EMPLOYMENT TRIBUNALS

Claimant: Mr B Garcha-Singh

Respondent: British Airways plc

Heard at: Watford **On:** 18, 19, 20 & 21 October 2021
22 October 2021 [Tribunal only]
8 November 2021 [Tribunal only]

Before: Employment Judge Maxwell
Mr Bean
Mr Bone

Appearances
For the claimant: Mr M Duggan QC, Counsel
For the respondent: Ms K Newton QC, Counsel

JUDGMENT

1. The Claimant's claims of unfair dismissal, wrongful dismissal, victimisation, race discrimination and disability discrimination are not well-founded and are all dismissed.

REASONS

Issues

1. The parties agreed the issues, per the list attached to the order of EJ McNeill QC of 8 January 2020. At the outset Mr Duggan QC and Ms Newton QC confirmed these were still agreed.

2. On the Tribunal noting the Claimant's witness statement referred to a reasonable adjustments claim there was some discussion of whether the Claimant's amended particulars included such a claim and if so what it comprised. The parties agreed on this also. This list of issues was amended so as to add the following issues with respect to reasonable adjustments:

    2.1 Did the Respondent apply the provision, criterion or practice ("PCP) of:

    2.1.1 having to prove fitness to fly by 21 December 2018;

    2.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the claimant's disability?

2.3 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

2.4 What steps could have been taken to avoid the disadvantage? The claimant suggests:

2.4.1 Making reasonable enquiries into alternative employment;

2.4.2 Revoking his termination date;

2.4.3 Rearranging the BAHS referral.

Disability

3. The Claimant says he was a disabled person at material times by reason of:

3.1 type II diabetes;

3.2 post-traumatic stress disorder.

4. The list of issues for determination did not include any questions about disability or knowledge. The claim has proceeded on the basis of concessions by the Respondent that the Claimant was a disabled person at material times:

4.1 by reason of a physical impairment (diabetes) of which it had knowledge by 7 December 2017;

4.2 by reason of a mental impairment (stress, depression & PTSD) of which it had knowledge by 13 July 2018.

Evidence

5. The Tribunal heard evidence from:

5.1 Mr Bahadur Garcha-Singh, the Claimant;

5.2 Mrs Harveen Gupta, formerly Inflight Business Manager;

5.3 Ms Renata Caruso Lorenzo, formerly Area Manager.

6. We were provided with an agreed bundle of documents, to which additions were made.

Submissions

7. Mr Duggan QC produced:

7.1 opening submissions;

7.2 a chronology;

7.3 a bundle of authorities.

8. Ms Newton QC produced:

   8.1 A chronology;

   8.2 outline closing submissions.

Facts

Witness Evidence

9. Whilst we were satisfied that all witnesses were doing their best to give an honest account of events, insofar as they now recall them, there were some deficiencies on both sides. In her evidence, Mrs Gupta's did on a number of occasions drift away from the question and offer generalities or justification, rather than the clarification being sought. The questions she was being asked were, however, almost all about contract, policy and fairness. She was not (or not significantly) challenged in her factual account of what she did or what was said on particular occasions. It was not put to Mrs Gupta that she acted as she had because of the Claimant's race or him doing protected acts. As far as the Claimant's evidence was concerned, this was somewhat more unsatisfactory. At various points in his cross-examination or when asked straight-forward questions by the tribunal, for example about his understanding of plainly worded correspondence he received or whether contemporaneous notes accurately reflected discussions which had taken place, there were very long pauses before any answer was provided. Whilst the Tribunal recognises these matters go back a number of years and it may on occasion have been difficult for the Claimant to recall events, this would not seem to explain the Claimant's difficultly in accepting the meaning of words on the page or agreeing their accuracy and it appeared these pauses coincided with questions, a direct answer to which might not support his case. Furthermore, when the Claimant did begin to answer, whether after a long pause or not, he would frequently ignore the subject of the question entirely and instead, speak at great length about some other aspect of his case. Whilst we do not doubt his honesty, we were not always certain of his reliability.

Background

10. The Claimant was employed by the Respondent airline in the position of Cabin Crew Long Haul, under a contract of employment dated 12 February 1997. His contractual duties and responsibilities included ensuring the safety and welfare of crew and passengers. The Claimant agreed his role required he be fit for flying and that he may be required to undergo examination from time to time, so the Respondent could be satisfied of his fitness.

11. The Claimant was dismissed following a lengthy period of sickness absence. Whilst the Respondent says his employment was terminated with effect from 21 December 2018 because of this pattern and it not appearing he would be able to return to flying or sustain regular attendance in his contractual role, the Claimant suggests he was dismissed for other reasons, including his race and because he did protected acts. The Claimant brings claims of disability and race discrimination relating to his dismissal on 21 December 2018, including an alleged failure to make reasonable adjustments which might have avoided that.

12. The background to the Claimant's claim includes him raising various matters of concern with his employer in the period from 2003 onwards. These included allegations that he had been the victim of racist abuse, bullying, threats and intimidation, in particular from members or officials of the trade union, namely the British Airlines Stewards and Stewardesses Association ("BASSA") which is a branch of Unite. The Claimant has not, however, brought claims with respect to these earlier matters and it does not, therefore, fall to this tribunal to make findings of fact in this regard.

Fitness to Fly T&Cs

13. The Claimant's terms and conditions included:

> **9. Fitness and Ability to Fly**
>
> **you must at all times have all appropriate Inoculations, vaccinations and medication to enable you to travel abroad as a cabin crew member and it is your responsibility to ensure that all are current. In addition you are required to undergo full medical examinations from time to time as required by the Company in order to verify fitness to fly.**

Absence Management Policy

14. During his employment, the Claimant had several lengthy periods of sickness absence and was subject to the Respondent's attendance management policy, EG300. Section 4 of this policy applies to absence lasting more than 21 days and includes:

> **4.1 Managing longer term absence**
>
> **Where an employee is unable to do their job to the standard reasonably required by British Airways due to the employee's medical incapacity, British Airways will follow the Medical Incapacity procedures in Section 4 of this Policy.**
>
> **If a line manager believes on reasonable grounds that:**
>
> > **- the employee's absence, although in excess of 21 consecutive days is not likely to be long term or affect their ability to do their job the employee's absence should be managed under Section 3 or 5 of this policy**
> >
> > **- the employee's absence or their inability to do their job to the standard reasonably required by British Airways is due to medical incapacity that is likely to be long term, the line manager will seek occupational health advice from BAHS. The line manager will ask BAHS to give an informed opinion on the employee's ability to do their job, or a suitable alternative job to the standard reasonably required by British Airways in the foreseeable future.**
>
> **The BAHS advice may include restrictions and recommendations on reasonable changes to the employee's job or working environment. If BAHS advises that the employee will not be able to do their job to the standard reasonably required by British Airways in the foreseeable future**

due to medical incapacity the advice may include whether the employee would be able to do a suitable alternative job.

If an employee chooses not to attend at BAHS within a reasonable period (usually 28 calendar days from the date the report is sent to the employee) the employee's line manager will make a decision about the employee's ongoing employment and management under this policy based on the information which is available to him or her.

[…]

4.6 Suitable alternative employment

If reasonable adjustments cannot be made to the employee's working environment, and the employee is capable of undertaking suitable alternative employment, the line manager will discuss with, and assist the employee to identify and apply for, suitable alternative employment. In doing so, the line manager should refer the employee to CareerLink and support the employee during the CareerLink process.

