

IN THE MATTER OF AN ARBITRATION

JAMES ANTHONY COWAN & OTHERS

Applicants

-and-

BRITISH PARACHUTE ASSOCIATION LIMITED

Respondent

DECISION AND REASONS

Arbitrator: Graham Stoker

Introduction

1. I have been appointed as Arbitrator to decide this matter under the terms of the Arbitration Rules of Sport Resolutions UK (Sports Dispute Resolution Panel Ltd) amended version 2008, together with an Arbitration Agreement drawn up pursuant to those Rules and signed by the parties dated 28th March 2013.
2. The Applicants, Tony Cowan, Sandy Barnett, Ken Broomfield, Donald Brown, Steve Clarke, Ken Glendinning, Nigel Jackson, Dick Kalinski, Nick O'Brien, Stuart Palmer, Dave Pinkney and Charlie Shea-Simonds are parachute pilots (also known as jump pilots), that is pilots of light aircraft that take off from airstrips on or in the vicinity of drop zones ("DZ") carrying parachutists who jump out and descend by parachute, the aircraft then returning to the "home" DZ airstrip.
3. The Respondent, the British Parachute Association ("BPA") was established in 1961, and is recognised as the UK National Governing Body for sport parachuting.

4. In addition the BPA enjoys certain special status in UK Air Law. Pursuant to section 130 of the Air Navigation Order (“ANO”), the Civil Aviation Authority (“CAA”) is empowered to control the dropping of persons by parachute, and has exclusive power to exercise this control by granting *parachute permissions* to an organisation that has demonstrated its competency to conduct parachuting safely, and that organisation that holds such a parachute permission must make available to the CAA a *parachuting manual*.
5. In the UK the CAA has pursuant to approval GA/101/96 granted a parachute permission to the BPA, who in turn has produced a BPA Parachute Manual approved by the CAA. The extent of the parachute permission is set out in an “*Exposition and Schedules: Ref GA/101/96*” that provides a description of the BPA’s role as holder of a parachute permission and includes relevant documents as schedules, including the Articles of Association of the Private Company limited by guarantee, known as the British Parachuting Association Ltd. In addition under CAP 660 the CAA has set out the minimum standards necessary for parachute permission, and the CAA’s minimum requirements for the conduct of parachute operations.
6. In addition because parachute flights carry passengers and they may, on occasions, make a payment, such flights could be classified as public transport flights. However under Article 270 of the ANO, where a person pays to be carried in an aircraft for the purposes of a parachute jump, then notwithstanding that this would normally be a public transport flight, if a parachute permission exists then such a flight will be classified as “*aerial work*” that permits pilots with PPLs (Private Pilots Licences) as opposed to CPLs (Commercial Pilots Licences) to be used for these flights.
7. It follows therefore that the role of the BPA under Air Law brings particular benefits to the Governing Body in the form of safety through the application of CAP 660 and the approved Parachute Manual, and also accessibility and affordability to the sport by it enjoying “*aerial work*” exemption under Article 270 of the ANO. Both the safety and the accessibility are important considerations to encouraging sport parachuting in the UK and it is clear that the BPA has responsibly sought to retain its parachute permission and public transport exemption in order to benefit the sport.

Issue

8. The issue before me for determination in this arbitration concerns the imposition of a maximum age for parachute pilots permitted to carry sport parachutists set out in the current BPA Parachute Manual,

imposed pursuant to the recommendations of a specific working group set up by the BPA, the Pilots Age Working Group (“PAWG”). The issue is described thus in the Arbitration Agreement:

“The new BPA rule on the maximum age limit of pilots flying sport parachute sorties (implementing the recommendations of PAWG).

The maximum age for which BPA authorised pilots may fly parachutists is 65 years for all pilots who fly under the terms of a Class II medical. This would include pilots who possess a Class I medical but whose circumstances restrict their flying to the privileges of a Class II.

