

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**Commercial Division  
2023/COM/lab/00010**

**IN THE MATTER OF** The Bahamas Airline Pilots Association Industrial Agreement  
(2018)

And

**IN THE MATTER OF** the Civil Aviation Act, 2021 and Regulation LIC

**B E T W E E N**

**CAPTAIN JOSEPH J. MOXEY**

**Claimant**

**AND**

**BAHAMASAIR HOLDINGS LIMITED**

**First Defendant**

**AND**

**BAHAMAS AIRLINE PILOTS ASSOCIATION**

**Second Defendant**

**Before:** **The Honourable Acting Chief Justice Deborah E. Fraser**

**Appearances:** **Mr. Raphael Moxey for the Claimant**

**Mr. Ferron J.M. Bethell K.C. with Ms. Camille A. Cleare  
for the First Defendant**

**Mr. Raynard Rigby K.C. with Ms. Shade Munroe for the  
Second Defendant**

**Hearing Date:** **28 November 2023**

**Employment Dispute – Construction of Collective Bargaining Agreement –  
Interpretation of Statute – Mandatory Age of Retirement –Breach of Contract – Breach  
of Statutory Obligations – Civil Aviation Act, 2021 – Civil Aviation Authority Act, 2021 –  
CAR LIC Licensing Regulations, 2021 – Industrial Relations Act, 1971 – Employment  
Act, 2001 - Custom, Practice and Procedure – Reasonable, Certain and Notorious -  
Evidence - Improper Party – Special Damages – General Damages**

## JUDGMENT

**FRASER, CJ (Acting):**

[1.] This is the trial of an action commenced by Captain Joseph J. Moxey (“**Captain Moxey**”) against Bahamasair Holdings Ltd. (“**BHL**”) and The Bahamas Airline Pilots Association (“**BAPA**” and the collectively the “**Parties**”) for alleged breaches of contractual and statutory provisions.

### **Background**

[2.] Captain Moxey was a pilot and In House Counsel for BHL. He was also a past President, Vice President and Treasurer of BAPA, but presently inactive as a member.

[3.] BHL is a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of commercial air transport, both domestic and international, and the former employer of Captain Moxey.

[4.] BAPA is a duly registered trade union in the said Commonwealth and the bargaining agent for all pilots employed by BHL.

[5.] By a Collective Bargaining Agreement dated 01 January 2018 between BHL and BAPA (“**Agreement**”), BHL and BAPA agreed to certain terms and conditions for, *inter alia*, better safety at work conditions and employment benefits for employees of BHL.

[6.] Article 26.1 and 33.1 of the Agreement provide:

*“26.1 Normal retirement age shall be sixty (60) years of age...”*

*33.1 Should any article, part or provision of this Agreement be rendered invalid by review of any existing or subsequently enacted legislation, such invalidation of any article, part or provision of this contract shall not invalidate the remaining portions and they shall remain in full force and effect.”*

[7.] It is important to note that the Agreement which is before me, which all Parties refer to, expired on 31 December 2022.

[8.] By email dated 16 November 2022, Captain Moxey informed the Director of Flight Operations, Managing Director and Deputy Managing Director of BHL that the mandatory age of retirement was purportedly raised from sixty (60) to Sixty-five (65)

by virtue of the newly enacted Civil Aviation Act, 2021 and its Regulations – particularly, CAR LIC Licensing Regulations, 2021 (“CAR LIC”).

[9.] CAR LIC 070(b) reads:

*“Age 65. The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in international commercial air transport operations.”*

[10.] Captain Moxey also alerted the Human Resources Committee of the Board of Directors of BHL about this purported change on 25 November 2022 who allegedly stated that the matter was to be addressed at a meeting on 29 November 2022.

[11.] By letter dated 30 December 2022, BHL notified BAPA about the purported change in the retirement age. On that same day, Captain Moxey was informed by the Manager of Training for BHL that his mandatory recurrent training would take place in February of 2023 and that Captain Moxey must pay his TSA clearance for the training session.

[12.] On 05 January 2023, however, an email from the Manager of Training was sent to Captain Moxey informing him that he (the Manager of Training) was directed by the Director of Flight Operations to remove Captain Moxey from the training session and that the initial notice was to be disregarded.

[13.] Captain Moxey immediately wrote back to the Manager of Training requesting the next available date for the training session, but he purportedly never received a response.

[14.] On 17 January 2023, Captain Moxey attained the age of Sixty (60). Captain Moxey stated that, if he did not receive the mandatory training by 28 February 2023, he would be disqualified from piloting. He was subsequently placed on vacation leave as at 13 February 2023 for four (4) weeks.

[15.] On 22 February 2023, Captain Moxey filed a Specially Indorsed Writ of Summons (“Writ”) claiming that, by the Defendants’ non-adherence to Article 33.1 of the Agreement along with CAR LIC 070(b), they failed to comply with sections 4 and

6 of the Employment Act. This, he alleges, is a breach of his employment contract which purportedly resulted in damage and loss. He requests the following relief:

“(A) An injunction preventing the Defendants by its servants or agents from breaching the [Agreement] and Regulations and Section 4 and 6 of the Employment Act.

(B) A Declaration as to the effective date of the CAR LIC 070(b)

(C) An Order that the Claimant retains his currency by allowing the mandatory Regulatory recurrent training exercise scheduled for the end of February, 2023

(D) Damages

(E) Costs; and

(F) Further or other relief as the Court thinks fit.”

[16.] Both Defendants then filed separate Defences on 14 January 2023 and 06 July 2023 respectively. They deny the allegations made in the Writ and put Captain Moxey to strict proof. Further, they both aver that Captain Moxey’s interpretation of article 33.1 of the Agreement and CAR LIC 070(b) is inaccurate.