[…]

4.7 Termination of employment on the grounds of medical incapacity

An employee's employment will be terminated on the grounds of medical incapacity if:

(i) reasonable adjustments cannot be made to the working environment of the employee's current job;

(ii) within a reasonable period of time, the employee is incapable of undertaking a suitable alternative job or no suitable alternative is available, and

(iii) in cases where the employee is a member of the British Airways Retirement Plan (BARP), the employees application for income protection benefit (see below) is unsuccessful.

Line managers when considering terminating an employee7s employment on the grounds of Medical Incapacity must:

• Write to the employee summarising the employee7s situation and explain the reason8s9 why the line manager is considering terminating the employee7s contract of employment on the grounds of medical incapacity and invite the employee to a meeting to discuss the situation

• seek advice from PeopleManager Advice

• ensure that guidance has already been sought from BAHS with reference to reasonable adjustments to the work environment, appropriate rehabilitation plan and suitable alternative jobs; and

• in cases where the employee is a member of BARP, ensure that the employee has made an application for income protection benefit under the Permanent Health Insurance Scheme (see below) and, in the case of an application which is unsuccessful, take such steps as are reasonable in the circumstances in relation to any first stage appeal mechanism

which may be provided for under the Permanent Health Insurance Scheme (or similar steps where no such mechanism is expressly provided for).

Earlier Matters

15. The Claimant's evidence at this hearing included that his earlier complaints had not been investigated by the Respondent and instead, it had perpetrated a cover-up. Ms Newton challenged this, taking the Claimant to a letter from the Respondent addressing the same. She referred to the report he made in 2003, which was about racist abuse received from a hotel guest whilst staying in South Africa. She suggested that managers had contacted him about this when it happened, he had said he was OK with it and thanked them for their concern. The Claimant denied this account, saying the investigation had been hijacked by a named manager who had wanted to make a name for himself. When the Claimant was then taken to an entry in the crew history document, which reflected what had just put to him by Ms Newton, he said he had been talking about a different matter, which had taken place later, in 2007.

16. In connection with this later event, the Claimant said that at a meeting he attended with senior management, the Respondent's chief executive said he would look into the complaints but then did not and the HR director said if the Claimant didn't like it he should "fuck off". Ms Newton took the Claimant to the crew history entry relating to this meeting, which recorded the Claimant being asked if he wanted to pursue these matters as grievances or whether he had any constructive ideas for the way forward and the Claimant replying he did not want to raise a grievance. In response to this the Claimant said he had faith at that time and agreed that he had not wanted these matters treated as grievances. The Claimant then went on to give a very lengthy answer, which included how upset he had been to receive an apology on toilet paper. This last piece of information was new, not appearing in the Claimant's detailed witness statement and whilst the Tribunal can understand that such an event would be upsetting, the answer avoided addressing the central point of the question being put by Counsel, namely that the Claimant's account of the Respondent's approach was inconsistent with the contemporaneous evidence and his own concession.

17. Ms Newton suggested to the Claimant when he had raised concerns in 2007, 2011 and later, he had been asked for more information and if he wished to pursue these matters as grievances and there was no evidence he had done so. In response, the Claimant did not disagree.

18. Whilst it entirely understandable that the Claimant would be very concerned about the issues he reported to managers, to the extent that on various occasions he was invited to pursue these matters as grievances or to provide detail and declined to do so, then it would be more difficult for his employer to act. In any event, such a pattern is inconsistent with a cover-up.

Protected Act (1st)

19. The Claimant's first protected act was a letter of 25 May 2012, in which the Claimant raised a grievance with his employer. This included that he had been

the victim of bullying, harassment and race discrimination. The Claimant also complained that he was being targeted by members or officials of the union. In his evidence at the Tribunal the Claimant referred to an acrimonious trade dispute involving BASSA and the Respondent. In addition to race discrimination, the Claimant said he was targeted by union colleagues because he had not supported the cabin crew strike. His letter objected to the manner in which a meeting had been conducted by a barrister the Respondent had instructed to carry out an investigation.

Sickness Absence 2012 - 2013

20. On 15 October 2012, the Claimant began a period of absence. A meeting under EG300 Section 4 took place on 9 November 2012. The Claimant required surgery on his uvula, sinuses and oesophagus. He had been referred to British Airways Health Service ("BAHS"). The Claimant was written to in connection with the absence management process. This letter and many others include the outcomes that might follow.

21. This sickness absence continued through to April 2013, being a period of 188 days. The Respondent's approach to measuring sickness absence is simply to count the calendar days between when it started and finished. The Claimant argued that only working days should be counted and by extension that if it were reasonable to allow a full-time employee a given period on sick leave before they were dismissed, then a 50% part-employee should be allowed twice as long because only then would they have accumulated the same number of working days missed. This was not the Respondent's approach.

22. The Claimant returned to work in April 2013, undertaking ground duties by way of a rehabilitation plan. He was declared fit to fly in July 2013.

Sickness Absence 2013 - 2016

23. Unfortunately, at a meeting on 13 August 2013, when he might otherwise have "exited" the attendance management process, the Claimant advised that he would shortly need to take further time off work for treatment.

24. By a letter of 25 June 2014, the Claimant was required to attend a Section 4 review meeting. The meeting took place on 17 July 2014. The Claimant advised that he required further time off for an operation to take place in August 2014. He continued under Section 4.

25. On 20 January 2015, the Respondent wrote advising the Claimant he had reached a trigger point, following two periods of absence between August and November 2014 and was required to attend a stage 1 absence review interview

26. By a letter of 25 May 2016, the Claimant was advised that he had now exited the attendance management process.

Fume Event

27. The Claimant has given evidence of a fume event occurring on 21 June 2016. He referred to an undated incident report (it has the date of the incident but not the report):

> **Crew Injury - extreme heat and fume incident at LHR resulting in shortness of breath.**
>
> **Whilst waiting on stand for engine start up at Door 2 Right 747, the aircraft had become very hot around Door 2R.**
>
> **I was working No7.**
>
> **Air start up unit used to start two right wing engines.**
>
> **At same time it became very hot and the smell of hot metallic metal and fumes in the air around 2R - 1 was finding it difficult to breathe A.C problem fixed. We took off.**
>
> **I was still finding it difficult to breathe.**
>
> **I asked for help from D2L. Contact PA for doctor, a combination of extreme heat and fumes probably caused by the air start up unit caused the shortness of breath and made me feel very unwell during flight.**
>
> **Doctors called - M5 opened, told to rest, was checked by two doctors onboard.**
>
> **Told to rest by doctor - get ECG done to blood tests.**
>
> **Incident been reported to SCCM/DOM/Captain? yes Was defective equipment involved??**
>
> **AML Completed? yes Defective Sticker Used??**

28. The Claimant's statement does not provide an explanation of when and how the incident report came to be made. The matter was investigated by Claire Houghton in 2018, when the Claimant sought to rely upon it to challenge the termination of his employment. Ms Houghton's outcome letter included:

