsaraf replied by email dated 5 March 2009: “I had recently taken over the station prior to signing Minoo Driver’s overtime from 18th to 30th Nov 2006. I was neither briefed nor was I aware of the CMD’s order dated 28th Dec 2005, and therefore inadvertently the overtime for the above period was certified by me. The oversight is sincerely regretted.” 29. This exchange is revealing. Mr Balsaraf accepts that he certified Mr Driver’s overtime. The time period in question was immediately contemporaneous to his arrival in post in London, and therefore he was of course in the best of positions to know whether or not the overtime claimed was justified. He signed the statement on 14 December 2006, intending as he said to certify it. However, Mr Balsaraf is referred by the email to him to Mr Thulasidas’ decision of 28 December 2005, which it is said he was aware of, albeit Mr Balsaraf says he was not. He is told by the Vigilance Department that in that decision Mr Thulasidas “had ordered that a Committee will examine the issue of the overtime of Mr Driver”. This is quite wrong. Mr Thulasidas had done no such thing. He had rather referred to the decision of the meeting of 10 December 2002 to appoint such a committee, intending to emphasise how stale the matter was (which Mr Sharma had emphasised in his recommendations to Mr Thulasidas). The investigative role of the suggested committee had been superseded by Mr Sharma’s investigations and recommendations. The decision of Mr Thulasidas had been to accept those recommendations (save where they were improved upon in Mr Driver’s favour). As Mr Thulasidas had said: “As recommended, applicable overtime may be paid to Mr Driver, regulated and certified at all times by the Airport Manager- Heathrow.” In the circumstances, the time for any further committee had passed (it might be said long past). The matter was left to the airport manager to regulate and certify. That is what Mr Balsaraf (and Mr Joseph) had been ordered by Mr Thulasidas (and requested by Mr Driver) to do, and what they had done. Mr Balsaraf, who was only involved with a single overtime statement, was allowed to escape with an apology. Mr Joseph, however, was in deeper water and, as Mr Brian Dye on behalf of Mr Driver realistically suggests, had to come up with a more detailed account to explain his position. 30. For these purposes Mr Joseph made a statement for the vigilance inquiry dated 16 February 2009. In it he said inter alia as follows: “Somewhere in the last week of November 2006, Mr Driver showed me the copy of the CMD’s letter dated 28.12.05 wherein with regards to the overtime of Mr. Driver, CMD had passed an order stating that a committee comprising of the Airport Manager – London and representative of Inflight Service Department will examine the issue and as recommended by the Committee the applicable overtime may be paid to Mr Driver regulated and certified at all times by the Airport Manager – Heathrow. Since I was being re-posted back to India, Mr Driver pleaded with me to certify the overtime claim forms for the period August 2003 to November 2006 for purpose of record for the Committee which was likely to be set up to look into his overtime

issue. When it was pointed out to Mr Driver as why he had not submitted the overtime claim forms to the undersigned as instructed to him vide letter dated 01.09.2003, Mr Driver was not able to give a satisfactory reply. However, as the issue of overtime of Mr. Driver was under consideration and as I was being re-posted back to India, in good faith I certified all the overtime claims of Mr. Driver for record purpose without verifying the authenticity of the same and put the date of certification as the date which was requested by Mr Driver.” 31. So, Mr Joseph’s position, even when under attack from the Vigilance Department, was to say that he was certifying the overtime statements in good faith. This may be contrasted with his evidence at trial, accepted by the judge, that his signature was merely intended to count as, and counted for nothing at all beyond, an acknowledgment that the statements had been shown to him. Moreover, Mr Joseph’s statement again reproduces the error that Mr Thulasidas had ordered a further committee to examine the issue of Mr Driver’s overtime claim. Moreover, Mr Joseph’s statement appears to have been affected by the Vigilance Department’s own input into it, as indicated by its last paragraph, where Mr Joseph states – “it has been brought to my notice by the Vigilance Department that there are various irregularities in the overtime claims of Mr Driver”. It is not clear what those irregularities are. 32. In that statement, Mr Joseph referred to a letter dated 1 September 2003. That letter, addressed by him to Mr Driver, and headed “Subject: Duty/Overtime”, had stated as follows: “In view of the fact that the catering unit where your office is located is away from the terminal, with immediate effect you will submit your duty roster pattern for the following month on or by the 27th of the preceding month. Further, you will also submit your shift time sheets along with your overtime statement for certification by me by the 5th of the following month for the preceding month. Please note that the overtime claimed should have all the details of the flights handled or notes if the overtime has been incurred due to any other catering activity.” 33. This letter was issued by Mr Joseph within the first month of his taking up his post as manager at Heathrow. A number of matters may be observed. First, it is written on the basis that Mr Driver is entitled to be paid for overtime. Of course, Mr Joseph cannot create a contractual right for Mr Driver to be paid for overtime where none would exist. However, the letter is consistent with a contractual right existing. The letter would make no sense if the right did not exist. Secondly, it is clear from the letter that Mr Driver is entitled to put forward for himself a claim for overtime, for certification by his airport manager. That makes good sense where Mr Driver is the manager of, indeed the only employee within, his catering department. Thus, there is no suggestion that someone else, such as Mr Joseph, has to request or authorise in advance the working by Mr Driver of overtime. Mr Cohen did submit on behalf of Air India that the first paragraph of the letter required presentation in advance of any suggested need for overtime, to enable Mr Joseph to authorise it in advance. I would reject that construction of the letter. The first paragraph is dealing with the separate matter of “duty”, ie the “duty roster pattern” (days working, shift time, rest days) referred to in that paragraph. Overtime hours however were to be presented for certification only monthly in arrears. Thirdly, there is nothing in the letter to suggest that compliance with the timetable is a condition precedent of any contractual right. If there were such a contractual condition precedent, it would have to be found in Mr Driver’s first

contract. Of course, if Mr Driver failed to present his shift time sheets with overtime statement for certification by the 5th of each following month, he might well face difficulty in obtaining certification if there was any real doubt about his claim: that, however, is a matter of evidence rather than contract. Fourthly, there is a dispute about the circumstances in which Mr Driver first began, and then ceased, to present Mr Joseph with monthly overtime statements in arrears. I shall refer to that dispute below. However, I do not regard the resolution of that dispute as being critical for Mr Driver's claim. Either his contract required timely presentation as a condition precedent or it did not. The rest is evidence. There is no positive case that Mr Driver's statements are inaccurate, let alone dishonest, merely a putting to proof. 34. This has been a lengthy introduction to the subject-matter of this litigation and this appeal, but it reveals the main issues which have emerged, which it seems to me are these: (1) Did the first contract give Mr Driver any entitlement at all to the payment of overtime? (2) If so, was any condition precedent imposed by that contract on any such right, such as pre-authorisation, or prompt presentation of overtime claims for certification, or certification itself? (3) Was any entitlement to be paid for overtime under the first contract solely in the discretion of Air India (as it was in the second contract)? (4) If there was no right to payment for overtime under the first contract, did Mr Thulasidas' decision give him such a right, and if so, was that prospectively only, or also retrospectively? (5) If Mr Driver obtained any right to payment for overtime from Mr Thulasidas' decision, was that right subject to any condition precedent of any kind, such as certification by the airport manager? (6) Were Mr Driver's claims for overtime payment properly certified, and if not, what is the effect of that? (7) In that connection, what, if any is the relevance of the judge's finding that Mr Driver's presentation to Mr Joseph in November 2006 had been motivated by fraudulent intent? (8) Similar issues arise in relation to the claim for payment for shift work. (9) What is the effect of Mr Thulasidas' decision on the claim for conveyance allowance? (10) What is the effect of his decision on the claim for telephone expenses? (11) What is the position in respect of overtime under the second contract?