[17.] They further aver that Regulation 33.1 of the Agreement does not apply as CAR LIC 070(b) – it merely allows pilots to fly international flights up to sixty-five (65) years of age and does not automatically create a new mandatory retirement age. BHL also alleges that there is no mandatory age of retirement for pilots in any legislation and such retirement age was based on practice, policy and custom of BHL which has been established for many years and which Captain Moxey (as an employee of BHL) was or should have been aware of.

### **Issues**

[18.] I have considered the respective Parties’ Statement of Facts and Issues (which have differing fact patterns and issues). In my view, the following issues arise for consideration:

(a) Whether the mandatory retirement age of BHL pilots is sixty (60) years of age and whether such retirement age was established through the practice, policy and custom of BHL and/or BAPA?

- (b) Whether the Agreement expiring on 31 December 2022 had any impact on the retirement age of pilots?
- (c) Whether upon the true construction and interpretation of article 33.1 of the Agreement coupled with CAR LIC 070(b), the mandatory age of pilots was changed from sixty (60) to sixty-five (65), thereby invoking article 33.1 of the Agreement and consequently altering article 26.1 of the Agreement?
- (d) Whether BHL and/or BAPA breached Captain Moxey's employment contract by failing to adhere to CAR LIC 070(b), thus contravening sections 4 and 6 of the Employment Act, 2001?
- (e) Whether Captain Moxey is entitled to damages or any other relief sought?

### **Evidence**

#### *Captain Joseph Moxey ("Captain Moxey")*

[19.] On 24 October 2023, Captain Moxey filed the Witness Statement of Captain Joseph Moxey ("**Moxey WS**"), which stood as his evidence in chief at trial. According to his witness statement, he was employed with BHL since April of 1987 in the capacity of a pilot, then on or about 2020 as both a pilot and as In-House Counsel for BHL with responsibility to, inter alia, provide BHL with advice on legal matters. During his twenty-five (25) year tenure with BHL, he also held the offices of Treasure, Vice President and President of BAPA, thus making him well acquainted with the Agreement.

[20.] He also states that as a pilot, he was required to undergo Proficient Check (PC) training regularly and consistently every six months (which was mandated by law). On 30 December, 2022, we was informed by letter from BHL that he was scheduled to undergo his PC training in February 2023. He further states that he became aware of BHL's decision to retire pilots at the age of sixty in or about 05 January 2023 – which was the same date he was informed that his PC training was unilaterally cancelled. According to his witness statement, Mr. Moxey stated that BHL was aware that he would turn sixty (60) on 17 January 2023. He was also advised by BHL to take all vacation leave he had accumulated.

[21.] He further stated that he was aware that the Agreement expired on 31 December 2022. Accordingly, on the relevant date(s) when decisions were made for the unilateral cancellation of his PC training and retirement, the Agreement already expired. He also

stated that, prior to his unilateral retirement he was performing his duties as a pilot satisfactorily and was never warned or reprimanded.

[22.] He further states that on or about 25 March 2021 Regulations LICENCES (LIC) made pursuant to The Civil Aviation Authority Act 2021 (“**Act**”) was enacted. He also states that the unilateral decision to retire him was unlawful by virtue of Regulation 070(b). On or about July of 2021 Captain Moxey verbally informed the executive management team of BHL about the changes to the legislation, which altered the mandatory retirement age from sixty (60) to sixty-five (65).

Mark B. Johnson (“Mr. Johnson”)

[23.] On 06 November 2023, BAPA filed the witness statement of Mark B. Johnson, (“**Johnson WS**”) which stood as his evidence in chief at trial. According to this witness statement, Mr. Johnson is the current serving President of BAPA and is a pilot employed by BHL since 28 October 2004. He has also served as Vice President of BAPA from 05 June 2018 to 18 June 2019. He further states that Captain Moxey is the immediate past President of BAPA and served from 2002 to 2007 and again from 2013 to 2019. Mr. Emile Saunders served as President during the period of 2007 to 2013.

[24.] Captain Moxey’s employment contract is with BHL and was negotiated between him and BHL. Mr. Johnson further states that Captain Moxey served as a captain and In-house Counsel for BHL. BAPA played no direct role in the negotiations of the terms of Captain Moxey’s employment with BHL. Both of them were required to adhere to the terms of the Agreement, but nothing prevented the parties from agreeing to more favorable terms.

[25.] The Johnson WS further provides that BHL and BAPA entered into the Agreement effective 01 January 2018 to 31 December 2022. It governs the terms of employment for pilots hired by BHL. The Johnson WS also states that, at the time the Agreement was entered into, Captain Moxey was BAPA’s President and, contrary to the view of the wider membership of BAPA, Captain Moxey negotiated and agreed with BHL for a retirement age of sixty (60) years old for pilots. This is reflected at Article 26.1 of the Agreement. BAPA and BHL entered into previous collective bargaining agreements in 2005, 2013, and 2018. During the entering of each of those collective bargaining agreements, Captain Moxey served as President of BAPA.

[26.] The Johnson WS further provides that the retirement age in 2005, 2013, and 2018 was sixty (60) years old. There were variances on the benefits available at retirement. For instance, in the 2005 collective bargaining agreement, a pilot at the retirement age had a right to remain in BHL's insurance group plan up to the age of sixty-five (65) years old. This provision changed in the 2013 and 2018 collective bargaining agreements to allow a pilot to remain in the insurance plan after his retirement at his expense.

[27.] Mr. Johnson also states that the consistency of the retirement age of sixty (60) years of age was well known to Captain Moxey because he occupied the position of President of BAPA during the negotiations of the last four collective bargaining agreements.

[28.] The Johnson WS further provides that, during Captain Moxey's presidency, BAPA held at least two polls to canvass the members' views on an appropriate retirement age. The polls were held on 23 June 2011 and the other during Captain Moxey's presidency between 2002 and 2007. The results of the polls were consistent in that the wider BAPA membership wanted a higher retirement age than sixty (60). However, during the negotiations towards the 2018 collective bargaining agreement, Captain Moxey did not carry out the wishes of the membership.