> **I have investigated this matter and have either interviewed or liaised with colleagues from IFCE, BAHS, Engineering and Operations.**
>
> **I have been unable to find any information relating to a fume event on the 21st June 2016 on flight BA 117 returning from New York. There is no log of this on the daily Engineering sheet, no flight crew report (ASR), and no evidence of any other customers/colleagues who were affected by this.**
>
> **The matter was not reported to the CAA (a mandatory requirement which should be undertaken within 72 hours of the event to ensure a full and appropriate investigation takes place). The only documentation that was submitted was an OSR (Occupational Safety Report) completed by yourself and submitted on your behalf by a colleague, Georgia Field, Cabin Crew Mixed Fleet.**
>
> **I have asked Georgia if she submitted this documentation on your behalf and asked her to outline the circumstances. She has confirmed that she did submit this on your behalf as soon as she received the document. This document was submitted some 10 weeks after the alleged event.**

> **As a fume event is a serious matter, it is the responsibility of a crew member to report the matter in a timely manner and if it requires reporting to an authority, within 72 hours. This is clearly stated in the Safety Management Manual.**
>
> **At the appeal hearing, you advised that you would contact Steve Wearing, the Captain on the flight who would be able to verify the incident. As I have not received any information from you to verify this matter, I contacted Captain Steve Wearing to ask him about the event. He advised me that he had no recollection of a fume event on this flight and stated that if there had been an incident, he would have filed an Air Safety Report. I can confirm that there was no air safety report filed for this flight.**
>
> **As I have no further information to assess if this incident occurred and no reports to review, I do not uphold the appeal point that BA did not attend to its duty of care towards you with regards to this alleged event or that this led to your absence at all.**
>
> **In future, and in the very unlikely event that another incident should occur, I would advise you to report any issues in a timely manner to ensure that the company has the opportunity to investigate and take appropriate action.**

29. We are somewhat surprised the Claimant did not report this event immediately (or at least within 72 hours, per the manual) at which point it may have been easier to investigate, rather than waiting 10 weeks before even causing an incident report to be made on his behalf. It is also odd that none of his colleagues appear to have reported such an event. On the evidence before us, we cannot make a finding about precisely what happened on 21 June 2016 and nor is that necessary for a determination of the issues in this case. We do, however, accept the Claimant now believes there was an incident of this sort and has been deeply affected by that recollection.

30. In closing submissions it was suggested that Ms Houghton's appeal outcome of 24 October 2018, which addressed various matters raised by the Claimant, was a whitewash. We do not accept that characterisation. Taking her response with respect to the 'fume event' as an example of her approach and given she was asked to look into this matter more than 2 years after it occurred, her enquiries appear to have been thorough and her conclusion reasonably open on the information obtained.

2016-2017 Sickness Absence

31. The Claimant began a further period of absence on 29 August 2016, necessitated by physical health problems. There was regular contact with his line manager, Parm Sandhu, Inflight Business Manager. Further to a BAHS referral, he was invited to a review meeting, which took place on 3 November 2016. Ms Sandhu summarised there discussion and the OH evidence in a letter sent out the following day:

> **I asked for your comments on the British Airways Health Service reports, which were as follows: […]**

Q:-1. His prognosis to return to his contractual role. A:- He has a review with the specialist on 17Nov16 and he agreed to update-me with the outcome. The expectation is he will be fit for flying duties around then. Please refer him back to review his fitness return to flying duties after his appointment with the specialist.

Q:-2. What support if any will need to be put in place to assist his return to his flying role. A:-I will advise on roster support when he is fit to return to flying duties

Q3. Will he be fit to do an alternative role ? A:- He remains unfit for all duties at present.

[…]

I also confirmed to you that it is-now appropriate for me to manage your ongoing absence from work within Section 4 of the EG300 Absence Management Policy – (Long term sick /Absence which exceeds 21 days) and I explained the possible outcomes.

• Returning to your contractual role

• Any reasonable adjustments that may be accommodated to your contractual role

• Suitable alternative employment

British Airways will support you back to work, however if this is not possible I may need to consider other options available to me under this policy, which may include termination of your contract under EG300 Section 4 as a last resort. However, I sincerely hope that we will be able to support you back to work.

We discussed each of the options and you raised no concerns.

32. As can be seen, from this point the Claimant's absence was addressed under section 4 of EG300. This letter and the many which followed listed the different outcomes that might follow, dependent upon the Claimant's health and prognosis for a return to flying duties. On this occasion and subsequently, occupational health advice was sought, including with respect to any support which might be put in place (i.e. adjustments) to assist a return to work.

33. A further review meeting took place on 28 November 2016. Ms Sandhu noted the Claimant had been exceptionally diligent in keeping the Respondent up to date. The latest BAHS report was discussed, which provided the Claimant was unfit for work in any capacity, as a result of residual symptoms.

34. Ms Sandhu made a further BAHS referral on 26 January 2017. On 14 February 2017, the Claimant advised he was signed off by his GP, awaiting test results.

35. A further BAHS referral and report of 3 May 2017 was prepared. This provided that the Claimant was unfit for any duties and no adjustments were identified that would assist a return to work:

> **[…] Since his last referral he has had an MRI and also test of his nerve ends. He has a return to work date for 4 weeks time however is hoping to ring in fit then or sooner […]**
>
> **A:- As you are aware and as outlined in the referral, Nick has been absent since 29Aug2016. The Specialist reviews him regularly and he is awaiting an appointment with a new specialist, which is likely to take place within next month. I have reviewed all of the available information and it is my opinion Nick remains unfit for all duties at present. […]**
>
> **A:- He remains unfit for flying duties at present. […]**
>
> **A:-He remains unfit for all duties at present. […]**
>
> **A:- I consider his health issues is unlikely to satisfy the disability discrimination provisions of the Equality Act 2010 because it does not impact his ability to carry out his normal day-to-day activities.**

36. With effect from 21 June 2017, the Claimant reduced his part-time hours from 75% to 50%

37. C had a further review meeting on 26 July 2017. The meeting and recent history were summarised by Ms Sandhu in her letter written two days later:

> **During our meeting on 26 July 2017 we discussed your sickness which began with an operation to remove polyps from your nose. Since then you have had symptoms of dizzy spells, concerns with your brain as you were having side effects, problems with your nerve ending, pins and needles sensation in your fingertips. You have spoken about being very stressed due to work related stress, which you feel has affected your general health. All the above has delayed you being able to return to work.**
>
> **I received the following report from OHA […]**
>
> **He has several health issues and he is receiving appropriate treatment.**
>
> **He has not reached a level of fitness to return to contractual role at present.**
>
> **Nick tells me his specialist advised him to take a short flight as a passenger to see how his underlying medical condition copes with the effects of flying.**
>
> **I advised Nick to arrange his flight as a passenger soonest and to link back with me following the flight. At that point I will initiate an Ess referral and advise on his fitness for a ground placement. I am writing to his GP for a medical report and on receipt I Will respond to your questions.**
>
> **[…]**
>
> **I informed you that you I will initiate a BAHs referral before our meeting on 23 August 2017, when BAHs will reassess your progress and your prognosis to return to your contractual flying role.**
>
> **However if there is no positive prognosis, the next step will be to register you with Career Transition Service (CTS) to enable you to explore the**

opportunity of finding alternative employment with British Airways as outlined in EG 300 Absence Management Policy Section 4.

A termination date will be set for 2 months' time. I pointed out to you that we have been more than generous with the time scales as you are trying different treatments to help overcome your health issues. I referred to E0300 Absence Management Policy Section 4.