This may be extended for pilots up to 70 years for those pilots in possession of a Class I medical. It should be noted here that no distinction is drawn between CPL holders and PPL holders. It is recognised that CPL holders will already possess Class I medicals but PPL holders who wish to extend to 70 will have to obtain one. Under no circumstances should consideration ever be given to extending the age limits. The rule takes effect from 1 April 2013.”

9. For the Applicants, five grounds were initially raised, but by agreement Grounds 3, 4 and 5 were withdrawn. This leaves Ground 1, which is a procedural unfairness and perversity challenge, and Ground 2 which claims the age limitation rule is discriminatory and unlawful under equality legislation.
10. Ground 1 alleges that the Pilots Subcommittee of the Safety and Training Committee had very little role in the implementation of the PAWG recommendations, the PAWG lacked proper terms of reference, and it lacked specialist medical expertise in aviation medicine. The PAWG did not properly examine whether the data showed lower accident rates amongst older pilots, and the PAWG focussed on age limits and did not properly consider whether there was any link between aircraft accidents and age.
11. Ground 2 under discrimination, and in particular section 13 of the Equality Act 2010, alleges that because of the failure to properly consider whether there was any link between aircraft accidents and older age there was no “*legitimate aim*” pursued by the PAWG and the BPA, and in addition an arbitrary maximum age of 70 was not a proportionate means of achieving such an aim.
12. The Respondents alleged that the PAWG was legitimately established to consider a safety issue that had to be monitored pursuant to the parachute permission of the BPA and also CAP 660. Certain accidents had occurred that led to the Air Accident Investigation Bureau (“AAIB”) asking for a review of operations

and that from 2006 maximum age limits were considered and applied for parachute pilots. The recent work of the PAWG leading to a report of 18 May 2012 was part of that ongoing monitoring. The BPA emphasised their role in seeking to protect their parachute permission and air public transport exemption; and that considering the maximum age of parachute pilots was a legitimate purpose, leading to legitimate and reasonable amendments to the BPA Parachute Manual imposing a maximum age for parachute pilots.

Evidence

13. In order to complete the hearing in one day, the parties agreed that apart from Professor Bagshaw for the Applicants and Dr Carter for the Respondent who would give oral evidence before me and be cross-examined, all other evidence would be taken as read. I have been provided with three Bundles A, B and C that contain statements from Professor Bagshaw, Tony Cowan, Paul Moore, Charles Shea-Simmonds, Dr Perry, Alex Brand, Ian Rosenvinge, Nigel Jackson and Dr Coker for the Applicants; and from Dr Carter and Dr Evans for the Respondent supplemented by the PAWG Report and additional BPA Council minutes and other relevant documents numbered 80 to 106 located in Bundle C. In addition to the oral evidence therefore I have taken into full account the numerous statements and other documents included in Bundles A, B and C.

14. For the Applicants, Michael Bagshaw, MB, BCh, MRCS, FFOM, DAvMed, DFFP, FRAeS, is Professor of Aviation Medicine at King's College London. Professor Bagshaw explained that Authorised Medical Examiners ("AME") exist that are authorised by the CAA to carry out medical examinations for pilots for the purposes of PPL's and CPL's. The basic qualifications leading to an AME can also be supplemented with the opportunity to take a Diploma in Aviation Medicine, or further postgraduate qualifications. Such specialist doctors were able to monitor and examine pilots and certify them as fit to fly, with comprehensive medical examinations included in Class II or Class I medical certificates. He said this should detect cognitive degeneration or increased propensity to incapacitation which was PAWG's concern. On incapacitation, he explained that if it was subtle as opposed to catastrophic, a pilot who felt unwell could always land his aircraft back in the DZ airstrip. He said he knew of many flying instructors operating in their 70s or even 80s, and he unequivocally reaffirmed his view expressed at page 613 of Bundle B that the *"imposition by the BPA of an age 70 cut off for parachute pilots is arbitrary"*.