[29.] At the time around 2018, Captain Moxey held the position of In -House Counsel at BHL and the President of BAPA. At that time there were approximately nine (9) pilots who were senior to him and slated for retirement between 2018 and 2022. If the retirement age was changed to sixty-five (65) years of age in the collective bargaining agreement, it meant that those senior pilots would not have retired and had another five (5) years remaining on their employment contracts at BHL.

[30.] Mr. Johnson further states that, when he assumed the presidency of the BAPA in 2019 and after the diversification of the membership, it was determined at BAPA's annual general meeting on 22 November 2022 that a fresh poll was to be conducted amongst the membership to garner their views on the retirement age. The poll was conducted on 14 February 2023 and the results determined that 50% of the members were in favor of an adjustment of the retirement age and 50% opposed such an increase. Mr. Johnson states that, as he was President, he had a casting vote and after careful consideration, he supported the increase of the retirement age to a number beyond sixty

(60). He further states that it was always understood that the actual retirement age to be agreed in a newly negotiated collective bargaining agreement required discussions with and the agreement of BHL. This is why the polls never settled on the exact retirement age to be advanced.

Tamara Lightbourne (“Ms. Lightbourne”)

[31.] On 14 November 2023, BHL filed the Witness Statement of Tamara Lightbourne (“**Lightbourne WS**”). According to the Lightbourne WS, Ms. Lightbourne is the Director of Human Resources for BHL. She commenced her employment with BHL on 18 April 2016 and has held the position of Director of Human Resources for the past twenty (20) months, previously holding the position as Acting Director of Human Resources for three (3) years. At the time of her initial engagement, she held the position of Senior Manager in the Human Resources Department for three (3) years.

[32.] Ms. Lightbourne states that she is familiar with Captain Moxey as he was employed as a pilot with BHL and prior to his attaining retirement age, as its In-house Counsel. She further states that Captain Moxey is a past President of BAPA, having held that post for at least ten (10) years. Captain Moxey would also have been the President of BAPA during the negotiations of at least two (2) collective bargaining agreements, the 2013-2017 collective bargaining agreement and the 2018-2022 collective bargaining agreement.

[33.] The Lightbourne WS also provides that Captain Moxey’s terms of employment were governed by the various collective bargaining agreements entered into between BHL and BAPA as well as the customs, practices and policies of BHL. She also states that the Agreement was never registered. Nonetheless, BHL and BAPA abided by its terms and conditions and all pilots, inclusive of Captain Moxey, received all benefits contained therein.

[34.] Ms. Johnson further states that, based on established principles of BHL and BAPA, all pilots were required to retire upon reaching the age of sixty (60). The mandatory retirement age was not only enshrined in the Agreement, but it was also clearly stated in BHL’s Flight Operations Manual (“FOM”) dated 02 February 2022. FOM is a policy document utilized by the Flight Operations Department for reference purposes governing the conduct of crew and the entire Flight Operations. Captain



Moxey was also governed by the FOM. She further states that, based on the custom, practice and policy all pilots shall retire at the age of sixty (60) years. This, according to Ms. Johnson, has been in place for at least twenty (20) years and has always been adhered to with full understanding and backing of BAPA. Ms. Johnson also states that Captain Moxey would have been aware of this during his tenure as a member and past President of BAPA.

[35.] The Johnson WS further provides that, Captain Moxey, in his capacity as President of BAPA and an employee of BHL, executed the Agreement. Thus, he acquiesced to the mandatory retirement age of sixty (60) for at least ten (10) years before he was required to retire from the employment of BHL. Further, due to Captain Moxey's dual capacity as In-house Counsel and a pilot, he was aware of two (2) employees of BHL, namely Captain Gail Saunders and Captain Frances Smith, who were retired from the employment of BHL at the beginning of 2023. She further states that, per the terms of the 2018 Agreement and as a result of the custom, practice and policy of BHL, Captain Saunders and Captain Smith were retired as pilots and, accordingly, removed from the flight roster on their 60<sup>th</sup> birthday.

[36.] She further states that, as is customary when a pilot is set to retire, if that pilot has accrued vacation, that pilot is placed on vacation leave and retirement commences immediately after the accrued vacation has been exhausted. Captain Smith had accrued vacation and was therefore placed on vacation leave immediately before her retirement.

[37.] Captain Moxey turned sixty (60) on 17 January 2023. Once he attained this age, BHL removed him from the roster for all of its international and domestic flights. Furthermore, recurrent training for Captain Moxey ceased. In accordance with BHL's custom, policy and practice, by letter dated 09 February 2023, Ms. Johnson informed Captain Moxey he was required to commence vacation effective Monday 13 February 2023 to exhaust his seventy-eight (78) days of accrued vacation. Captain Moxey was therefore put on vacation for four (4) weeks and twenty (20) days.

[38.] The Johnson WS further provides that by a further letter dated 23 May 2023, Ms. Johnson wrote to Captain Moxey and outlined how the balance of his accrued vacation would be used and also advised him that his vacation leave would officially end on 13 June 2023. As a result of all accrued vacation days being exhausted, Captain Moxey was officially retired on 13 June 2013. The aforementioned official retirement

letter was sent six (6) months after Captain Moxey attained the age of sixty (60) and seven (7) months after the Agreement expired. However, Captain Moxey at all times knew that he was going to be retired from BHL as a pilot as a result of the Agreement, the custom practice and policy of BHL. Ms. Johnson also personally advised Captain Moxey that he would be retired at the age of sixty (60) because his position was unique as he was functioning in the dual capacity of a pilot and In-house Counsel for BHL.