38. Mr Duggan said the meeting of 26 July or letter of 27 July 2017 amounted to the Respondent giving the Claimant notice under his contract to expire within two months. We do not agree. The Claimant was told that a termination date "will be set" rather than it had been set. This was a warning that something would happen (i.e. he would be given notice of termination) rather than it had already happened.

Termination Date (set for 5 January 2018)

39. The next meeting took place on 31 August 2017, with Ms Sandhu as decision-maker and Harveen Gupta as notetaker. This is an important meeting as it did involve the Claimant being given notice of termination under his employment contract and also an explanation of the process that would be followed thereafter:

PS: So today is about reviewing where we are, you have had a BAHS assessment and they are trying to help you RTW with a grounded placement first, for a month?

NGS: Said 2 months initially, now 1 month.

PS: Read BAHS review 23rd August 20179 from OHA Monica Martyn.

NGS: Ok

PS: I have spoken to Barbie in the grounded team - you don't want to work in WTS, is that because of the stress?

NGS: I told Harveen yesterday on the phone, told you Parm, it's to do with the unions (they are intimidating, they think they run this place).

PS: You okay to work in Terminal 5, or Cargo, not Waterside.

NGS: Can I work in SEP? Spoken to Barbie told her my reason for not working in Waterside.

PS: You have been absent since the 29th August 2016, were put in Section 4 on the 3rd November 2016 and since then we have had formal and informal reviews. You are very good in keeping in contact. Now I don't like to use the word termination as many people dread it, so I look at it more as a date to aim to RTW. It is not set in stone, we will set a termination date and support you during the time. Sometimes you can lack confidence being away for so long from your flying role, so the grounded role helps in getting you back in uniform, mind set. Discusses CTS and termination process. Will register you with CTS today and your termination date for 5th January 2018.

NGS: Is the flying role gone now?

> **PS: No...discusses the process. Your contract is a flyer, CTS assist you with tips for interviews, other roles in case you are unable to RTW for your flying role. So you will be in CTS for a month from today and then a termination date for the 5th January 2018.**
>
> **NGS: If I go back flying does the TD go? I am 50% now from June 2017.**
>
> **HG: Explains the whole Section 4 process, entry, 3 outcomes etc.**
>
> **PS: CTS is outcome 2, trying to find you alternative suitable role due to time off work. […]**
>
> **PS: Recap, register you with CTS today, grounded role commences 4th September 2017, 3 days - discuss the details with Barbie. You will need to call in fit for grounded duties. Your pay will be reinstated - basic. BAHS review 28th September 2017, may be FIT after the month who knows? Termination date set for the 5th January 2018, we will have a section 4 review to discuss the termination date and review this 6 weeks before in November 2017. […]**

40. In setting this termination date, a period of more than 4 months was allowed within which the Claimant's health and prognosis might be reviewed. It was explained to him that the termination date could be varied or revoked in light of this. He was also advised of registration with the Respondent's career transition service ("CTS") as in the event that he was unable to return to flying, then alternative employment could be explored in the period before his notice expired.

41. Very shortly after this termination date was set, on 1 September 2017 the Claimant contacted Ms Sandhu as he was worried. The crew history entry provides:

> **Spoke to Nick this morning as he had sent me a text message to ring him. He spoke about some persoanl issues, he is worried as I have set a TD. I explained to him that the TD has been set however if he returns to his flying role and sustains it the TD can be moved. I have aksed him if he had rung in fit as he is to commence grounded duties from 4/09/17. He siad that he was about to but just wanted to speak to me about the TD and other personal issues.**

Ground Duties

42. A BAHS recommendation was made that the Claimant undertake some ground duties in September 2017, as part of a phased return to work and as a precursor to flying once again. The Claimant had requested this not be at the Waterside site, as he was concerned about the Union presence at this location. In the event, his request for a different site having been accommodated, the Claimant changed his mind and decided to return to Waterside; per Ms Sandhu's note of 4 September 2017:

> **Nick rang me as he wanted to do his ground duities in WTS. I pointed out to him that it was decision by OHA Monica in BAHS after consulting him. I adviced hin that I will ring BAHS and get back to him re working in WTS.**

43. By 10 October 2017, the Claimant was declared fit for flying duties. He was not, however, immediately rostered to fly. During his sickness absence the Claimant

had accumulated a considerable amount of annual leave, which would shortly expire. He was given the choice to 'use it or lose it' and elected to do the former. The Claimant also had to undertake a return to work course because of the passage of time since his absence began.

Termination Date (extended to 31 March 2018)

44. Following the departure of Ms Sandhu, Mrs Gupta took over managing the Claimant's absence. They met on 7 December and she summarised their discussion in her letter of 13 December 2017. By this point the Claimant had undertaken some ground-based work and BAHS advised he was fit to return to flying:

> **You have been managed in Section 4 of EG300 Absence Management policy since the 3rd November 2016. Since your last review meeting on the 31st August 2017 you have worked on the ground for a short period 1st September 2017 until the 2nd October 2017. You have completed the majority of your Return to Work (RTW) course and told me that you have found it fine. […]**
>
> **You did point out that you have been diagnosed with Diabetes and you have told BAHS about it but you don't believe it has been considered, as you feel this condition should be covered by the Equality Act (EA) 2010 and therefore, you should not be terminated from your contract. I advised you that if you have spoken to BAHS then they would have considered it as part of their recommendations to Parm. However, as you would like clarification on this I will check with BAHS again. I explained that even in circumstances whereby someone is covered by the EA 2010, a termination date can be set.**
>
> **Your BAHS referral under the care of Occupational Health Advisor (OHA) Monica Martyn. 10th October 2017 - Telephone conversation**
>
> **[…] He is fit for full flying duties with immediate effect. […]**
>
> **Ongoing**
>
> **Parm discussed registering you with the Career Transition Service (CTS) to enable you to explore the opportunity of finding alternative employment with British Airways on the 31st August 2017, should you be unable to return to your contractual role. You told me at our meeting that you did not participate with this service.**
>
> **Parm had set a termination date today of 5th January 2018, on the 31st August 2017.**
>
> **However, since then you have worked on the ground and have completed the majority of your RTW course in readiness to fly. Therefore, in view of this I have postponed your termination date to the 31st March 2018 to allow you time to demonstrate an ability to sustain your commitments on your flying roster. […]**

45. As can be seen, Mrs Gupta proposed to vary the Claimant's termination date to 31 March 2018. The Claimant had not flown since the improvement in his health (in part because of taking annual leave) and this extension was intended to allow

him to demonstrate that he could do so. In this letter Mrs Gupta also advised the Claimant of his right to appeal against her decision to give him notice of termination expiring on 31 March 2021.

CRB / ID

46. Having successfully completed a period of ground work and taken outstanding annual leave, on 18 January 2018 the Claimant attended for work in the expectation he would be called upon to fly. At this point, however, it was discovered that his ID and CRB clearance had expired:

> **NGS has come back to work having been off for 17 months but although being advised his ID would be. okey and having spoken to the DOMs we have now realised this is not the case due to not flying for more than 12 months regardless of a new ID being issued... I have directed NGS back to the ops desk to reissue the paperwork for a criminal record -I have now CID roster til 26Jan as this was not NGS fault... (Note Taken by Douglas Lloyd)**

47. Not unreasonably, the Claimant was concerned about how this would impact on his return to work. The crew history entry for 23 January 2018 reads:

> **Nick called me and advised me that he wanted to check that we were aware of his ID situation. I told him I was not aware. He was worried it would affect his termination date set and I advised him that this is a seperate issue not a medical issue, therefore although he should have organised this before returning to flying as it was over 12 months it is not something that would directly affect his ability to RTW from a medical point of view.**

48. At this hearing there was a dispute as to whether the fault in this matter (not keeping the CRB and ID up to date) rested with the Claimant or the Respondent. We note that Mr Lloyd, who appears to have been involved on the day and in a good position to judge, felt the fault was not the Claimant's.