Professor Bagshaw contrasted parachute flights to commercial flights which, because they were long range all weather flights to other destinations, were more onerous. Parachute flights took place in good

weather without adverse wind conditions in sight of the DZ. He rejected the application of the so-called “1% rule” (limiting risk to an aircraft caused by pilots to 1%) as it only applied to multiple pilots typically in commercial flight. A single male pilot over the age of 65 could not achieve the “1%” test at all, and it had little relevance to aerial work. He confirmed that from 2006 (initial PAWG work) to 2011 there had been no age related parachute pilot accidents. He called for a specialist panel to decide on applications to fly parachute flights by older pilots. In cross-examination and in questions from myself he said risk of accidents amongst pilots increased sharply above age 80, but reaffirmed that an age 70 maximum was not founded on any justification in his opinion.

15. For the Respondent, Dr Carter was the long established BPA medical adviser. He explained he had been involved at the outset of the PAWG work, that followed upon the crash of a parachute aircraft, known as the Dunkeswell incident in 2004. Following recommendations of the AAIB after Dunkeswell, all aspects of parachute flights were examined, and in particular PAWG looked at the maximum age for pilots. PAWG had recognised the need to retain experienced pilots so a maximum age of 60 or 65 was rejected, and PAWG recommended 70. He confirmed however that the PAWG had attempted to obtain a valid accident rate for the maximum age under consideration, but the information was simply not available. Instead it was based upon more general medical principles that the age of 70 heralds a progressive decline in psychomotor ability. He also confirmed that when the PAWG maximum age of 70 was introduced into the BPA Operations Manual, the BPA Jump Pilots Manual permitted exemptions to be granted to experienced individuals that perform satisfactorily beyond these age limits. I was told there had been four applications for three individuals that had led to exemptions up to the age 72. Dr Carter was sceptical that testing would pick up deterioration caused by age, and if the BPA pursued that route they did not have the staff to carry out a procedure of individual assessment.

He referred to the PAWG report and justified the industry bench marking, saying they tried to find comparable operations, with a single pilot flying paying passengers from one up to multiple individuals. In cross-examination he agreed that the age 70 maximum was arbitrary, but that there was a safety case for imposing a maximum age, and the BPA had to protect their parachute permission and exemption. He stated there was no particular paper or research relied upon to justify the age 70 maximum. The PAWG thought the commercial maximum of 60 was too low, but that age 80 was too high, and 70 was a compromise. He had a firm view that AME testing was not predictive enough over the age of 70. The PAWG wrote to leading experts, but were unable to obtain accident rates for the ages in question. It was also not considered helpful to look at the situation of whether a maximum pilot age exists in other countries such as the USA. He agreed the “1% rule” was not relevant as it was exceeded by a single pilot

over 65 years of age, but PAWG rejected an upper limit maximum of 65 years. Finally he drew attention to the members of the public now taking part in tandem jumps, and the need for caution in safety matters.

Decision and Reasons

16. There is agreement between the parties upon my approach to this arbitration. It was agreed that it was not for me to make a fresh decision on the merits, but instead to carry out a review of the BPA decision based on well known legal principles. I have therefore by agreement asked myself whether the BPA had paid regard to any irrelevant considerations, or disregarded any relevant considerations, or had reached a decision that no reasonable body properly directed could have reached. This in turn related to the major part of Ground 1 of the claim. In addition under Ground 1 the decision making process should be examined to identify whether there was some procedural error that was so serious as to strike at the decision. Finally under Ground 2 there was the question of whether the rule offended Equality legislation or the BPA Articles of Association.
17. The Report and Recommendations of the Pilot Age Working Group, 18 May 2012 (Bundle B, page 529) are critical to understanding the rule change introduced by the BPA Safety and Training Committee, 2 August 2012, (Bundle 8, page 657). In respect of the PAWG Report I make the following findings and observations:
 - (a) The Committee itself consisted of six individuals, but only one member familiar with Aviation Medicine, namely Dr Carter.
 - (b) Although reference is made to an age 70 limit being introduced in 2006, the Dunkeswell Incident of 2004 did not involve a pilot of the ages in question at all. Reference was made in the PAWG work to 60, 65 or age 70. But the pilot at Dunkeswell was aged 52.
 - (c) Moreover the consequential AAIB recommendation arising out of Dunkeswell, AAIB 2005-041, makes no reference to age limits at all. This of course is not surprising as age had nothing to do with the cause of this accident.
 - (d) I have been provided with a previous BPA Pilot Working Group Report of 15 June 2007 responding to AAIB 2005-041, recommending a 70 years upper limit. However there is no explanation as to how the 70 years maximum was arrived at.