- (12) What is the position under the second contract in respect of the expenses claims? Issue (1): Did the first contract give Mr Driver any entitlement at all to the payment of overtime? 35. The judge found that it did not. He acknowledged that clause 10 envisaged that there might be overtime working (and shift work), attracting payment, but reasoned in effect that, because provisions in relation to such matters were to be found in "notices and circulars issued by Air India from time to time", and there were none; and because certain communications to Mr Driver relied on by him as being such notices and circulars were ineffective to constitute such provisions (or were even counter-productive from Mr Driver's point of view); and having construed Mr Thulasidas' intervention as being prospective only; therefore, Mr Driver was not entitled to any payment for either overtime or shift work. There are two passages in his judgment which perhaps contain the essence of his reasoning, at paras 83/84 and 105 respectively. Paras 83/84 are to be found under the heading of "The overtime claims", and para 105 is to be found under the heading of "Implied term of trust and confidence": "83. The short answer to Mr Driver's claims to be paid overtime was in fact

given by Captain Sharma during the course of his cross-examination. Captain Sharma pointed to clause 6 of the First Contract and said, correctly, that Mr Driver's duties and responsibilities were to be assigned to him from time to time by his immediate superiors. It was not up to Mr Driver himself to decide what he would do, and then seek to charge Air India for undertaking overtime which Air India had not asked him to work. It is a clear and straightforward point. In my judgment it is plainly right. Mr Driver was not, as he seems to have thought, the judge of whether he should work overtime and charge Air India for it. Air India was only potentially liable to pay Mr Driver for undertaking overtime duties if it had asked him to perform such duties. On the evidence, it had made no such request.

84. It is also correct that the First Contract contained no provision for the making of payment for overtime working. The contract contemplated that there would, or might, be a need for overtime working, but detailed provisions in relation to overtime, and in particular provisions for payment of overtime working, clause 10 of the First Contract envisaged would be found in other documents. No such other documents were produced in evidence. The documents relied upon as notices or circulars in relation to overtime did not deal at all with rates of payment or the precise circumstances in which payment might be made for working overtime..." "105. As I understood it, the point Mr Stagg [counsel for Mr Driver at trial] wished to make, as an alternative to the principal case of Mr Driver was that if, on the proper construction of the First Contract or the Second Contract, there was a contractual right to a payment – for example, in respect of overtime – dependent upon a claim for the payment being approved by someone on behalf of Air India, it was no answer to the claim that the approval of that person had not been given, unless there was a good reason for denying the relevant approval. I do not think that that was really in dispute in this action. The essential position of Air India in respect of those claims of Mr Driver which were pursued was that there was no contractual right to the relevant payment, not that it was entitled to refuse a payment which was otherwise due because a necessary approval had not been given." 36. 37. The judge went on to accept Air India's position there expressed, reasoning that no implied term for payment could be found where none was express, and that it would have been different if Air India had requested work in excess of that contractually required: in that case a fresh contract would have arisen to pay a reasonable sum, or a restitutionary remedy might have been available (at para 107). In sum, it appears that the judge's decision in this respect was founded on his understanding of the first contract as simply creating no right to overtime at all (which would have to be found, if at all, outside the contract in a notice or circular, or in a specific request). Clause 6 was relied on as supporting this view. As it was Air India had made no relevant requests. The judge accepted, however, that if the contract had contained a right to payment for overtime worked, then, even if not approved, payment would have been earned unless Air India had good reason to withhold approval. 38. On this appeal, Mr Cohen echoes that reasoning (but also goes beyond it, see issue 2). He submits that the first contract contained no express right to payment for overtime, because there were no notices or circulars providing for it; and that in such circumstances no obligation could be implied. Therefore a right to payment

had to be found outside the contract: but that factual enquiry was ultimately irrelevant, since it was not contended that Air India had expressly requested the overtime claimed. A flavour of his submissions can be obtained from his skeleton argument as follows: “This contract provided for no enforceable rights at all without more. D [Mr Driver] would only have an entitlement to shift or overtime pay if and in so far as AI [Air India] determined to grant such payments, by the issue of notices and circulars. In that sense, clause 10 was little more than an agreement to agree. Put another way, if a contract provides for a further agreement to be incorporated that does not exist or is not made, it is of no effect... Thus, the exercise that the learned judge was required to perform in this claim was to identify whether the discussions and communications between the parties were such as to create further contractual rights going beyond the terms of the written contracts... In the circumstances, whether or not D was required to obtain prior approval for overtime worked or not and whether or not particular witnesses were telling the truth...are moot. D simply did not have the contractual rights that would be necessary to make out his claim... ..The real value in this case was the claim for unpaid overtime...The battleground between the parties was whether D simply did so of his own volition (D’s case) or whether he did so against the repeated instructions of AI (AI’s case). Once again, when viewed against the contractual background, that was irrelevant if no contractual right existed to pay. Nor was there any cogent explanation as to why D continued to work overtime for years when payment was persistently refused. Viewed from that perspective, it is not surprising that the learned judge approached D’s claim with scepticism. It was at best curious and at worst misconceived.” 39. I will return as necessary to the factual allegations contained in those submissions. What I am at present concerned with is the issue of the proper analysis of Mr Driver’s contractual rights, if any, to payment for overtime under his first contract. I would merely observe in passing: (a) that a sufficient explanation of Mr Driver’s continuation to work overtime may be found in his conscientiousness as an employee, of which Air India’s senior officers, Mr Sharma and Mr Thulasidas, after proper investigation, were satisfied; (b) that payment of his overtime claims was never, let alone persistently, refused, they were merely ignored, and, it has to be said, ignored without explanation – until Mr Thulasidas intervened and responded positively – and were then ignored again, and again without explanation; and (c) that although there is a submission that Mr Driver’s claim was “at best curious and at worst misconceived”, it is, of course, not said that it was dishonest.

40. Mr Cohen supplemented his written submissions in oral argument. He submitted that contractual provisions requiring an employee to work overtime, as clause 11 of the first contract did here, are common: but that did not mean that the employee was entitled to be paid for overtime. Nor could payment for overtime be implied, least of all for a salaried, as distinct from an hourly paid employee. He acknowledged that authority was scarce or non-existent, but referred us to Harvey on Industrial Relations and Employment Law at B3/8 which states: “There is generally speaking (in the absence of an express or implied contractual term to the contrary) no obligation on employees to work overtime. However, in contrast to sick pay, there is no general implied right on the part of employees to be paid for

overtime when worked voluntarily. Correspondingly, since the majority of contracts will stipulate the hours of work, unless there is agreement on the question of payment beyond these normal hours of work (and absent a term requiring the employee to work on without additional payment) mutual agreement (express or implied) on the subject of additional remuneration will generally be the prerequisite before the employer can insist overtime is worked.” 41. 42. To the extent that that extract helps at all, which is limited, it suggests that (subject no doubt to contrary agreement) a requirement to work overtime (as distinct from what is described as the voluntary working of overtime) is likely to involve additional remuneration. Much no doubt might depend on context and practice. I would agree that a salaried employee, especially a more senior employee, is more likely to expect and be expected to work as may be reasonably necessary beyond his or her normal hours, and to be rewarded for doing so by salary scale and/or by bonus. Professional employees may be archetypically within such a regime. However, one might not expect even a salaried employee like Mr Driver on a basic salary as relatively low as £24,000 per annum to be required to devote all the time which his employer or his job might require of him without the expectation of payment. Ultimately, however, it is a matter of contract (an unusual example, cited by Mr Cohen, although he accepts that it is not directly on point, may be provided by *Ali v. Christian Salvesen Food Services Ltd* [1997] IRLR 17 (CA)). In the present case the first contract plainly contemplated by its clauses 10 and 11 that overtime, ie hours beyond the basic hours of 37½ hours per week, which was “required...on a rostered and ad hoc basis”, would be remunerated. That may be contrasted with the provisions for overtime contained in the second contract, under which overtime came free to the employer between the basic 40 hours per week and a further 8 hours amounting to 48 hours per week and thereafter was expressly stated to be in Air India’s “discretion”. Under the first contract, however, subject to any “notices and circulars” (which Air India says do not exist), payment for overtime is nowhere said to be discretionary. Is then the consequence of an absence of notices and circulars that the payment for overtime promised in clause 10 becomes a mere chimaera? In my judgment, that would be a most unlikely construction, and contrary to the general position that where a contractual payment is not specified, the law implies a reasonable sum. (It may be different where the contract merely says that (for instance) the price is to be agreed.) The contract is not to be construed by subsequent conduct, but it is nevertheless to my mind highly relevant that overtime was in fact being paid to Mr Driver until the end of 2001, and then ceased without any explanation. 43. It is accepted by Mr Driver that the overtime has to be “required”, but disputed by him that that means that it has to be expressly requested, let alone requested in advance, or pre-authorised, in order to be “required”. It may be that in practice “rostered” overtime will be requested in advance; but it is in the nature of “ad hoc” requirements that they do not fall into that pattern. The contract could have said that overtime had to be requested in advance: or the absent “notices and circulars” could have laid down conditions for authorisation, either in advance or even retrospective. But there are none such. There are two questions here. One is a matter of construction: what does “required” mean? The other is a matter of fact: was any particular overtime in fact “required”? The answer to the first question, as it seems to me, is that in