Protected Act (2nd)

49. The Claimant wrote on 24 January 2018 to the Respondent's Chairman. The Claimant proceeded to set out allegations that a white pilot had subjected him to racist abuse in 2011. He said he had reduced his hours in light of this and lived in constant fear of racial assault and abuse.

50. The trigger for this letter was not, however, any recent incident of racial abuse or anything further to the 2011 incident. The Claimant was repeating historic allegations rather than making new ones. The beginning of the letter suggests the Claimant was prompted to write because the pilot in question had recently drawn adverse publicity to the Respondent as a result of excess alcohol consumption. In addition to the matters he refers to, it is likely the Claimant was anxious because of his recent unsuccessful attempt to return to flying and a concern about how this might impact on his continued employment.

Bereavement

51. The Claimant's return to flying was also delayed at this time by a family bereavement, namely the passing of his mother in law. He needed to take time off work in connection with this.

Termination Date (extended to 30 June 2018)

52. Mrs Gupta wrote to the Claimant on 13 March 2018. In light of the unfortunate turn of events which had frustrated his attempted return to flying, she decided to extend the termination date by a further three months to 30 June 2018:

> **Although you rang in fit on 01 September 2017 you have not flown in your capacity as cabin crew.**
>
> **You reported for duty on 18th January 2018. However you were removed from the flight as you had not flown for seventeen months, your crew identity card had to be renewed even though it had not expired. You were not aware of this and you were not notified by British Airways.**
>
> **You had to take lime off as your wife needed support so were not able to fly this month either.**
>
> **Taking all this into consideration I am moving your termination date from 31st March 2018 to 30th June 2018, This move is needed for you to demonstrate to me your ability to sustain a full flying roster.**
>
> **I advised you that we will meet for a face to face review meeting towards the end of May 2018 when we will review your situation and discuss the notice of termination date set to either, remove, postpone or keep it. You understood and felt this was okay. […]**
>
> **You have the right to appeal my decision to terminate your employment. Should you decide to do so, you must write to, the appeal manager, within 7 days of the date of this letter, stating the reasons for your appeal.**

53. On 25 April 2018, the Claimant attended for work but did not fly, saying he was stressed and wished to take unpaid leave.

Sickness Absence May 2018

54. Similarly the Claimant attended on 11 May 2018 and was unable to fly. The crew history entry provides:

> **Nick had asked if he could speak with me confidently. We went behind the cabinets and he proceeded to tell me that he was stressed and unable to do his duty today of a B2B. He said he was not mentally stable, the company wanted to terminate his contract, he had suffered racism - his car had been sprayed with racist graffiti. He went on to say he had a fumes event back in 2016 and since then he has suffered from depression, which also included having an operation and a mini stroke. I asked if he was having support from BAHs in which he said they were very hostile. I asked about his IBM and he said she had now left. Nick asked if I could give him unpaid leave for two days. I replied I would be unable to do this and that if he was unfit to fly he should be reporting**

> **sick. He went onto say the company has told him if he does not fly they would terminate him. Nick said he paid for a ticket yesterday and flew to Rotterdam to help him rehabilitate, however, been give a B2B he felt was very difficult to handle. He was reporting at 0845. I asked him to go and have a drink to calm himself a little and if he wanted to the option of having a chat with crew care was available. He was not receptive to the idea of speaking with crewcare as he felt this was not a secure option. 1 asked what he meant and he renlied he felt it wasn't confidential.**

55. On 15 May 2018, the Claimant wrote to Amy James, of the Respondent's legal department. He set out wide-ranging allegations against the Respondent and BASSA running over several pages. His opening paragraph provided:

> **Overt racism is institutionalised, tolerated, condoned and concealed regardless of its effect or heinous offensiveness. This racism has been significant, regular and deeply offensive to my race and culture and despite bringing it to the attention of the CEO, HR Director and Head of Employment Law, the company failed to act according to its obligations. The effect is devastating and deeply offensive. I fear entering Waterside due to the racist reception I can anticipate in the guise of the BASSA Rep's, who are always present in the building.**

56. The Claimant sought the resignation of senior personnel within the Respondent and BASSA as an outcome to his letter:

> **In conclusion, resignations must now, therefore, follow: my family and I will be calling in public for high profile resignations at BA and UNITE I BASSA. We have lived a nightmare resulting in racial attacks and assaults down route and also visits to our home town. Security at my home and premises has been heightened as a result. I suggest that an attack on me is tantamount to an attack on the entire ethnic population**

57. As far as the allegations of racial abuse are concerned (i.e. the specific things the Claimant reported were said to him) again these appeared to be the matters which occurred in 2011 or earlier.

58. From 17 May to 8 August 2018, the Claimant provided Med3s from his GP, signing him as unfit for work as a result of

> **Anxiety and depression**
>
> **Work related stress disorder**

<u>Termination Date (extended to 31 July 2018)</u>

59. The Claimant attended another review meeting in June. A decision was made to further extend his termination date; per Mrs Gupta's letter of 13 June 2018:

> **I asked you how you were feeling with regards to your health and you advised me that you remain off since the 111h May 2018 due to work related stress, anxiety and depression. I asked you if you required British Airways Health Services (BAHS) support as per our long-term sickness support and management. You said you didn't mind being referred but did not want to be threatened to return to work. I therefore, advised you that I**

> **would not refer you at the moment but may reconsider it in the near future. […]**
>
> **I am aware that you are in communication with Amy James and Navdeep Deol, regarding some ongoing issues you have. Therefore, Amy James has advised me that she has agreed with you to extend your termination date to the 31st July 2018 whilst she considers your complaints. In view of this, I am writing to confirm that your termination date will, be postponed from the 30th June 2018 until the 31st July 2018.**

60. On 9 July 2018, the Claimant contacted Mrs Gupta and requested more time to consult with his lawyer and prepare an appeal against the termination decision. In her email sent the following day, Mrs Gupta agreed.

61. A BAHS report of 13 July 2018 provided:

> **As you are aware Nick has been absence from work since May 2018. He is currently under the care of his GP and is awaiting treatment on the NHS. Nick has privately funded treatment to help improve his health and he feels this has been beneficial. On a daily basis Nick continues to have some on going symptoms which he feels have been triggered by the on going issues with BA.**
>
> **I have discussed with Nick his capability to return to work. With the information available to me, Nick has taken all reasonable steps to ensure that his health improves to a sufficient level for him to return to work but the on going work related issues with BA appear to be the barrier to his return to work at present. Currently I am not able to give you a timescale for return to work. I consider it likely that his underlying medical condition satisfies the statutory definition of disability provided for by the Equality Act 2010 because, but for treatment, it could have a significant impact on his day to day activities on a long term basis.**

62. At this point, there would appear to have been two barriers to the Claimant's return. Firstly, there was the ongoing sickness absence, which was being managed by Mrs Gupta who was getting occupational health advice and listening to the Claimant's representations about this. Secondly, there were the "work related issues", namely the broad-ranging complaint about the Respondent and BASSA, which the Claimant had made to the Respondent's legal advisors. Mr Duggan criticised Mrs Gupta for not taking the latter into consideration. We note, however, it was the Claimant who chose to pursue these separate strands as he did and it is an odd criticism of Mrs Gupta to say she is a fault in not addressing the entirety of these matters before making her decisions.