- (e) Moreover pursuant to the Jump Pilots Manual the BPA immediately granted, and thereafter entertained individual justified exceptions to the 70 year maximum on four occasions raising the individual permitted maximum to 72 years of age.
- (f) Referring to the CAA Pilots Licensing Framework noted in the PAWG report, it is noted that there is no upper age limit for pilots performing aerial work, and the CAA via CAP 660, or the Exposition has conspicuously not recommended any maximum age for parachute pilots.
- (g) With regard perhaps to the heart of the PAWG report concerning age related medical considerations, PAWG identified no key research findings or accident rate data to justify their 70 years maximum age figure. Indeed the unequivocal expert opinion evidence heard before me both from Professor Bagshaw and Dr Carter was that the age 70 upper maximum age was "arbitrary". This was the clear evidence placed before me by both parties.
- (h) As far as benchmarking was concerned the PAWG chose not to have regard to any other countries. Whilst not determinative I note that Dr Perry (Bundle B, page 622) reports that most of the world has no age limit, relying on licensing regulations both medical and flying to police pilots. The biggest of these groups, he reports, is the US, as well as Canada, Australia and New Zealand where there are no upper age limits except to scheduled airlines. With regard to industry benchmarking I am surprised contact was made with British Airways, Virgin Atlantic, and EasyJet as these companies would appear so different as to be misleading. Of the other seven companies, flight training aside, not one employed anyone over the age of 60 years. This may well have something to do with the retirement age for staff, but in any event, the PAWG did not follow this evidence but recommended a maximum age of 70 year instead.
- (i) I consider the PAWG conclusion that parachuting in the UK appears currently out of step with mainstream aviation practice not to be based on any credible evidence placed before me.
- (j) Nor was there any credible evidence placed before me that there was a mental and physical decline between the ages of 60 and 70 that was extremely significant. If this was "*extremely significant*" as described in the Report I would have expected Professor Bagshaw and Dr Carter to place before me credible research material to justify this, but it is noticeably absent.

18. The reason why the PAWG report becomes so important is that this Report provides the only intelligible reasons for the decision of the BPA Safety and Training Committee that met on 2 August 2012, and

adopted the PAWG Report maximum pilot age which was then included in the current BPA Operations Manual. We see this set out at page 657/658 of Bundle B, where the explanation for the decision is advanced.