[39.] The retirement age was also well known to all because it was published in the various collective bargaining agreements, the FOM's and BHL would forward announcements by email to all employees. As at the date of the filing of the Johnson witness statement, the retirement age for BHL pilots remained at sixty (60).

Captain Paulo Cartwright (“Captain Cartwright”)

[40.] On 16 November 2023, BHL filed the Witness Statement of Captain Paulo Cartwright (“**Cartwright WS**”) which stood as his evidence in chief at trial. According to the Cartwright WS, Captain Cartwright is the Director of Flight Operations of BHL as well as a pilot with over forty-two (42) years’ experience. He commenced his employment with BHL, as a pilot, in April of 1982. He last acted as a pilot in May 2013 when he resigned for employment elsewhere. He rejoined BHL in March 2019 in a non-flying capacity – as Director of Flight Operations.

[41.] The Cartwright WS further provides that, as Director of Flight Operations, his duties included, but were not limited to, the administration and supervision of the Flight Operations Department. He further states that he is familiar with Captain Moxey because he was employed as a pilot and In-house Counsel for BHL. Captain Moxey when acting in the capacity of a pilot reported to the Chief Pilot, then the Chief Pilot reported to Captain Cartwright. He states that the retirement age of pilots was established by the customs, policies and practices and it was also written in the various collective bargaining agreements between BHL and BAPA. The retirement age for pilots is also contained in the operations manual Part A formerly known as the Flight Operations Manual, which is utilized by pilots for guidance on operational policies.

[42.] Captain Cartwright also states that he concurs with Ms. Lightbourne that BHL’s custom, policy and practice is that all pilots shall retire at the age of sixty (60) years of age. This custom, practice and policy has always been adhered to.

### **Findings of Fact**

[43.] I shall now examine the testimony of each witness and make my findings of facts based on same, coupled with their respective evidence-in-chief.

#### **Captain Moxey**

[44.] Captain Moxey maintained his position that Regulation .070(b) increased the retirement age of pilots from sixty (60) to sixty-five (65), despite strenuous cross-examination by two counsel. He also confirmed that he held various offices with BAPA, including President and that he was instrumental in negotiating collective bargaining agreements. In addition, he admitted that he was aware that past collective bargaining agreements, which he confirmed he played a role in negotiating, expressly stated the retirement age for pilots was sixty (60) years old. This contradicts the evidence contained in his witness statement at paragraph 8 where he states:

*“...I first became aware of the decision/action of the 1<sup>st</sup> Defendant in ‘retiring’ Pilots at the age of sixty when, in or about 5<sup>th</sup> January 2023, I was informed by the 1<sup>st</sup> Defendant that my regular recurrent training was unilaterally cancelled...”*

[45.] Another instance where Captain Moxey contradicts his own evidence is at lines 30 to 32 on page 15 of the 28 November 2023 Transcript (“**Court Transcript**”) to lines 1 to 5 on page 16 of the Court Transcript. The excerpts read:

*“Q Okay. So, at the time you penned that e-mail, were you appreciative of the fact that you were supposed to retire or attain your 60<sup>th</sup> birthday?”*

*A No.*

*Q No. Not that I wasn’t aware. But I didn’t appreciate the fact that was involved because of certain circumstances that changed it.”*

[46.] I find it odd that he would say he was unaware of the sixty (60) year retirement age where he also evidences that he was President of BAPA for some ten (10) years and was aware of the terms of several collective bargaining agreements.

[47.] It is also noted that Captain Moxey acknowledges that the FMO does mention that the retirement age for pilots is sixty (60) years of age. According to lines 2 to 5 on page 20 of the Court Transcript:

*“Q Mr. Moxey, would I be correct that the flight’s operation manual for Bahamasair also specify that a pilot must retire on attaining the age 60*

*A Yes. I believe it’s there. Yes.?”*

[48.] Whereas Mr. Moxey believes that the retirement age was a contractual arrangement, the fact that the retirement age is mentioned in the FMO strongly suggest that the retirement age also forms a part of BHL’s custom, practice and procedure. I will explore this further in my judgment. This is further buttressed by Captain Moxey’s admission at lines 25 to 29:

*“Q Now, you were asked questions. Do you know of, do you know of any pilot of the First Defendant who remained in the employ of the First Defendant after their 60<sup>th</sup> birthday?*

*A No.”*

[49.] During cross-examination, Captain Moxey also confirmed that the terms of pilots’ employment contracts (who worked for BHL) are governed by the terms and conditions as provided in the Agreement. He also testified that such terms are also governed by law, as pilots are highly regulated and that changes in the law impact such terms.

[50.] I found Captain Moxey to be a fairly reliable witness. His evidence, for the most part, remained consistent. Though Captain Moxey remained consistent with his interpretation of Regulation .070 (b) and its impact on the retirement age of pilots, I found his evidence at certain instances difficult to follow, inconsistent and contradictory. I treat such evidence as somewhat trustworthy but not entirely convincing.

*Mark Johnson (“Mr. Johnson”)*

[51.] Mr. Johnson confirmed that he is the current President of BAPA.

[52.] During cross examination, Mr. Johnson testified that the Agreement was negotiated on behalf of BAPA by Captain Moxey as well as the rest of the executive body of BAPA. The following was also noted during cross-examination at lines 23 to 29 of page 49 of the Court Transcript:

*“Q Mr. Johnson, how long have you been at Bahamasair?”*

*A Some 20 years, from 2004.*

*Q Since 2004, are you aware of Bahamasair allowing any pilot to fly once they have attained the age of 60?*

*A No, sir.”*

[53.] Mr. Johnson also provided the following testimony during cross examination at lines 30 to 32 of page 49 and line 1 of page 50 of the Court Transcript:

*“Q So, would you agree that the customary practice of Bahamasair is that a pilot retires at age 60 in accordance with the Industrial Agreement?*

*A Yes Sir”*

[54.] This too is evidence which suggests that a custom of retiring pilots at the age of sixty (60) was known to the pilots of BHL. It also suggests that the custom was placed into a written contract. Under cross examination, Mr. Johnson also confirmed that Captain Moxey is a past President of BAPA and was a part of several negotiations regarding the age of retirement increasing from sixty (60) to sixty-five (65).