Grievance Against Dismissal

63. By his letter of 19 July 2018, the Claimant raised a "formal grievance" challenging Mrs Gupta's decision, criticising her letter as "extremely confusing, as it is riddled with non-sequitur after non-sequitur, with each key statement seemingly contradicting the other", citing an extensive body of case law and legal principle, and including:

I do not believe that British Airways has or is acting reasonably in proposing to treat the adverse effects of my depression, anxiety, and diabetes, which presently militates against an immediate return to work, as sufficient reason for proposing the terminating my employment either on 31 July or within the immediate future having regard to all the circumstances.

These circumstances, which have yet to be fully investigated, are fundamental to British Airways ensuring that it is committed to complying with a fair and impartial process, in order to eliminate any unlawful discrimination on the grounds of my protected characteristics. The relevant protected characteristics are my race (Asian) and disability, and the relevant circumstances to be investigated are as follows:

For the avoidance of doubt, my unresolved work concerns are as follows:

• My current absence is directly linked to a 'fume event' and the accumulated stress emanating from the serious acts and omissions of British Airways in regard to its failure to properly manage my adverse health, which was initially documented in a letter dated 26 September 2016 from Professor Kotecha. It is also my understanding of SOP's that the flight crew have an obligation in the event there is a "suspicion" of a fume event, to don oxygen masks and complete the relevant ASR paperwork: This incident was reported as a 'fume event' and, as such, I require you to disclose all the paperwork, in keeping with your obligation.

• There is objective evidence that there was a clear problem with engine number 3 on the day. The email is available to you for inspection as I followed this up with Engineering. The air conditioning packs are at row 17 and the position I worked, Number 7, that day was literally less than five feet from the entry point of the fumes.

In the course of my meeting with Ms Harveen Gupta and Ms Jas Gill on 7 December 2017, I informed you of my recently diagnosed medical condition, Diabetes, which is, by definition, long term. As such, I am of the view that it would be entirely inappropriate to terminate my contract due to the protections this condition, invokes legally.

• No investigation has been carried out into the concerns raised by my Doctor that she was put under pressure by one of your BAHS staff to sign me back fit to work earlier than she would otherwise have done, due to the threat from Sue Persaud that were she not to do so, my contract would be terminated immediately. The Doctor is willing to attest to this and has recorded this incident in her medical file with the details and dates. (See Transcript)???.

It is my case that British Airways has:

1. caused my ill health by failing to deal adequately with historical ethical concerns raised in connection with alleged tolerance of high level racism, data protection breaches and has subsequently exacerbated the same;

2. failed to date to explore any reasonable adjustments to, potentially facilitate my return to work or to a suitable alternative role prior to proposing the; termination of my employment contrary to section 4.7 of the EG300: Absence Management Policy April 2018;

> **3. failed to discuss or even propose an appropriate rehabilitation. plan prior to proposing the termination of my employment contrary to section? 4 .7 of the EG300: Absence Management Policy April 2018;**
>
> **[…]**
>
> **Notwithstanding the above, and without any consideration of a phased return, any offer of alternative employment and/or any consideration of reasonable adjustments, based on British Airways' prior failure to investigate whether my mental impairments amount to a disability within the meaning of the Equality Act 2010, British Airways are proposing to terminate my employment.**
>
> **[…]**
>
> **It is therefore imperative that the ongoing work related issues are resolved without further undue delay in order to facilitate my return to work.**
>
> **[…]**
>
> **It is also possible that I could regard any decision to dismiss me in breach of the procedural expectations of the Absence Management process, as an act of direct race discrimination, contrary to section 13 and 39 (2) of the Equality Act 2010, on the premise that a hypothetical non- Asian comparator, would not have been dismissed in such circumstances. Moreover, a claim for personal injury, subject to obtaining further medical evidence from a neurologist, cannot be ruled out at this stage either.**
>
> **I would therefore urge you to revoke the proposed decision to dismiss me on 31 July 2018 as a matter of urgency. Please also postpone the proposed meeting intended to take place on 30 July 2018 for a period of 4 weeks, so that there is sufficient time for British Airways to consider the Occupational Health Referral.**

64. We note that in the section where "for the avoidance of doubt" the Claimant's lists his unresolved work concerns, he does not include allegations of racist abuse. The only reference to this matter is later, when he says his ill health was caused by the Respondent failing to deal with historical concerns. This latter proposition would not appear consistent with the observable pattern. In the period since 2011, the Claimant had been at work carrying out his duties for several years. When his long-term absence began it had a physical cause. Only in mid-2018, did the Claimant's mental health cause him not to be at work. Throughout the entire period, the Respondent was obtaining regular occupational health advice from BAHS, including about adjustments which might assist him to return to work.

65. At this hearing, the Claimant said that he had been unable to return to flying during part of 2018 because of intimidation by "unsavoury characters" (which we took to refer to members or officials of BASSA) on site. We note, however, that in his letter the Claimant did not provide any information about matters of this sort, which the Respondent could investigate (e.g. name, place, time or what they did). His letter was primarily a vehicle for argument rather than reporting new factual complaints.

66. This letter was a protected act (number 3) as it contained Equality Act complaints, for example alleging a failure to make reasonable adjustments.

Termination Date (extended to 17 August 2018)

67. By a letter of 30 July 2018, the Respondent further put back the termination date, on this occasion the proposal to do so came from the Claimant to allow for further medical information to be obtained.

> **You made contact with me on the 26th July 2018 via telephone and advised me that you wanted me to delay the review meeting we had scheduled for 30th July 2018.**
>
> **You explained that you had to go into London (Harley Street) for an appointment to see your psychiatrist in order to be assessed by them and to get paperwork to provide to British Airways Health Services (BAHS) and Monday 30th July 2018 was the earliest date you could see them.**
>
> **I advised you that your termination date set for the 31st July 2018 would be impacted by this delay to your review meeting as the reasons for the meeting prior to the termination date was to review your termination date and also any change to your health situation. You asked me to move the termination date by a few days to allow for this appointment.**
>
> **I advised you that BAHS had indicated a review (3 weeks times) on the referral received on the 13th July 2018, therefore, given your appointment and the requirement of a BAHs review it would be reasonable if I delayed the meeting to allow you see your psychiatrist and have the BAHS review before we meet to review the overall situation. I advised you that I will contact you with a new date for the review meeting and an adjusted termination date, once I had contacted BAHS to see when they could see you but by the 30th July 2018. You were okay with this. […]**
>
> **in view of this, I am writing to confirm that your termination date will, be postponed from the 31s' July 2018 to the 17th August 2018 to accommodate you seeing BAHS**