case of need a trusted manager such as Mr Driver, who was in charge of his own department, would be entitled to say that additional hours were “required”. That does not mean that he could absolutely self-certify without supervision: but he could be left to exercise his own judgment on what was required of him to perform his responsibilities. It would then be a matter for his relevant superior managers to determine whether his claim was justified. That, however, does not mean that that determination is a matter of “discretion”. As the judge acknowledged at para 105 as being common ground, the question that then arises is a matter of fact (or ultimately judgment). The judge did not discuss the meaning of clause 11. In my judgment, the combination of clauses 10 and 11 gave to Mr Driver, even in the absence of any notices and circulars, a contractual right to be paid for overtime where overtime was “required”. I do not regard clause 6 as being of assistance in this respect. Clause 65 is dealing with Mr Driver’s duties and responsibilities as an employee, whether as the catering manager at Heathrow, or in some other capacity. Where Mr Driver’s contract entitled him to payment for overtime, his immediate superiors could not change his contract. 44. I will discuss the second, factual, question below (under issues 6/7). I would merely observe here that Mr Sharma was expressly of the view that “Mr Driver is a conscientious officer” and that as “the sole representative of IFSD at Heathrow is often required to work overtime beyond his rostered hours”. Mr Sharma was there plainly addressing the terms of Mr Driver’s first contract. Mr Thulasidas by his decision with regard to Mr Sharma’s investigations and recommendations plainly endorsed that judgment. In such circumstances, it seems to me that it ought to require strong evidence from Air India that Mr Sharma and Mr Thulasidas had erred in principle, for all that the detail of the matter was ultimately remitted to be regulated and certified by the local airport manager at Heathrow. 5 “Your duties and responsibilities will be assigned to you from time to time by your immediate superiors, however such are the operational needs of an international airline that it may be necessary to transfer you from one section to another or perhaps to other cities within the United Kingdom. Should a transfer involve relocation to a city other than the city office and airport office of the area in which you are appointed, you will be consulted and consideration given to any representation made by you.” Issue (2): Was any condition precedent imposed, by the first contract or otherwise, such as pre-authorisation, or prompt presentation of overtime claims, or certification itself? 45. 46. Since the judge considered that the first contract gave Mr Driver no right to payment for overtime work at all, any question of a condition precedent did not arise – other than the judge’s acceptance of the submission that there had to be a specific request for Mr Driver to do overtime for there to be any possibility in any event for overtime payment. However, the judge went further and found that a number of communications over the years imposed still further difficulties on Mr Driver’s overtime claim. On this appeal, Mr Cohen submitted that the judge had been right so to find. Mr Dye submitted that the judge had misunderstood the relevant communications. The judge viewed them against the background of his opinion that the first contract gave Mr Driver no right to payment for overtime. In that, he was, with respect, in error. Thus, the judge found that three such communications either imposed a requirement of prior authorisation or eliminated any possibility of overtime: (i) a memorandum dated 20

April 2000 addressed to Mr Driver from Captain Belhari, regional director UK & Ireland, and copied to Ms Kulkarni, then Air India's manager at Heathrow; (ii) Ms Kulkarni's memorandum to Mr Driver dated 5 May 2002; and (iii) Mr Joseph's evidence at trial that he had orally instructed Mr Driver not to undertake overtime without authorisation. I will need to mention a few other documents, to put these three items in context. 47.

- (i) Captain Belhari's memorandum dated 20 April 2000. This read as follows: "As already advised, henceforth you will report to Miss S. D. Kulkarni, Manager- London Airport, for all administrative matters, i.e. leave requests, passages, overtime, etc." The judge said of this (at para 84): "I find that, on proper construction, the memorandum dated 20 April 2000 had the effect for which Mr Cohen contended; that is to say, it was an instruction not to work overtime without the prior authorisation of the Airport Manager, London. The construction for which Mr Stagg contended, it seems to me, produced absurd consequences; namely that Mr Driver might choose to work overtime, that being necessary in his view, but then not be paid, because Air India, in the form of the Airport Manager, did not share that opinion." 48. In my judgment, the construction put on this document by the judge is unjustified. The memorandum is entirely general and neutral. It does not impose any obligation of pre-authorisation. Of course, if one starts from the position that the contract gave Mr Driver no right whatsoever to payment for overtime working, then no doubt it might be necessary to seek prior authorisation from Mr Driver's line manager to work overtime, on the basis, as the judge viewed it, that any such authorisation would amount to an agreement outside the first contract justifying contractual or restitutionary compensation (see at para 31 of the judge's judgment, where he also discusses this memorandum). 49. It will be recalled that Mr Driver was being paid overtime until the end of 2001. Moreover, a memorandum dated 11 May 2001 from Mr Dileep Row, the then regional director, copied to Ms Kulkarni and Mr Driver among others, stated inter alia that – "2. Mr. M. Driver has prepared a format which gives details by day on the flights attended by him. This chart indicates reasons for overtime, if any. The chart is satisfactory.
3. Mr. S. N. Dhotre, Dy. Gen. Manager, GSD, LHR will countersign the format prepared by Mr. M. Driver.
4. Upon the completion of every month, Mr. Driver may bring the format duly countersigned by Mr. Dhotre to the undersigned [Mr Row] who will then certify the overtime claim submitted by Mr. Driver." 50. The judge prompted by Mr Cohen's submission, construed this memorandum, as requiring pre-authorisation by Mr Dhotre, and post-event certification by Mr Row. He considered any other construction absurd (at paras 29/31). However, there are two considerable difficulties with that construction. First, it requires "flights attended" to be construed as "flights to be attended", which is not what is said. Secondly, it is inconsistent with the way in which the "format" in question, said to be "satisfactory", was in fact approved. Monthly examples of the format are in our files. It is plain that the documents were drawn up by Mr Driver and countersigned by Mr Dhotre retrospectively. Thus the May 2001 document gives details of total (not overtime) "Hours worked" and "Hours claimed" day

by day. A standard day would be 8 hours. A day on which overtime was claimed might be 10 hours, from which it needed to be calculated that overtime was 2 hours: but there was no separate column for overtime. The May 2001 format was countersigned by Mr Dhotre on 4 June 2001. The June 2001 format was countersigned by Mr Dhotre on 18 July 2001. This, it will be recalled, was an approved format. There is no sign on the format of Mr Row's certification. This would presumably be done by Mr Row separately, as it required a separate calculation. Thus Mr Dhotre countersigned for the hours worked and Mr Row certified the overtime calculation. It seems that he did certify it, for Mr Driver was paid overtime at this time. There is no support here for Air India's position. 51. On 19 December 2001 Captain Sharma, the then regional director, in a memorandum to Mr Driver, copied to Ms Kulkarni and Mr Dhotre among others, said that Mr Row's memorandum dated 11 May 2002 "stands superseded" and that Captain Belhari's memorandum of 20 April 2000 was to be followed. Nothing whatsoever was said, however, about any curtailment of Mr Driver's overtime entitlement. I surmise: it is possible, simply on a post hoc ergo propter hoc basis, that it was as a result of this memorandum in December 2001 that Mr Driver's overtime ceased to be paid as at the end of the year. There was, however, no evidence to that effect, even though Captain Sharma was a witness at trial. The position remains that both the payment of overtime to Mr Driver up to the end of 2001, and the cessation of payment thereafter, are entirely unexplained. Indeed, Captain Sharma said in his witness statement: "From 19 December 2001 therefore Mr. Driver was required to submit his statements on a timely basis every month to the Airport Manager for verification. Mr Joseph's letter dated 4 July 2006 reconfirms this procedure when it states at paragraph 6: "Your time sheet should be submitted to this office no later than the 05 th of the next month for the past month verification." 52. It is plain that Mr Joseph's letter of 1 September 2003 (discussed above at paras 32/33) only required post-event verification and not pre-authorisation. Captain Sharma's evidence could well have referred to that letter, but instead chose to refer to Mr Joseph's letter of nearly three years later, of 4 July 2006, which was written to congratulate Mr Driver on his reemployment pursuant to the second contract. Overtime is not mentioned in that letter expressly, but the quoted sixth paragraph remains entirely consistent with all that had gone before. Thus Captain Sharma's own evidence at this point confirms what all the evidence of the documents referred to at this point of my judgment suggests to my mind to be the case on their true construction: namely, that Mr Driver's overtime was to be certified monthly in arrears, but was not required to be authorised in advance. 53. (ii) Ms Kulkarni's memorandum dated 5 May 2002. This was headed "Duty Roster" and stated: "With effect from 08th May '02 following will be the roster pattern to be followed by you as per the timings given below. Your shift will commence at 0600 Hrs to 1430 Hrs." 54. The memorandum then tabulated the days 8 to 27 May as either a shift day (marked "E" for "Early") or a rest day (marked "R" for "Rest Day"). Four days of E were followed by two days of R (a normal seven day week was not observed). Thus Mr Driver was rostered to work five days in every seven. The memorandum then concluded: "The attendance has to be signed in the office of the Commercial manager London Heathrow. Please ensure strict compliance of the above." The judge said (at para 85): "I accept the submission of Mr Cohen that Miss