19. I have also considered the decision in its historic context, and looked more widely to see if intelligible and rational reasons could be deduced in this way.
- (a) The Safety and Training Committee (“STC”) was a subcommittee of the BPA Council, and is specifically given the power to deal with matters relating to safety, page 505 of Bundle B.
 - (b) The PAWG was set up by the STC, and therefore had safety as its crucial purpose. Noting the maximum age of 70 in the BPA Operations Manual, but also the ability for individuals to apply for exemptions under the BPA Jump Pilots Manual, PAWG was set up to review *“the suitability”* of these requirements, page 764 Bundle B.
 - (c) Dr Carter, speaking about the work of PAWG at page 709, Bundle B, said that following an AAIB investigation BPA had no choice but to review parachuting operations, and he made clear in this letter that safety was the key rationale for the PAWG work. He also however noted *“the PAWG asked the CAA Chief Medical Officer for reliable data on accident rates in the over 70s but none were available”*.
 - (d) The CAA in CAP 660, page 783 Bundle B, considered the qualifications for parachute pilots, including experience and training, but however chose not to express a view on or impose any maximum age on pilots.
 - (e) I note two letters from the CAA, from Dr Evans of 9 February 2012 (page 878, Bundle C) and also from Dr Mitchell of 29 April 2013 (page 845, Bundle C). They both make a similar point, namely that *“as part of a risk based approach we (the CAA) have been aware of your (the BPA’s) work on age limits for pilots ... and have not needed to take any action or make any further recommendations in this area. The BPA’s approach has enabled the organisation to justify a change from the limits presented for CAT regulation by ICAO and EASA, which provided an upper age limit of 60 for single pilot operation and 65 for multi-pilot operations”*. However back in 2006, and again in 2012 PAWG conspicuously rejected upper limits of 60 or 65 years of age as it would lead to a loss of experienced pilots, and in any event parachute flights enjoy CAT exemption, and are classified as *“aerial work”*. This also reaffirms my understanding that all the way through a

maximum age for jump pilots was risk-based and a safety issue. Clearly if the maximum age could not demonstrate improved safety and lower risk the soundness of the decision is called into question.

Decision

20. (a) As to the decision of the BPA STC accepting the PAWG Report, as confirmed by the BPA Council, I consider that the BPA decision has failed to have regard to the material consideration that this was a safety and risk based exercise, however no reliable information was available to the PAWG to demonstrate increased risk and lack of safety for older pilots of 70 years or more. In addition, I consider that the BPA decision has failed to have regard to the material consideration that on the totality of the evidence before me the upper age of 70 years for pilots was unequivocally accepted as “*arbitrary*” without any ability to demonstrate a reduction in risk or an improvement in safety by the imposition of this maximum age of 70 years on parachute pilots. In my view therefore the decision of the BPA has no basis in risk or safety, and cannot be justified in those terms, and as such is unreasonable and irrational. On the evidence before me it was clearly impossible to demonstrate that an upper age of 70 years reduced risk, or improved safety, and it was therefore arbitrary. The decision of the BPA should therefore be quashed on these grounds, and the matter remitted back to them to introduce a proper safety and risk based approach to pilot age in the BPA Operations Manual.
- (b) Minimum and maximum ages for licences amongst sports governing bodies, nationally and worldwide is a known and recognised area of proper sport governance. However I would have expected the PAWG to have included predominantly experts in aviation medicine to properly address the risk and safety case for recommending a maximum pilot age that can be justified. The PAWG only had the benefit of Dr Carter, and he unequivocally said before me that the maximum age of 70 years was arbitrary.
- (c) The BPA decision also included a maximum age of 65 years for pilots who are in possession of a Class II medical certificate. This was absent from the previous 2006 Operational Manual, and equally was an age that had no risk of safety rational or justification on the evidence before me.
- (d) The BPA decision also decided that under no circumstances should consideration be given to extending by individual exemption the age limits set out in the Operations Manual. It does seem to me however that it was the possibility for individual exemptions that made the maximum age of

70 years, decided in 2006, workable by the BPA. As soon as the upper age was strictly enforced the inability to justify it on risk based or safety grounds became clear.

- (f) I therefore find for the Applicants for the reasons given in this decision. Because I have quashed the BPA decision and remitted it back to the BPA for them to decide afresh, I need not consider the other grounds of challenge advanced before me.
- (g) It will now be for the BPA to reconsider the matter in light of my decision; however I would add that the 2006 situation of a maximum age of 70 years with the possibility of a justified exemption appeared to have wider support. However such exemptions in my clear view should only be granted by an expert specialist panel of aviation doctors that the BPA could readily set up. It may be therefore that the reintroduction of the previous 2006 rule, together with the establishment of an expert medical panel to rule upon individual exceptions, provides the BPA with a sound course of action.



GRAHAM STOKER

Arbitrator

Date: 12th August 2013



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