[55.] I found Mr. Johnson to be a trustworthy and impressive witness. His evidence was consistent and he was unwavering during cross examination. He appeared truthful and reliable throughout his testimony. I also note that he did not contradict any of the evidence contained in his witness statement. I therefore accept his evidence and will apply same accordingly.

*Paulo Cartwright (“Captain Cartwright”)*

[56.] Captain Cartwright’s evidence was consistent. There was no difficulty with following his testimony and cross-examination was rather brief. From his testimony, he did confirm that the retirement age of pilots has been sixty (60) years of age since ‘forever’ and that the agreed age of retirement of sixty (60) was expressly stated in the Agreement.

*Tamara Lightbourne (“Ms. Lightbourne”)*

[57.] Ms. Lightbourne’s cross-examination was also brief. I was, however, able to extrapolate from her evidence that the FOM expressly provides that the retirement age

is based on company policy. This corroborates the evidence in her witness statement regarding the retirement age being a matter of custom, practice and procedure of BHL.

[58.] Ms. Lightbourne also appeared trustworthy. I found her evidence truthful and reliable. I therefore accept her evidence.

[59.] Having considered the testimony of all witnesses, I make the following findings of fact: (1) Captain Moxey was aware that the retirement age of pilots was sixty (60) before 2023. This is evidenced from his own email communications, the fact that he was a part of several negotiations regarding the increase of the retirement age from sixty (60) to sixty-five (65) on behalf of BAPA, and the testimony of Captain Cartwright, Mr. Johnson as well as Captain Moxey himself; (2) The terms of Captain Moxey's employment are governed by the Agreement and through legislation and any applicable amendments; and (3) The age of retirement was derived from the custom, practice and procedure of BHL and was codified in the Agreement and the FOM. Mr. Johnson, Captain Cartwright and Ms. Lightbourne all testified that the age of retirement was a matter of custom, practice and procedure of BHL which, according to their evidence, has been in place for many years.

### **Law, Discussion and Analysis**

[60.] I have read and considered all of the submissions of the Parties, along with the relevant law, and will now address each issue.

- (i) ***Whether the mandatory retirement age of BHL pilots is sixty (60) years of age and whether such retirement age was established through the practice, policy and custom of BHL and/or BAPA?***
- (ii) ***Whether the Agreement expiring on 31 December 2022 had any impact on the retirement age of pilots?***
- (iii) ***Whether upon the true construction and interpretation of Article 33.1 of the Agreement coupled with Regulation LIC 070(b), the mandatory age of pilots was changed from sixty (60) to sixty-five (65), thereby invoking article 33.1 of the Agreement and consequently altering article 26.1 of the Agreement?***

[61.] In my view, these issues are inextricably linked. Accordingly, I shall address them all under the same heading. The competing views on these issues requires a comprehensive review of the relevant legislation, and the Agreement. According to the

evidence, the Agreement became effective on 01 January 2018 and expired on 31 December 2022. Furthermore, the Agreement was never registered. As BHL's counsel correctly submits, the Agreement, being unregistered and expired, renders it ineffective.

**Section 50 of the Industrial Relations Act, 1971** provides:

“50 An Industrial Agreement under Section 46 shall have effect only if it is registered by the Registrar in accordance with Section 49.”

[62.] **Section 46 and 49 of the Industrial Relations Act, 1971** provide:

“46. (1) Subject to the following provisions of this Part, any union which is the bargaining agent for employees employed by any employer, may make an industrial agreement under this section with that employer affecting those employees.

(2) Every industrial agreement under this section shall contain provisions for the setting up of effective machinery, including a procedure for conciliation, for the prevention and settlement of general disputes, for the reference of any question or difference arising out of the interpretation or application of any provision of an industrial agreement, in relation to an essential service or a nonessential service to the Tribunal, for final settlement, and shall be for a term, to be specified therein, not being less than two years nor more than five years:

Provided that where, on the application of the parties to any industrial agreement, the Minister is satisfied in any particular case that it is in the public interest that such industrial agreement should have effect for a period less than two years, he may so determine, and thereupon such industrial agreement shall have effect for the lesser period so determined by the Minister.

49. (1) Within fourteen days of receipt of any such copy of a draft industrial agreement, the Registrar shall make thereon such comments as he may think fit and if he is satisfied that the draft industrial agreement does not contain any illegality, the Registrar shall request the union and the employer to execute the industrial agreement in proper form and shall register such industrial agreement when so executed.”

[63.] The Agreement was negotiated and prepared by both BHL and BAPA (the recognized union for BHL pilots). Thus, the union for pilots, along with BHL agreed to the terms of the Agreement, which fall within the ambit of section 46 of the Industrial Relations Act. Furthermore, it was a requirement that the Agreement was to be registered. This, however, was not done. Accordingly, the Agreement is rendered ineffective. The impact of an expired collective bargaining agreement was explored in

**Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al** SCCiv App No. 61 of 2014. At paragraph 19, Allen P (as she then was) stated:

*“18 Inexorably, there are no provisions in the Act which speak to the incorporation of the terms of collective industrial agreements into the individual employment contracts of workers. The law which would therefore apply to that issue is the law of contract and the rules of interpretation.*

*19 There is clear authority for the proposition that relevant provisions in an industrial agreement may be expressly or impliedly incorporated in individual contracts, but is also undeniable that the relevant terms must be those contained in the current collective agreement at the time of incorporation. See *National Coal Board V Galley* [1958] 1 WLR 16.*