Kulkarni's memorandum dated 5 May 2002 itself amounted to an instruction not to undertake overtime, because strict compliance with the roster set out above meant that no overtime would be worked." 55. It seems to me that the judge's view of this document reflected his general line of thinking. However, if he had borne in mind that Mr Driver was entitled to payment for overtime under his contract, that he had been receiving overtime payments in 2001, and that there is no sign whatsoever in any of these documents that Mr Driver was not entitled to overtime, or that overtime had to be pre-authorised, he ought not, in my judgment, to have read into this latest memorandum, which is headed "Duty Roster" and does not refer to overtime at all, any prohibition on what the contract refers to as overtime required on an ad hoc basis. 56. (iii) Mr Joseph's oral evidence. The judge said: "86. I also accept the submission of Mr Cohen that, on the evidence of Mr Joseph, which I accept, he instructed Mr Driver not to undertake overtime without authorisation, unless in an emergency, in which event he was to notify Mr Joseph of what he had done. Mr Joseph, in his memorandum dated 1 September 2003, instructed Mr Driver to submit any claim for overtime for certification by the 5th day of the month following the month in which the overtime was said to have been worked. Mr Driver did not comply with that instruction." 57. The judge may have in theory been entitled to accept Mr Joseph's evidence, but the question must arise: what is the value of that evidence unless it is reflected in contemporaneous documentation? Mr Joseph arrived in post as the manager at Heathrow in August 2003. On 1 September 2003 he wrote to Mr Driver in the terms of the memo which I have already discussed above (at paras 32/33). I will repeat its relevant paragraph for the sake of convenience: "Further, you will also submit your shift time sheets along with your overtime statement for certification by me by the 5th of the following month for the preceding month. Please note that the overtime claimed should have all the details of the flights handled or notes if the overtime has been incurred due to any other catering activity." 58. There is nothing there to suggest that overtime had to be pre-authorised; or was forbidden save on an emergency basis; or even that timely submission of the retrospective form requested was a condition precedent for certification. I acknowledge, of course, that efficient administration requires prompt dealing with such claims. 59. On 15 September 2003 Mr Driver wrote to Mr Joseph as follows: "Subject: Overtime certification for period 01 Jan 2001 – 31 Jul 2003 The overtime statements of my duties for the above period were presented for certification and regularisation for payment to the then Manager London Airport namely Ms Kulkarni and thereafter Mr Gupta. During the above period, I was signing the attendance register kept in their office. However, till date, I have not been advised as to the whereabouts of these overtime sheets and whether they have been certified. On enquiring with accounts, I have been informed that they have not received the same from the airport office. I do have copies of the statements that were submitted earlier and may I seek your assistance in getting the same regularised now, as they have been outstanding and pending for quite a long time." 60. On 20 September 2003 Mr Driver wrote again to Mr Joseph as follows: "This has reference to your letter dated 01 Sep.03. Further to our discussions on receipt of your letter and as confirmed by you, I will be submitting my duty roster to your office for a three monthly period. However, the overtime statement will be forwarded to your office on a

monthly basis.” That confirms at any rate Mr Driver’s understanding of Mr Joseph’s letter of 1 September 2003, viz that overtime statements had to be submitted only on a monthly basis in arrears. I have already expressed my view that that is a correct understanding of the letter. On 24 September 2003 Mr Driver wrote a lengthy letter to Mr Joseph headed “Subject: In-Flight Service Department Issues”. Mr Driver there sought to bring Mr Joseph up to date with the history of his transfer to London from Frankfurt, and of his inability to obtain payment for his overtime (despite his success in driving down the payroll cost of the catering department). He also explained his claims regarding car and telephone expenses. He asked for Mr Joseph’s help in resolving his claims. 61. 62. 63. On 27 September 2003 Mr Joseph wrote in manuscript on Mr Joseph’s letter: “Many of these issues seem to be pending approval from HQrs. For which I may not be in a position to resolve. However to ensure that your working time records are kept updated, please follow instructions regarding overtime and see my letter dated 01 sep ’03.” It appears that this manuscript note was passed to Mr Driver, for Mr Driver accepts that he received it. 64. In any event, on 4 October 2003 Mr Joseph replied to Mr Driver’s letter of 15 September as follows: “Subject: Overtime certification for period 01 Jan 2002 – 31 Jul 2003 I do confirm that your overtime statements are not in my office as of now and I am not aware of the whereabouts of the same. Since these records are pertaining to overtime payments for a period before I assumed office of Manager, London Airport, please be advised that I am not in a position to certify and regularise the same for payment. However, by means of a copy of this letter addressed to the RD – UK/EUR and RFAM – UK/EUR, both of whom were in office during the above period, I am bringing this issue to their notice for necessary assistance in resolving this matter. Hence may I suggest that you kindly approach them with this pending issue. For the future and with immediate effect, please ensure that you submit your roster pattern and overtime statements on a monthly basis to the undersigned for necessary certification.” 65. 66. 67. It appears that Mr Driver may have done that for a while, because Mr Joseph eventually accepted in cross-examination that he may in fact have signed one or two monthly statements in the autumn of 2003, just after taking up his position. However, it seems that sometime in the autumn or towards the end of that year Mr Driver gave up presenting his monthly overtime statements to Mr Joseph (although he maintained the preparation of them and ultimately presented them to Mr Joseph in November 2006 as described above). Why did Mr Driver give up doing what he had been instructed to do? Was it because, as Mr Joseph said in his evidence and as the judge accepted, that he had orally instructed Mr Driver not to undertake overtime, save in an emergency? As set out above, there is no contemporaneous support for Mr Joseph’s evidence. There is his 1 September 2003 letter, which accepts the existence of overtime and asks for monthly statements in arrears. There is his manuscript note dated 27 September 2003, which is to similar effect, as is his letter to Mr Joseph dated 4 October 2003. There is nothing further directly from Mr Joseph to Mr Driver until his letter dated 4 July 2006, in the context of the second contract. There is nothing in any of this to suggest a direction of the kind of which Mr Joseph spoke in his evidence. It seems to me to be in principle unlikely that a direction of the kind of which Mr Joseph spoke would have been left uncommunicated in writing. On the other hand we know from Mr

Driver's continuing correspondence to management what he was saying at the time about these matters. Thus in his letter dated 4 January 2004 addressed to Captain Sharma, Mr Driver referred to Mr Joseph's letter dated 4 October 2003 (in which Mr Joseph had informed him that his overtime statements were not in the office and had been misplaced) and asked for a meeting "with all relevant documents such that this long pending issue can be resolved". Then, in his grievance letter dated 21 March 2004 to Mrs Mascarenhas, Mr Driver said this: 68. 69. "Further as of Sept 03, I have stopped sending the overtime statement to Airport Managers Office as no one is ready to confirm the receipt of the same but all records of these statements are available with the undersigned in his office." It appears therefore that with the news of the loss of his previous statements, and an inability to get a receipt for any new statements, Mr Driver stopped submitting them on a monthly basis. However, he informed management that that was what was happening. If that is what the contemporaneous evidence shows, I turn to evidence given at trial. In his first witness statement dated 8 March 2010 Mr Driver said this, after referring to Mr Joseph's letter to him dated 4 October 2003: "74. Mr Joseph also told me that I should hold on to the overtime sheets because they would get lost in his office. He said to wait until approval from Head Office had come through which would be after the committee to look into my overtime had considered the point. The committee was of course never formed."