68. The BAHS report of 7 August 2018, provided:

> **Since Nick's last assessment with BAHS there has been some improvement in his health and he remains proactive in trying to improve his health. Nick is keen to return to work and as such has paid privately to see a specialist who he saw on 29th July 2018. He has been diagnosed with an underlying medical condition and is due to commence a course of additional treatment next week, which will last for 6 weeks.**
>
> **In answer to your questions answered in your original referral dated 9th July 2018: Nick remains unfit for flying duties and I am unable to give you timescales for a return to flying duties however his health has improved over last 3/52 and I plan to review him again in 5/52 to assess the impact of his treatment.**
>
> **Hopefully if his health continues to improve and his treatment is successful he will be able to return to flying duties however I would remain guarded until I review his health again on 6th September 2018. I**

> **would also envisage that if the on going legal issues which Nick has with BA have moved forward, this will positively impact on his health**
>
> **Nick feels he is fit to commence ground duties With the information available to me I feel that he would be fit for ground duties with the support of some adjustments. I would recommend late start times to help with some of his on going symptoms.**

Termination Date (extended to 13 September 2018)

69. The Claimant's GP fit note expired on 8 August 2018.

70. At a meeting on 9 August and in light on information about an improvement in his health and a request from the Claimant to complete a short course of treatment, Mrs Gupta agreed to further extend the termination date again, this time to 13 September 2018. The Claimant also thanked Mrs Gupta for the way in which she had approached matters. Her summary in a letter of 24 August 2018 included:

> **During our section 4 meetings held on the 3rd and 9th August 2018 you explained to me that you were feeling much better now as you were dealing with the issues you felt had been affecting your health and with the new treatment you had started. You advised me that you felt better about everything being out in the open and you had taken steps to stand up for things you felt you were wrongfully accused of. You thanked me for pointing you in the right direction in terms of addressing these issues. I advised you that today I wanted to discuss your ability to return to your contractual role as Cabin Crew on Worldwide and that we need to let your legal team work alongside BA's legal team to address those issues as they cannot be resolved by me or you. You agreed with me. […]**
>
> **You explained how you have already put things in place to assist you and assured me that your goal was to return to flying. You expressed how you felt very confident that after 5 more sessions of the current treatment you would be able to come back to flying and be mentally able to deal with the issues. You said that the one session you had attended on the 7th August 2018 has already made a positive impact on your mindset.**
>
> **In view of your comments above, and the latest medical prognosis from BAHS, I recognise there has been a positive change to your health in the last few weeks and therefore, I consider it reasonable to allow you further support to continue with your treatment and to enable you to return to work.**

71. Mrs Gupta set out the latest OH advice:

> **Nick remains unfit for flying duties and I am unable to give you timescales for a return to flying duties however his health has improved over last 3/52 and I plan to review him again in 5/52 to assess the impact of his treatment. Hopefully, if his health continues to improve and his treatment is successful he will be able to return to flying duties however I would remain guarded until I review his health again on the 6th September 2018. I would also envisage that if the ongoing legal issues which Nick has with BA have moved forward, this will positively impact on his health.**

> **Nick feels he is fit to commence ground duties. With the information available to me I feel that he would be fit for ground duties with the support of some adjustments. I would recommend late start times to help with some of his on going symptoms.**

72. Mrs Gupta reminded the Claimant of his CTS registration and the revised termination date:

> **You told me at our meeting that you still had not participated with this service. You said you did not remember this being available to you and I reminded you that we have spoken about this before and that Parm had in fact registered you at the meeting in August 2017. I confirmed that this was still available for you to consider as part of your support. I advised you that you often speak about considering a role on the ground and advised you to contact the Career Transition team to see if there was anything that they could offer you, with regards to tips for interviews, jobs, your CV etc. You said you would look into this and I also offered my ongoing support if you identify any roles you would be interested in applying for.**

Ground Duties August 2018

73. The Claimant undertook further ground duties in August 2018.

74. Although subsequently declared fit for flying, the Claimant suffered further health issues and did not actually fly

75. By a letter of 15 August 2018 from Claire Houghton, the Claimant was told that since his grievance related to a decision to dismiss it would be treated as an appeal. She made enquiries into the matters raised by the Claimant, interviewing various witnesses about his allegation that his doctor had been pressured, the fume event, and the BAHS advice received.

76. On 22 August 2018, the Claimant wrote challenging the consideration of his grievance letter as an appeal:

> **Against this context, it is wholly unreasonable to determine that I have not exercised my right to appeal against the decision to terminate my contract under Section 4 of EG300, when the underlying basis of my grievance takes issue with British Airways breaching the relevant provision of its Absence Management policy, which has made my termination (now deferred to 13 September 2018) possible. […]**
>
> **It is my case that British Airways' breach of the Absence Management policy invalidates my dismissal. Therefore, pending the outcome of my grievance, it is wholly inappropriate for me to be requested to appeal against the termination of my employment in these circumstances. If my grievance succeeds the alleged justification for dismissing would be completely eliminated.**

77. The approach of considering the Claimant's grievance letter as an appeal was not an unreasonable course as despite the title of grievance, given its purpose was to challenge Mrs Gupta's termination decision, it appears more in the nature of an appeal. Furthermore, in terms of the fairness of the Claimant's dismissal, the relevant consideration is likely to be whether the substance of his grounds

were addressed, as opposed to the procedural forum in which that was said to be done.

78. The Claimant relies on the 22 August 2018 letter as a protected act (Number 4). This does not include an allegation under the Equality Act and we do not find it amounted to a protected act.

79. On 3 September 2018, the Claimant wrote pressing for an update on his grievance and making representations about the correct approach where there are overlapping grievance and disciplinary cases. He relied upon this letter as a protected act (Number 5). This does not include an allegation under the Equality Act and we do not find it amounted to a protected act.

80. The Claimant wrote to Mrs Gupta on 30 August 2018. Having previously expressed his thanks, the Claimant was now highly critical of Mrs Gupta. His letter included:

> **Notwithstanding this, your letter makes no reference whatsoever to any steps being taken to try and progress the resolution of my work related issues. Against this context, there is no credibility to your statement that it is "your aim to support [my]..return to [my] flying role", in circumstances where any potential return is medically contingent upon the effective resolution of my work related issues.**
>
> **Until a proposed timetable of action is agreed in regard to investigating the barrier to my return to work, it is wholly inappropriate, and indeed damaging to my mental health and wellbeing for you to threaten me with a potential termination date of 13 September 2018, contrary to the recommendation of the medical report.**
>
> **You are essentially requiring me to warrant my fitness to return to work independently of any commitment being made to deal with my grievance, which of course, will not be possible for the reasons already stated.**
>
> **If this state of affairs represents your commitment to supporting my return, it is now clear and obvious that British Airways have simply delegated the task to you of going through the motions of a process that is set up to ensure my termination goes ahead as planned.**
>
> **This is a wholly unacceptable state of affairs. I am therefore sending a copy of this letter to Clare Houghton with further instruction that she sends a copy of the same to your legal advisors for consideration as soon as possible.**

81. A BAHS report of 5 September 2018 provided updated advice on the Claimant's health and prognosis:

> **He has 1 last final planned treatment session to take place on 11/9/18 (deferred from 4/9/18 re: dealing with a more recent family issue)- he has self funded this treatment. He also has a medical condition of an endocrinological nature which requires him to take daily medication, carry out weekly blood checks & he has 6 monthly specialist review appts- next one is due very soon. For this reason I am able to advise that he is likely to be protected by the disability discrimination provisions of the Equality Act 2010.**

in discussing his fitness to work in detail, I am able to advise/recommend the following:

Nick is fit to continue with his current ground duties as per 50% contract equivalent: 1 more week 2/7 on 6hrs/day, then 2 weeks of 2/7 per week on 8hrs/day- he states he works Thursdays & Fridays.