*20 Moreover, once a term has been incorporated into individual contracts, the termination of the collective agreement does not in and of itself affect the incorporated terms (See *Robertson and Jackson v British Gas Corporation* [1983] ICR 351).*

*21 As noted, incorporation may be effected either expressly, or by implication and must be done during the currency of the industrial agreement.*

*[Emphasis added]”*

[64.] This position was also adopted by Winder J (as he then was) in the case of **Ferguson et al v West Bay Management Limited (t/a Sandals Royal Bahamian Spa Resort and Offshore Island)** [2019] 1 BHS J. No. 3. There the learned judge made the following pronouncements:

*“10 It is not disputed that the agreement has expired. Section 20 of the Industrial Agreement provided a mechanism for the giving of notice and other procedures when the employer seeks to make an employee redundant. The notice is to be given to the union. The Plaintiffs claim that the Defendant breached its obligations under terms of the agreement.”*

*11 I am not satisfied on the evidence before me that there has been any such breach as I am not satisfied that there is any evidence of the incorporation of this term (Section 20) into the individual contract(s) of employment. According to Jones J in *The Bahamas Hotel Catering & Allied Workers Union v Cable Beach Resort Limited and New Content Ventures Inc D/B/A Melia Beach Resort* at paragraph 75:*



[75] *Where a valid registered Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement. Authority for this proposition is found in The Bahamas Court of Appeal case of *Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al* SCCiv App No. 61 of 2014.*

*This statement as to the law was later approved on appeal by the Court of Appeal.*

*12 On the evidence before me there is no direct or indirect evidence, which I accept, that Section 20 of the Agreement was incorporated. At best the parties may be said to have implicitly accepted the disciplinary procedures under the agreement but nothing as to the question of redundancy...*

*[Evidence added]"*

[65.] In the instant case, no separate employment contract for Captain Moxey was adduced into evidence. There is no indirect evidence which may prove the existence of such contract either. The terms of his employment were clearly and expressly placed into the expired Agreement. It would appear that, with respect to the retirement age, it would have to be gleaned from the custom, practice and policy of BHL. According to the English Court of Appeal decision of **Henry v London General Transport Services Ltd** [2002] EWCA Civ 488, in order to establish a custom and practice, clear evidence of such practice is required. Lord Justice Pill held the following:

*"28 In stating the test to be applied when considering custom and practice, the employment tribunal referred to the judgment of Peter Pain J in *Bond v CAV Ltd* [1983] IRLR 360. There was an issue as to whether the right of an employer to lay off without pay was a custom of the trade.*

*Peter Pain J stated at paragraph 54:*

*"A custom of the trade must be reasonable, certain and notorious, and I refer to a brief passage in the judgment of Mr. Justice Jelf, who was the judge at first instance who was upheld in *Devonal v Rosser*, at p. 733, where he says this:*

*"Now in order to succeed the defendants must prove a custom or general usage so well-known as to be properly read into the contract. It must be, as Lord Denman CJ said in *R v Stoke-upon-Trent*, 'A custom so universal that no workman could be*

*supposed to have entered into this service without looking to it as part of the contract.’ In the same case Coleridge J said: ‘I have always understood that general usage is evidence in a case of this kind on the ground that its notoriety makes it vitually part of the contract...’*

[66.] Based on the foregoing, in order to establish a custom, practice and policy, it must be reasonable, certain and notorious. Based on the evidence of Ms. Lightbourne, Mr. Johnson and Captain Cartwright (as noted in the Findings of Fact section of my judgment), there was clearly an established custom and practice of retiring pilots at the age of sixty (60). According to Mr. Johnson’s testimony, the age of retirement being sixty (60) has existed since “forever”. This seems to have been well known to all employees of BHL - including Captain Moxey, based on his own testimony and admissions during cross-examination (see the Findings of Fact portion of my judgment). This was also confirmed through Ms. Lightbourne’s testimony and evidence-in-chief. It was also mentioned in the FOM., which according to Ms. Lightbourne’s evidence, all pilots were provided with. Captain Moxey did not refute this evidence.

[67.] Furthermore, Captain Moxey admitted during cross-examination that, being the Past President, Vice President and Treasurer of BAPA, he was well aware of the retirement age of sixty (60) and he was involved in negotiations and even polls with employees to determine a suitable age of retirement for pilots (this was corroborated through Mr. Johnson’s testimony). It appears that BHL and BAPA accepted that sixty (60) ought to be the mandatory retirement age for pilots – as negotiated and agreed. As it was negotiated and agreed, this strongly suggests that all parties found this acceptable and reasonable. I am therefore satisfied that the evidence establishes that the mandatory age of retirement of sixty (60) was reasonable, certain and notorious, thus a custom, practice and procedure of BHL.

[68.] I now turn to whether the mandatory age of retirement was changed from sixty (60) to sixty-five (65). I preface my disposition by highlighting the background against which the legislation came into being. In The Bahamas, the aviation industry is regulated by the Civil Aviation Authority (“CAA”) – the body statutorily established to supervise all pilots and the aviation industry. The CAA’s powers and functions are codified in the Civil Aviation Act, 2001, the Civil Aviation Authority Bahamas Act, 2021 and the Civil Aviation Regulations. The CAA then implemented CAA Licensing

Regulations known as “CAR LIC”. The most recent version of the Regulations is dated 01 July 2021. I also note that the Chicago Convention, an international convention promulgated by the International Aviation Organization, provides international standards relating to, inter alia, travel/aviation guidelines and employment guidelines internationally accepted. The Convention has also been codified in our laws as we are a Contracting State – hence CAR LIC This is confirmed by section 6(1)(a) and (b) of the Civil Aviation Act, 2021, which provide:

“6(1) The Authority shall have responsibility to ensure that the principles and arrangements of the Chicago Convention are adhered to in order that –

- (a) International civil transport services may be developed in a safe and orderly manner; and
- (b) International air transport services may be established on the basis of equality of opportunity and operated soundly and economically.”