70. Mr Joseph's first witness statement is dated 9 May 2010. (He had not then seen Mr Driver's first witness statement.) This statement is a most unsatisfactory document. It begins by seeking to make a case for saying that overtime had always had to be pre- authorised (addressing documents discussed above, but which preceded his arrival in London as airport manager). He then referred to the meeting of 10 December 2002 and said that as a result of that he was instructed to curtail Mr Driver's overtime. But there is nothing in the office note of that meeting, which Mr Joseph did not attend, or in any other documentary material, to support that. Mr Joseph then moved on directly to November 2006, without reference at all to the correspondence between him and Mr Driver (on Mr Joseph's arrival in London) in the autumn of 2003. As for November 2006, he said that he was persuaded to sign Mr Driver's overtime statements by being shown Mr Thulasidas' letter dated 28 December 2005, and that he had signed "in good faith". He said that "I trusted him that his claims were genuine". As manager at Heathrow, he ought to have known whether that was so. He then continued: "I have acknowledged my error in signing the overtime statements. If I was aware that Mr Driver had prepared false claims and had I examined the statements in detail I would not have signed the statements in good faith." 71. The acknowledgment of his error presumably reflects his experience at the hands of the vigilance department. His accusation of "false claims" cannot come from himself. But neither does it reflect Air India's stance in this litigation. It is an unfortunate allegation.
72. Mr Joseph's second witness statement followed a week later on 25 May 2010 (shortly before trial), by which time he had seen Mr Driver's statement. He said that his second statement was "to clarify" some matters raised in his first statement, and also "to respond" to Mr Driver's statement. However, he did not challenge Mr Driver's statement that he, Mr Joseph,

had asked him to hold on to his monthly statements. Nevertheless, he now supplemented his earlier evidence (that he had been instructed to curtail Mr Driver's overtime) by stating positively for the first time that he had told Mr Driver "to curtail overtime" and "that he was not required to do any overtime in general". However, he also recognised in effect that overtime was feasible and could be remunerated by referring to the procedure set out in his letter of 1 September 2003. That was his first recognition of such correspondence. In his evidence, Mr Joseph embellished his evidence still further, to say for the first time in cross-examination that he had told Mr Driver that his overtime had to be "brought to nil" (Day 2.59) and that, save in unpredictable circumstances, it had to be pre-authorised (Day 2.66/67). However, he was unable to explain why these important directions had not been put in writing to Mr Driver. He also said that he was able to keep tabs on whether Mr Driver was on duty or not (Day 2.55) and that he knew that Mr Driver was working overtime (Day 2.80). In my judgment, in circumstances where there is nothing in writing directing Mr Driver not to work overtime, or to curtail overtime, or not to work overtime without prior authorisation; nothing in writing to impose any formal condition precedent on the working of overtime; where Mr Joseph knew that he was working overtime and never challenged him on it, let alone in writing; where senior management on investigating the matter acknowledged that Mr Driver had been required to work overtime and should be compensated for it: it is not possible to conclude that there was any formal condition precedent imposed merely orally on Mr Driver's overtime claims. It is true that, subject to Mr Driver's evidence that he was told to keep his monthly statements rather than submit them, he ought to have submitted them for Mr Joseph's verification. However, while that might have made the proof of his working more difficult, it is not a formal failure to meet a contractual condition precedent. In any event, subject to a general view about the value of Mr Driver's evidence, there was no challenge by Mr Joseph to his statement that that is what happened; it is reflected in and supported by his contemporaneous documentation; and Mr Sharma and Mr Thulasidas accepted that in principle Mr Driver ought to be compensated for his overtime which it was acknowledged had been required of him. 73. 74. 75. 76. For these reasons I would reject the judge's finding that there was any failure of a formal condition precedent to the earning of overtime by Mr Driver. Air India's case at trial, as reported in the final sentence of the judge's para 105 (cited at my para 35 above), supports the conclusion which I favour. Issue (3): Was any entitlement to be paid for overtime under the first contract solely in the discretion of Air India (as it was in the second contract)? 77. In my judgment, the question of overtime under the first contract was not a matter of discretion, even of one controlled by the standards referred to in Socimer at its para

66. Subject to proof that overtime was worked, a question of fact, and that it was required, which for the employer involves an evaluative process and for the court a question of balance of probabilities, the question of overtime is in this case a matter of contractual right. In the normal case an employer might very well be entitled to say that, where a procedure for verification had not been complied with, it would find itself unable to reach a decision in favour of a claimant. This case, however, is unique in its complex hinterland:

which includes investigation at the highest levels of the employer's management, and then an unexplained failure of the employer to put its own top management's decision into effect. Issue (4): If there was no right to payment for overtime under the first contract, did Mr Thulasidas' decision give Mr Driver such a right, and if so, was that prospectively only, or also retrospectively? 78. 79. The hypothesis has been rejected, and so there always was a right to earn overtime under the first contract. It is unnecessary, therefore, to consider Air India's submission that Mr Thulasidas' decision, communicated to Mr Driver as it was, even so did not amount to an effective variation of the first contract or entitle Mr Driver to payment for overtime, subject to its terms. The judge regarded the decision as amending the first contract. I regard it rather as being consistent with and confirmatory of that contract. In the circumstances it may be unnecessary to do so, but I will consider the issue as to whether that decision or variation was prospective only, or also retrospective. As I have indicated above, I regard Mr Cohen's submission that the Thulasidas decision was prospective only, to be a difficult, even threadbare, one. It is plain that the chairman and managing director of Air India was considering Mr Driver's long-standing grievances, with the aid of an investigation which he had requested Mr Sharma to undertake. His decision was plainly intended to resolve those grievances, and not merely to point a way for the future. If the decision had been intended to be prospective only, that would not have been a resolution of the grievances and would have had to have been made, and would have been made, crystal clear. As it is, the language of Mr Sharma's recommendations and of Mr Thulasidas's decision is replete with a recognition that the decision is dealing with the past as well as the future. Thus Mr Sharma points out that the issues have been "pending since long without any justification", and that this has been "depriving [Mr Driver] of his legitimate dues", and that "clearance of his dues" is now requested. It seems to me to be plain that that is what Mr Thulasidas was doing. It would have been plain to Mr Driver, who had raised his grievances, that that must have been the intention. It is emphasised by the fact that in his decision Mr Thulasidas reached back to the meeting of 10 December 2002 which had itself decided to set up a committee to look into Mr Driver's longstanding complaints (see at para 7 above, and that meeting's office note reference to "the outstanding overtime claims raised by Mr Driver"). A committee or investigation had been set up under Mr Sharma, and the decision had now been reached. 80. The submission that this was merely a prospective exercise does Air India no credit. 81. The judge thought otherwise because the decision did not say that outstanding claims were to be met; because "may" in the phrase "applicable overtime may be paid" was in the present tense; and because regulation and certification could not sensibly be done retrospectively. As to the first reason, I would have thought that the boot is on the other foot: if it had been intended to reject Mr Driver's grievances for the past, the decision would have said so. As to the second reason, "may" is the natural way to deal with Mr Driver's claims which were historical and were awaiting authoritative disposal. As for the third, there is no reason why Mr Driver's claims (like any claims, which tribunals of all kinds deal with pathologically) could not be dealt with retrospectively: as Mr Thulasidas said "regulated and certified at all times by the Airport Manager" (emphasis added). Issue (5): If Mr Driver obtained any right to payment for overtime from Mr