[69.] For the purposes of this judgment, the relevant legislation is CAR LIC Regulations 070(a) and (b). These provisions will be discussed further below.

[70.] The Claimant’s Counsel submits that, by virtue of Regulation 070(b), the mandatory age of retirement has been changed from sixty (60) to sixty-five (65). He acknowledges that the initial mandatory retirement age was sixty (60) by virtue of Clause 26.1 of the Agreement, but clause 33.1, he asserts, was automatically invoked and such invocation invalidated 26.1 of the Industrial Agreement and was prefaced by CAR LIC 070(a) and (b). He further submits that, accordingly, the new retirement age is sixty-five (65). For clarity, clauses 26.1 and 33.1 of the Agreement provide:

“26.1 The normal retirement age **shall be** sixty years of age.

33.1 Should any article, part or provision of this Agreement be rendered invalid by review of any existing or subsequent enacted legislation, such invalidation of any article, part or provision of this contract shall not invalidate the remaining portions and the shall remain in full force in effect.

[Emphasis added]”

[71.] I do not agree with the Claimant’s Counsel’s submissions. I have already determined that the Agreement is ineffective as it has expired and is not registered. If, however, my interpretation is not the true position, I will go through the exercise of

analyzing the relevant clauses and the aforementioned regulations. In my view, there is no mandatory language in Regulation 070(b) which changes the retirement age of pilots from sixty (60) to sixty-five (65).

[72.] BHL placed much reliance on **Symonett v Bahamasair Holdings Limited** BS 2013 SC 74 (“**Symonette**”). The facts of that case are quite similar to the instant case. It also involved a former pilot employed by BHL and the interpretation of section 26.1 of a collective bargaining agreement (which is similar to section 26.1 in the instant case). The main issue in that case, like this one, was whether the mandatory retirement age was changed from sixty (60) to sixty-five (65) by virtue of an amended to the Chicago Convention. In dismissing the claim, Barnette CJ (as he then was) made the following pronouncements at paragraphs 8 to 13:

*“8 The plaintiff’s case is that by adopting the 2006 amendment the new retirement age for pilots is now 65 and not 60 and that the plaintiff is entitled to serve as a pilot until he attains that age. In short, it is his contention that it was always the position of the parties that the normal retirement age would be that as specified in the Convention.*

*9 I do not agree.*

*10 The retirement age between the pilots of Bahamasair and that company is a matter of contract. They are entitled to agree a retirement age when the contract of employment comes to an end. I agree entirely with the observations made by Sopinka, J. of the Supreme Court of Canada in McKinney v. University of Guelph [1990] 3 S.C.R. 229 where he said: “employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be”.*

*11 Although the retirement age specified in Article 26 was that specified in the Convention as it existed at that time, I do not accept the submission that the industrial agreement defined the retirement age as the age specified in the Convention and /or that it was agreed that the retirement age would be that as specified in the Convention and that it would change whenever it may be changed by the Convention. The draftsmen of the Industrial Agreement did not fix the retirement age by reference to the Convention. They stated quite clearly that the retirement age was sixty.*

*12 The Bahamas is a signatory to that Convention and must abide by its provision. The Convention imposes safety standards which (inter alia) prevents pilots of international commercial carriers from being in charge of an airplane beyond a specified age.*

However, there is nothing in the Convention which prevents any airline company from negotiating and entering into employment agreements which provide for a lower retirement age than that permitted by the Convention. Countries and not companies are parties to the Convention. I accept that an airline company could not properly enter into an industrial agreement, which permitted its pilots to fly beyond the age of retirement, which the safety standards of the Convention prohibited. If it did, the airline company would be in breach of the Regulations and subject to penalties as prescribed by the Regulations including suspension and revocation of licences as well as criminal prosecution. However, the adoption of the 2006 amendment and the 2010 Regulations could not by themselves alter or modify the expressed contractual term agreed to by the plaintiff (through the Association as his bargaining agent) and the defendant in the 2005 industrial agreement that the “normal retirement age shall be age sixty (60) years.”

12 It may well be that in the next industrial agreement the parties may agree to a higher retirement age consistent with the safety standards of the Convention; but that is a matter for them.

[Emphasis added]”

[73.] I agree with the learned judge’s analysis and reasoning. I believe the rationale employed by His Lordship is applicable, relevant and correct. Accordingly, I shall adopt such sage pronouncements.

[74.] **CAR LIC 070(a) and (b)** read as follows:

“LIC.070 Curtailment of privileges of license holders aged 60 years or more in commercial air transport

(a) Age 60-64. The holder of a pilot license who has attained the age of 60 years **shall not act as a pilot** of an aircraft engaged in international commercial air transport operations **except** as a member of a multi-pilot crew;

(b) Age 65. The holder of a pilot licence who has attained the age of 65 years **shall not act as a pilot** of an aircraft engaged in international commercial air transport operations...

[Emphasis added]”

[75.] “Shall” has always been interpreted to be mandatory and “may” as discretionary. Clause 26.1 uses the word “shall” when stating that sixty (60) is the age

of retirement. This can only mean that sixty (60) is the mandatory age of retirement – even if one were not to accept that a custom, practice and procedure of retiring pilots at sixty (60) was established. It is also to be noted that, based on the evidence before me, this was an agreed term which Captain Moxey, as then President of BAPA was fully aware of and agreed to, by signing the Agreement on behalf of all pilots of BHL. This must mean that he accepted that sixty (60) was the mandatory age of retirement.