Thulasidas' decision, was that right subject to any condition precedent of any kind, such as certification by the airport manager? 82. If I am right in my answers to the first two issues above, then there is no contractual condition precedent and Mr Thulasidas' decision cannot naturally be thought of as retrospectively introducing one. Nor in any event does Mr Thulasidas' decision use the language of formal condition precedent. However, he naturally remits the question of regulation and certification to the local level. It would be impermissible, however, to conclude that a wrongful failure to certify (or an attempt at "regulation" which would countermand the CMD's decision) would destroy the right. Issue (6): Were Mr Driver's claims for overtime payment properly certified, and if not, what is the effect of that? Issue (7): In that connection what, if any, is the relevance of the judge's finding that Mr Driver's presentation to Mr Joseph in November 2006 had been motivated by fraudulent intent? 83. The judge said: "82. While, as Mr Joseph acknowledged, it was unwise of him to have signed Mr Driver's overtime statements in November 2006, the fact of him having done so had, as it seems to me, no impact on Mr Driver's claims in this action. It was not the case that, because Mr Joseph had signed, Mr Driver was entitled to some payment. Given the circumstances in which Mr Joseph signed, his signature was of no value in relation to the question whether Mr Driver had done the work in respect of which he sought payment. I accept Mr Joseph's account that, essentially, he signed the overtime statements in order not to prejudice Mr Driver's position in relation to the anticipated investigating committee. That was misguided, but charitable. Mr Driver's attempts to obtain signatures below the words "certified and verified", which I accept is what he sought, show, as it seems to me, that he was in fact seeking to produce documents which would look, contrary to the fact, as if they had been checked and found correct contemporaneously with the dates on the various statements. His motivation, as was accurately recognised in paragraph 13 of the Amended Reply and Defence to Counterclaim, was "fraudulent intent"." 84. There was no cross-examination to challenge Mr Driver with fraud. The judge's citation from Mr Driver's own pleading arose from a most curious allegation in Air India's defence (not settled by Mr Cohen), para 18 of which stated: "...the Defendant denies that the overtime and shift allowances from August 2003 were duly certified on a monthly basis by Mr M. V. Joseph... The Defendant has carried out a vigilance inquiry into this matter and found that the certification of the alleged overtime and shift allowances were fraudulently done on a single day, much later to the period to which they pertain and after the retirement of the Claimant." The reference to "monthly basis" was a reference to Mr Driver's particulars of claim where he referred by that phrase to the monthly overtime statements which he had drawn up, and which he presented to Mr Joseph in November 2006. The appeal bundles do not contain any findings of Air India's vigilance inquiry. Mr Joseph's statement to the vigilance inquiry (see para 30 above) does not suggest that he was in any way deceived by Mr Joseph (cf Mr Joseph's allegation of "false claims" in his first witness statement). In his reply and defence to counterclaim Mr Driver responded to para 18 of the defence as follows: "As to paragraph 18 of the Defence, it is admitted that Mr Joseph certified overtime worked by the Claimant after the event in November 2006...There was no fraudulent intent whatsoever in Mr Joseph certifying the Claimant's overtime on a retrospective basis. He had declined to do

so pending resolution of the matter by higher management...” It will be recalled that in his grievance letter dated 21 March 2004 Mr Driver had stated that he had stopped submitting his monthly overtime statements since he could not get a receipt for them. In the circumstances, and where Mr Joseph knew what the position was, it is difficult to understand what point was being made in Air India’s defence para 18. In any event, the matter was not pursued in cross-examination (other than that Mr Driver was berated for his counsel’s language “on a monthly basis”). In these circumstances it is somewhat difficult to know what to make of the judge’s rejection of Mr Driver as a witness in preference to his acceptance of Mr Joseph. Before, I revert to that subject, however, I need to deal with the judge’s other main criticism of Mr Driver. 85. 86. 87. 88. At para 42 of his judgment the judge said that Mr Driver’s assertion that he had worked every day between 15 September 2001 to 11 May 2002, and that 12 May was his first day off, “was untrue”, and that the same was shown by analysis of his own records. I am afraid that the judge has misunderstood those records. He purported to find that whereas some records showed that Mr Driver’s claim was true, others showed that it was untrue, and he preferred the evidence of the latter, as it were as an admission against interest. He reasoned: “It seemed to me, as a matter of common sense, that the documents indicating that time off had been taken, especially as these were the claims for payment submitted by Mr Driver to Air India in respect of overtime, were more likely to be accurate than documents indicating that even more work had been done by Mr Driver than that for which he was seeking payment.” 89. 90. 91. 92. However, there were no documents which showed that Mr Driver had had a day off. It was simply that he did not claim as overtime all the work which he put in. His documents show both the time worked and the time claimed. The fact that he did not claim for all time worked is not something that can be held against him. Moreover, (a) it was never suggested to him that he had not worked on any relevant day; (b) up to the end of 2001, when payment of overtime ceased, he was actually paid overtime on the basis of the records disputed by the judge, which were countersigned by Mr Dhotre; and (c) even after 1 January 2002 Mr Driver always had to swipe his card as he went on and off work, so that what he said could always be checked – and was not positively disputed, other than by the judge. In my judgment, therefore, these two critical findings, one of lying to the court (and therefore to his employer too) about the absence of days off in the relevant period, the other of a fraudulent intent in obtaining Mr Joseph’s signature to his overtime statements in November 2006, were wrongly and unfairly held against Mr Driver. In these circumstances, and where the judge looked at all the evidence against the background of the wrong perspective of Mr Driver as a man who unaccountably (and dishonestly) sought to be paid for overtime where none was contractually payable, it seems to me that even this court, exercising all the caution which is appropriate for an appellate court in the face of a trial judge who has seen and heard the witnesses, must regard his preference for Mr Joseph’s evidence, where unsupported by contemporaneous documents, to be suspect. In this connection I bear in mind jurisprudence which teaches that issues which arise in oral evidence must be carefully evaluated against contemporaneous documents and the probabilities; that a judge must not make a finding of fraud unless the witness has had a fair opportunity of dealing with it (in

the light of a proper pleading and a proper challenge in cross-examination); and that an inappropriate finding of fraud or bad faith requires the whole of a judgment to be subject to careful scrutiny: see *Armagas Ltd v. Mundogas Ltd (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1 at 56/57, *Co-operative Group (CWS) Ltd v. International Computers Ltd* [2003] EWCA Civ 1955, and *The Mayor and Burgesses of the London Borough of Haringey v. Hines* [2010] EWCA Civ 1111 at [39]. 93. In my judgment, the essential honesty and truthfulness of Mr Driver's claim is supported as to the probabilities of the thing by: the underlying fact that his first contract provided for the earning and recompense of overtime; by the long service which Mr Driver had performed at Air India, and by the fact that even at his initial retirement age and in the light of his burgeoning grievances Air India wished to secure his continued service for another two years; by Mr Driver's careful documentation throughout the years in question; by the fact that at any rate until the end of 2001 overtime was paid; by the absence of explanation for Air India's treatment of his grievances both before and after the decision of Mr Thulasidas; and by the trust which the most senior management of Air India placed in Mr Driver when dealing with his grievances at the end of 2005.