[76.] According to paragraph 6 under the “Foreword” section of CAR LIC Regulations, 2021, “shall” is also interpreted as mandatory and “may” as discretionary. Further, I note that Regulation 070(b) only uses the words “shall” in relation to a pilot aged sixty (60) not being permitted to fly international flights. In comparison, the portion which reads “...*except as a member of a multi-pilot crew*”, **merely allows** one to render international commercial transport services over sixty (60) years of age to **and** is only permissible under very specific conditions (i.e. when there is a co-pilot under the age of sixty (60)). I agree with both Defendants’ Counsel’s interpretation and see such language as simply allowing an individual with a pilot license to render international commercial air transport services up to an allowable age cap. In other words, even if one were to attain the age of sixty (60) as a pilot, one **may be allowed – not required** – to work up to sixty-five (65) years of age. It is a discretionary extension.

[77.] Accordingly, I do not accept the Claimant’s Counsel’s submissions that the mandatory retirement age has been changed. It remains unchanged unless and until a new collective bargaining agreement is prepared, executed and registered or pilots employed at BHL have an express term in their respective contracts stating that the age of retirement is no longer sixty (60). The language of CAR LIC 070(b) does permit pilots to render flights services beyond the age of 60 (sixty), however, this is entirely discretionary. I therefore rule that the language used in CAR LIC 070(b) – in relation to permitting a pilot to render piloting services beyond sixty (60) - is discretionary, not mandatory and conditional on certain criteria being satisfied. The mandatory age of retirement for BHL pilots, therefore, remains sixty (60) years of age unless and until a new collective bargaining agreement has been executed or each individual pilot’s separate employment contract says otherwise.

[78.] Furthermore, I rule that neither BHL nor BAPA breached any statutory or contractual provision as Captain Moxey was appropriately retired on his 60<sup>th</sup> birthday and permitted to use his accrued vacation time leading up to his formal retirement.

(iv) **Whether BHL and/or BAPA breached Captain Moxey's employment contract by failing to adhere to CAR LIC 070(b), thus contravening sections 4 and 6 of the Employment Act, 2001?**

[79.] According to **sections 4 and 6 of the Employment Act, 2001:**

“4. The provisions of this Act shall have effect notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act) so, however, that nothing in this Act shall be construed as limiting or restricting —

(a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom;

(b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or (c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act.

6. No employer or person acting on behalf of an employer shall discriminate against an employee or applicant for employment on the basis of race, creed, sex, marital status, political opinion, age or HIV/Aids by —

(a) refusing to offer employment to an applicant for employment or not affording the employee access to opportunities for promotion, training or other benefits, or by dismissing or subjecting the employee to other detriment solely because of his or her race, creed, sex, marital status, political opinion, age or HIV/Aids;

(b) paying him at a rate of pay less than the rate of pay of another employee, for substantially the same kind of work or for work of equal value performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions except where such payment is made pursuant to seniority, merit, earnings by quantity or quality of production or a differential based on

any factor other than race, creed, sex, marital status, political opinion, age or HIV/Aids;

(c) pre-screening for HIV status:

**Provided that this section does not affect any other law or contract term which stipulates a retirement age.**

[Emphasis Added]”

[80.] The proviso under section 6 of the Employment Act expressly indicates that the section does not apply to any retirement age provided under the terms of an employment contract. Accordingly, I rule that Captain Moxey was not deprived of any better benefits or greater rights. Thus, there is no breach of these sections by BHL nor BAPA.

***(v) Whether Captain Moxey is entitled to damages or any other relief sought?***

[81.] The well-known adage “*He who asserts must prove*” still stands true. It was incumbent on Captain Moxey to provide details of any alleged damages he is owed. No special damages are pleaded. Special damages must be specifically pleaded and specifically proven (*Ilkiw v Samuels and others* [1963] 2 All ER 879). With respect to any purported general damages, he has not particularized this either. Under his Prayer for Relief, Captain Moxey merely requests “Damages”. When one desires to bring an action against another, the claimant ought to fully particularize their case and pleadings so that all parties, and the Court, are fully aware of the purported claim, the relief sought and the parameters of the litigation. Without doing so, parties may be embarrassed and/or unsure as to what the litigation fully entails, thus depriving them of the opportunity to bring their defence/case as comprehensively and strongly as possible.

[82.] Based on the evidence before me and my determinations, I am not satisfied that Captain Moxey is owed any damages or any other relief sought as Captain Moxey has not satisfied this Court that there was any breach of contract or statutory provision. Accordingly, I grant no relief he seeks.

### **Miscellaneous**

[83.] With respect to BAPA being joined to the action, I agree with their Counsel - it is unclear to me why they are named as a defendant in these proceedings. This action is in relation to the mandatory retirement age for pilots and purported breaches of



contract and statutory duties for alleged failure to comply with the Employment Act and CAR LIC 070. Any purported breach of any employment contract or statutory provision would be against BHL. Moreover, at the material time, Captain Moxey was the President of BAPA during the preparation and execution of the Agreement. It is perplexing that he pursued BAPA in these proceedings.

[84.] I however, do not agree with BAPA's Counsel in relation to costs. I do not believe that this case rises to the level of an award of indemnity costs. There was no unfair or egregious behavior of counsel that warrants such costs (*NYMOX v Averbak* COM/com/57 of 2023). Captain Moxey appears to have brought the action against the parties he believed were liable for breaches of contract/statutory duties as against him. I saw no egregious or other behavior that warrants such costs.

[85.] Accordingly, I shall make an appropriate order as to costs.

### **Conclusion**

[86.] Based on the aforementioned principles, my interpretation and application of the law, coupled with my construction of the Agreement, I dismiss Captain Moxey's claim in its entirety.

[87.] Captain Moxey shall pay the costs of BHL and BAPA, fit for two counsel for each of the Defendants, to be assessed by this Court, if not agreed.

**Dated this 11<sup>th</sup> day of September 2024**

**Deborah E. Fraser  
(Acting) Chief Justice**