94. What then is one to make of Mr Joseph's evidence? In my judgment, it should be treated with great caution. He did in fact certify the monthly overtime statements. He was by far the senior figure to Mr Driver, and if, therefore, he was in any way influenced by Mr Driver's predicament, it could only be on the basis that he knew Mr Driver, had reason to trust him, and was satisfied that Mr Driver had a good case. Indeed, it was Mr Joseph's evidence even in his first statement that, when he signed Mr Driver's monthly overtime statements in November 2006, "I trusted him that his claims were genuine". That was from the man who, as his station chief over three years, had reason to know him well. Mr Joseph was later hauled over the coals for certifying the statements by the vigilance department and forced to recant. Under that pressure he made a most unsatisfactory first witness statement, and then sought to embellish his evidence by stages. His ultimate explanation of what he was doing in certifying Mr Driver's documentation does not make sense. If he had told Mr Driver, as he ultimately gave evidence that he did, that overtime had to be cut to nil and in any event pre-authorised, then his signing of Mr Driver's overtime sheets is incomprehensible. He said that he knew that Mr Driver was working overtime, which supports his certification. Indeed, he agreed in cross-examination that he was aware that Mr Driver was sometimes working long hours (Day 2.80). His contemporary correspondence on arrival at Heathrow in the autumn of 2003 is consistent with his certification, but inconsistent with his recantation in the vigilance inquiry and with his ultimate evidence. 95. It remains true that the monthly statements were dated by Mr Joseph, he says at Mr Driver's request, Mr Driver says not, for the most part with retrospective dates. Such dating may always appear questionable. However, in all the known circumstances the probability of the matter is that it was believed that such dating most fairly represented the essential truth of a situation where it was known throughout the years that Mr Driver was working overtime, but Mr Joseph had not been in a position to acknowledge Mr Driver's statements until "headquarters" had spoken (see Mr Joseph's manuscript note to Mr Driver dated 27

September 2003, cited at para 63 above). It is plain that headquarters had spoken by reference to Mr Thulasidas' decision, and Mr Driver was entitled to approach Mr Joseph on that basis. Why Air India has in effect reversed that decision is one of the unexplained mysteries of the case. 96. In sum, in answer to the two questions posed under this heading, I would be inclined to say that Mr Driver's overtime statements during the period of Mr Joseph's management at Heathrow were properly certified; and that even if, albeit under pressure from the vigilance department, such certification may have to be regarded as withdrawn, there is every reason to suppose that Mr Driver's paper-work was both honest and accurate. There was indeed no challenge to its honesty, nor even to its accuracy, just a putting to proof. In my judgment, Mr Joseph's withdrawal of his certification should not be recognised: it was only done under pressure, in the face of Mr Driver's litigation.

97. What then is the position if Mr Joseph's certification had to be regarded as withdrawn? And what in any event is the position for the period from the end of 2001, when overtime ceased to be paid, and the arrival on the scene of Mr Joseph in August 2003, during which time there had been no certification of Mr Driver's paperwork, although it had been regularly submitted? In my judgment, the answer is that under the implied term of trust and confidence which exists in any employment contract, the position must be regarded as though the relevant manager had done what Air India regarded as necessary to be done, pursuant to Mr Thulasidas' decision, namely the proper regulation and certification of Mr Driver's overtime claims. It is then for the court to conclude what such proper regulation and certification would have achieved. The judge accepted that in principle that solution was not in dispute (see his para 105 cited at para 35 above). Issue (8): Similar issues arise in relation to shift work. 98. 99. There is no reason to come to any different conclusion regarding Mr Driver's claim for shift work. For the same reasons discussed under issue (1) above, it seems to me that the first contract (but not the second contract which does not mention shift payments) required payment of a shift allowance. Mr Driver was a shift worker throughout the relevant period. Shift pay had continued down to the end of 2002 and then had unaccountably ceased. Mr Thulasidas had ruled that "Applicable shift allowance may be paid in line with the entitlements of other staff in the same grade." There is no evidence that shift payments were not payable, nothing whatsoever to explain the cessation of shift payments at the end of 2002. Although the legal burden of proof is on Mr Driver, the combination of payment of shift allowance down to the end of 2002 together with the absence of any explanation for the then cessation of such payments places an evidential burden upon Air India which it has failed to discharge.
100. An attempt to meet that evidential burden was made by reference to an Air India document dated 10 April 2006 from Mr Lokur, then regional manager UK, headed "Shift Allowance". It provided as follows: "In supersession of all previous orders on the subject, with effect from 1st May 2006, Shift Allowance will only be paid to staff working in shifts. Staff working in shifts when transferred or assigned duties during normal working hours will not be entitled to any shift allowance with the effect from 01 May 2006. The earlier practice of paying Shift Allowances (full for the first six months and 50% of the allowance for the next six months)

on transfer from the shift duties to normal working hours, will be discontinued effective 01 May 2006.”

101. However, in my judgment that document proves that as late as May 2006 a system of shift work payments was still operative. 102. The judge rejected Mr Driver’s shift allowance claim only on the basis that his contract did not provide for it (and on the basis that Mr Thulasidas’ decision was prospective only). It is not clear to me, however, why in the judge’s opinion a shift allowance was not in any event payable from January to June 2006, ie in the last six months of the first contract. 103. I would therefore find that Mr Driver was entitled to a shift allowance throughout the period of his first contract. There is no reason not to accept his quantification of that allowance at £61.37 per week (as in 2002) down to June 2004, and at £65.75 thereafter. Issue (9): What is the effect of Mr Thulasidas’ decision on the claim for conveyance allowance? 104. It will be recalled that Mr Thulasidas decided that a “fixed conveyance allowance of £100 per month” was payable to enable Mr Driver to use his personal car. 105. The judge held that this supplemented and varied Mr Driver’s first contract, but only prospectively, but also that the payment was only available on proof that Mr Driver had in fact made his car available. He found that “there was no real evidence” that Mr Driver had used his car for business journeys specifically in the last six months of the first contract following Mr Thulasidas’ decision. 106. The fact is however that Mr Driver’s office was 7 miles from the airport. In September 2001 Mr Driver had submitted a car allowance claim of 773 miles for that month, itemising the daily journeys. At 34p per mile that amounted to £262.82. There had been similar claims in the previous months of 2001. The allowance appears to have been paid up to that time but stopped in that September. At the meeting on 10 December 2002 the decision was for a fixed allowance of £100 per month “in view of the complexities of monitoring/verifying such use”. In October 2005 Mr Sharma recommended returning to a mileage allowance, but Mr Thulasidas preferred the solution of a fixed allowance as recommended by the December 2002 meeting. It was designed no doubt not only to avoid difficulties of proof, but also to achieve efficiency and economy. It is difficult to think that Air India was not aware of Mr Driver’s needs. 107. The purpose of such an allowance was to make proof of the usage, certainly proof of the extent of usage, unnecessary. Mr Driver did give evidence of usage of his car. In any event there was no reason to think that usage made in 2001 was not continued. There was limited evidence that one only of the catering sub-contractors provided a car to Mr Driver for the purpose of visiting their premises (where he had an office). 108. In my judgment the judge was mistaken in thinking that Mr Driver had to prove the extent of his usage. Mr Driver is entitled to his allowance, and the Thulasidas decision operates retrospectively. 109. The second contract reverted to a mileage allowance, and there is no claim under that contract. However, Mr Driver’s claim under this heading is for £100 per month from September 2001 to June 2006 inclusive. Issue (10): What is the effect of Mr Thulasidas’ decision on the claim for telephone expenses?

110. Mr Thulasidas decided that Mr Driver should get the same facility as that extended to other officers in his grade. There was evidence from Mr Sankarnarayana, a TGWU representative, that Air India paid £10 per month towards line rental and £21 towards call charges, a total of £31 per month. Mr Driver's claim was £34 per month, which he stated was his understanding of the allowance in his grade at the time of Mr Thulasidas' decision, although he also gave evidence in support of what I take to be the possibly earlier rates totalling £31. The judge said that since it was impossible to tell from Mr Thulasidas' memorandum itself what the allowance was, therefore the claim, even prospectively, failed. That seems to me to be a harsh decision. In my judgment, it succeeds for £31 per month from September 2001, when the allowance ceased to be paid, down to June 2006 inclusive. Nothing is payable under the second contract, however. Issue (11): What is the position in respect of overtime under the second contract?
111. Under the second contract, overtime above 48 hours was in Air India's discretion. However, there is no evidence that Air India ever purported to exercise its discretion, at any rate other than in terms of Mr Thulasidas' decision, which, strictly speaking, preceded the second contract. Therefore the court's task is to put itself in the shoes of the decision maker and to consider what decision, acting rationally and not arbitrarily or perversely, it would have reached (Socimer). Mr Thulasidas' decision is some guidance. In my judgment a rational decision-maker, accepting Mr Driver's honesty, would have in principle been prepared to approve his claims. Issue (12): What is the position under the second contract in respect of the expenses claims?
112. As stated above, nothing is payable under the second contract. Quantum 113. For the reasons stated above, I regard Mr Driver's overtime claims as proved in principle, and he is entitled to be properly compensated for his overtime, either as such or alternatively as damages for breach of the implied term of trust and confidence. There remains the question of the proper quantum of such claims. 114. 115. There was no originally pleaded defence of limitation in respect of claims which date back to more than six years before the commencement of this litigation on 12 May
2008. However, on the first morning of the trial Air India successfully applied to introduce such a plea. Mr Driver responded with a plea of acknowledgment, resting *inter alia* on the decision of Mr Thulasidas. The amended pleadings were not in our bundle, and little if any attention was paid to this point on the appeal. It seems to me, for the reasons given above, that Mr Thulasidas' decision was an acknowledgment, which started time running again. There is therefore no applicable time bar. I have asked myself whether, given the difficulties of a situation where Mr Driver's claims are, subject to management supervision, effectively self-certified, and have never been properly scrutinised since the end of 2001, when his overtime claims ceased to be met, the best way of calculating his entitlement is to pro-rate forward, to the end of his first contract, the average monthly claim for overtime over the period ending in December 2001. This would have the effect of cutting his claim, since it is noticeable that the monthly average has tended to rise in the later years. In the

end, however, I have concluded that this would be doing Mr Driver an injustice. Mr Driver has throughout the years been entirely open about the way he has proceeded, even during the period when he was not submitting monthly statements to Mr Joseph. Mr Joseph certified those statements when they were presented to him in November

2006. It would always have been possible, subject at any rate to Mr Driver's contractual rights, for Air India to have instructed Mr Driver in writing that he was not to undertake any overtime. It has never done so. Air India has never explained to Mr Driver why his overtime claims have not been met; nor why the December 2002 decision to set up a committee to look into his claims was never advanced; nor why Mr Thulasidas' decision was never put into effect (even prospectively). Instead it has accused him in its pleadings of submitting "false claims", although that allegation has never been particularised and was not advanced at trial, at which, as again on appeal, Air India's case was the legal one of saying that Mr Driver was not entitled contractually to his claims, and otherwise of putting Mr Driver to proof. 116. In circumstances where Mr Joseph did certify Mr Driver's claims for the three years of his management of Heathrow, and where Air India has not sought to enter into the question of quantum, I have ultimately concluded that there is no proper basis upon which I should diminish Mr Driver's overtime claims. I regard him, as Mr Sharma and Mr Thulasidas, and Mr Joseph also, regarded him, and they should have known him best, as an honest, loyal and hard-working man. I am prepared therefore to take the risk that there might, after all, be an element of over-compensation for Mr Driver. There is evidence that overtime was paid at 1 ½ times and 1 ⅔ times normal hourly rates. 117. I am confident that, armed with this judgment, if my Lords agree, counsel will be able to agree its financial consequences. If there are any disputes, they can be resolved for the purposes of our order.

Conclusion

118. In sum, I would allow this appeal for the reasons stated above. Lord Justice Longmore: 119. 120. I agree with the judgment of Rix LJ and add only a few words on the true construction of the first contract. In *Tarmac Roadstone Holdings v Peacock* [1973] 1 WLR 594 Lord Denning MR gave three non-exhaustive examples of overtime arrangements (at pages 598-599, all in the context of "normal working hours" the calculation of which was necessary for the calculation of redundancy payments):- i) ii) iii) overtime is voluntary on both sides, so that the employer is not bound to provide overtime work and the employee is not bound to serve it; a fixed period of overtime obligatory on both side, so that the employer is bound to provide overtime and the employee is bound to serve it; overtime is obligatory on the employee but not on the employer, so that the employer can call on the employee to work overtime and the employee is bound to serve it but the employer is not bound to make any such call. 121. The first and main contract in the present case provides for an overtime case which does not fit neatly into any of the above categories because clause 11 provided that the basic hours of work were to be 37½ hours per week but continued:- "... in view of the operational needs of an airline, you will be required from time to time to work overtime,

both on a rostered and ad hoc basis. Your agreement to the working of such overtime forms an important part of this contract of service." Rostered overtime may no doubt fall within the third of Lord Denning's categories but "ad hoc" overtime is necessarily somewhat different. The judge thought that even "ad hoc" overtime had first to be called for but that is not to my mind the meaning of "ad hoc". 122. The nature of ad hoc overtime is that it can arise with little warning where a prior request or authorisation cannot be made or given and, in such circumstances, the employee will be bound to do the necessary overtime work. In the airline business nobody except the employee on the ground can decide whether those circumstances have arisen; if he reasonably decides that overtime work is necessary, he will be obliged to perform it and the employer will be obliged to pay for it. The judge seems to have thought that such an arrangement was "bizarre" (para 26) but I do not see why. On the contrary I agree with para 43 of Rix LJ's judgment where he concludes that the combination of clauses 10 and 11 gave to Mr Driver a contractual right to be paid for overtime where "overtime" was required Lord Justice Mummery : 123. I agree with both judgments and add a few general comments on two points only: (a) pay disputes in employment tribunals and (b) overtime pay. Employment tribunals

124. Mr Driver was an employee of Air India. Employees who want to take their employer to the County Court or, as here, to the High Court in a wages dispute should be made aware of the availability of a cheaper and quicker alternative jurisdiction exercised by a tribunal that has relevant judicial and workplace expertise. The employment tribunal has a specialist jurisdiction under the Employment Rights Act 1996 (ss13-15) to determine cases where the employee claims that he has received less pay than he is contractually entitled to be paid. Those provisions do not prevent the ordinary courts from entertaining contract claims, which have the advantage of a longer limitation period: 6 years in the case of contract claims in the ordinary courts, as compared with 3 months (with a discretion to extend time) for claims in the employment tribunal (see *Rickards v Glass Supplies* [1990] ICR 50). 125. In general, the employment tribunal is to be preferred for self-evident reasons. The court was informed at the hearing that Mr Driver is a union member (the Transport and General Workers Union). Like other unions TGWU offers its members expert advice and legal representation on employment matters. If the appellant had taken this dispute to the employment tribunal with the backing of his union soon after it had begun, it could have been clarified and, I would hope, resolved, while the events were recent and still fresh in peoples' minds and at a fraction of what it has cost the parties in time and money in these proceedings. 126. Instead, Mr Driver brought a contract action in the High Court in 2008 asserting claims for overtime, shift allowances and car and phone allowances dating back to
2002. Two years later the action was tried. It was dismissed with an uninvited finding of "fraudulent intent" and an order for indemnity costs against him. Now this court has allowed his appeal. At the end of the day litigating about wages in the ordinary courts cannot have been a rewarding litigation experience that either side would wish to repeat. Overtime 127. 128. 129. The main dispute is between Mr Driver and Air India is about payment for "overtime." As Rix LJ says at [41], overtime is a question on which much

“might depend on context and practice.” Longmore LJ adds a citation from Lord Denning MR’s non-exhaustive examples of obligatory and voluntary overtime arrangements.

“Overtime” is not a defined term in the employment legislation nor is it a term of art at common law. Its meaning and its financial implications will depend on the way the parties have defined it contractually or, in the absence of an express agreement, on the particular circumstances leading to a claim that overtime has been worked and should be remunerated. The general idea of overtime is obvious: extra time spent working more than the contracted normal working hours. A contract may make express provision about it and about how it is to be remunerated. It may be expressly agreed that the contractual wage or salary covers work done by the employee, even if done in excess of, or out of, the contracted hours of work, and whether that extra work has been done unilaterally by the employee or at the express or implied request of the employer. That would make sense where it was contemplated in the workplace that the employee should be able to complete the contracted work within a contracted time. In those cases the employee will not usually be entitled to any extra pay. He will be entitled to receive what it has been agreed he should be paid for his work, whenever he does it and however long it takes him to do it. For example, overtime would not normally be paid to a pieceworker, who is paid by results on the basis of the amount done or produced, and not by reference to an hourly rate and the number of hours that the employee takes to do that work. 130. In some cases, however, it may be expressly or impliedly agreed that the employee should be paid for overtime which the employer has required, requested or authorised should be done in addition to the contracted hours of work. It may be agreed that overtime pay should be at the same rate as applies to work done in contracted hours; but in other cases there may be an express agreement that work done in excess of contracted hours at the employer’s request will be paid at a higher agreed rate, such as double time for additional working in unsocial hours.

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