Then from 29/9/18 Nick is deemed fit to resume his flying role. He states he last flew in 2016. Therefore he would benefit from the support of 3/12 of max 3 day trips. He is fully aware he will need to undertake a return to flying course prior to actual flying duties. After he has completed his 3 months of supported flying duties, it will be appropriate to review him re: his progress with the expectation of him then being assessed fit to resume his full contracted flying duties.

Appeal Hearing

82. The Claimant's appeal hearing took place on 5 September 2018. Ms Houghton was the decision-maker and the Claimant was accompanied by a trade union representative. Ms Houghton began by summarising issues to be determined. In addition to the matters set out in his letter, the Claimant also referred to:

82.1 An occasion in May 2017 when he had been rostered to fly but had not been able to go through with this because the first officer was the same person who in 2011 had subjected him to racist abuse and at this time he was being "hounded by the press" and had to move his family;

82.2 moving the termination dates had caused him extra anxiety and stress;

82.3 asked whether the Respondent had shown reasonable adjustments and a duty of care from May 2018 he said:

"Yes, I would, but I have undertaken via my own funding having treatment at the Priory, this is EMDR therapy and I have one session left. I do feel a lot better through this treatment and have enjoyed working in the Terminals recently.";

82.4 there was a specific exploration of what the Claimant was looking for in terms of a resolution to his work issues:

CH: What would a satisfactory investigation look like for your health/ work issues to restore trust and confidence?

Well, my Doctor was put under pressure to sign me off to come back to work, she spoke to Sue and a cat fight took place. It was stated that: 'If you don't send him back to work we will sack him', my DR said she had not heard anything like it in 25 years of practice.

There have been a lot of flaws in the period 10th October 2016 - 27th November 2017. These have not been my fault, I am a 50% Part-time employee and work to those blocks, with owed leave and administrative errors these have been the cause if the issues.

Duty of Care under the Equality Act Section 6

83. Notably, when the Claimant was asked about a resolution of his issues, he recited complaints but did not suggest any specific outcomes. The Claimant was also asked about alternative employment:

> **Why did you not engage with the CTS process?**
>
> **I just want to fly, looked at other jobs in BA and enjoying my time in the Terminals, but just want Fly.**
>
> **My health has been affected by the four occasions that my termination date has been extended, Navdeep claims it is due to 'legalities'. I have been threatened, abused, had my car damaged.**
>
> **Klaus and Navdeep are aware of the Unions targeting individuals in support of the company and I have always supported the company. I enjoy working for BA and want to continue to work for BA and be able to fly.**

84. Subsequent to the appeal hearing, Ms Houghton made various further enquiries including with respect to the matters raised by the Claimant about the CRB / ID issue. On 10 September 2018, Ms Houghton wrote to the Claimant with a list of further enquiries it had been agreed she would make and seeking information from him.

Termination Date (extended to 13 December 2018)

85. The Claimant met with Mrs Gupta for another review meeting on 12 September 2018. Their discussion included that BAHS had now advised the Claimant would be fit to return to flying from 29 September 2018, which Mrs Gupta described as “very good news”. She agreed to extend his termination date to 13 December 2018 in light of this welcome development. Once again, when in person the Claimant expressed his thanks to Mrs Gupta for her support. The meeting concluded as follows:

> **HG: The next SEP is on 8th October and I have provisionally placed you on that day.**
>
> **I will contact OHA Emma today and see if she can see/speak to you today. So, to confirm I have extended your TD for 3 months.**
>
> **NG: I can’t thank you so much Harveen. You have been so helpful and supportive. Thanks**
>
> **HG: I am concern about you. We will have a review early November 2018. You have not self-certified yourself.**
>
> **NG: OK**
>
> **HG: We will go to the HUD straight after this meeting and they will help you self-certify yourself**
>
> **NG: OK**
>
> **HG: You are fit now**

NG: Yes

HG: Do you want me to remove you from career transition service (CRT)?

NG: Yes - I can't thank you enough Harveen. I feel much better now.

86. Mrs Gupta confirmed her decision to extend the Claimant's termination date in a letter of 28 September 2018:

> **At your Section 4 Review meeting held on 9th August 2018 I advised you that I would be extending your termination date to the 13th September 2018, due to the change in your medical circumstance and to allow you the time to undergo further medical treatment. At this meeting we agreed to meet again once you had been reviewed by BAHS on 6th September 2018 to review your medical circumstance and gain a prognosis for your return to your role as Cabin Crew. As stated above, following your review with OHBP Emma Cissell in Kathy's absence she provided an updated report stating you would be fit to resume your flying duties with some restriction on the 29th September 2018 for a period of three months.**
>
> **During our meeting on 12th September 2018, you also told me how you are feeling better and want to come back to flying. Due to the positive change in your health and ability to now return to flying, I believe it is reasonable for me to amend the termination date from the 13th September 2018 to the 13th December 2018, to allow you time to return to your role as Cabin Crew. During this time, I will continue to support you and review how you are progressing. I will arrange to meet with you prior to your termination date and will arrange a date in November 2018. I will confirm a date once this meeting has been arranged. You advised you were very grateful of this extension and support and said you were even going to fly as a passenger in your time, to prepare yourself to return to flying as a crew member.**

Further Sickness Absence

87. In October 2018, there was then a repeat of the ID issue and Mrs Gupta wrote to the Claimant about this, explaining her disappointment, whilst also pointing out how he could still fly:

> **I am very disappointed to read the below as this is something I have proactively advised you of and reminded you to keep up tb date to avoid a repeat of last time. You should've been aware of this from last time and made an effort t avoid this happening again so soon.**
>
> **Anyway, you will be able to continue with your crew roster on a visual check. Please do not remove yourself from the trip due to these reasons as you can operate.**
>
> **I am away after today until the 5th November 2018 and have asked Jas to support you if required in my absence.**

88. Unfortunately, the Claimant did not fly and then had further sickness absence. On 22 October 2018, the Claimant was admitted to hospital with a suspected stroke. The Claimant was absent from work and signed off by his GP from 30

October to 26 November 2018, with: Anxiety and depression; Work related stress Hypertension and Diabetes.

Appeal Outcome

89. On 24 October 2018, Ms Houghton wrote with her decision on his appeal against dismissal and she did not uphold this. She began by looking at the matters the Claimant had said were the unresolved work issues. Her analysis with respect to the fume event was set out earlier in the Tribunal's reasons. She then went on to deal with the Claimant's general argument that in light of the various matters he had raised, his contract should not be terminated:

> **2. Inappropriate Contract Termination**
>
> **At the appeal hearing, you outlined a number of events that occurred, most of which were historical. You explained that these events were being managed separately by our Legal Department.**
>
> **Having spoken to the Legal department, I understand that your solicitor sent a letter before action in May 2018. Following receipt of that letter, the Legal department provided a response to a number of your allegations to your solicitor. They also asked for more information about some of the allegations that were not detailed. To date, they have not received this information from your solicitors.**
>
> **You then stated that on four occasions you were unable to fly when arriving at work, because the first officer operating the flight was an individual involved in another case with you. As you felt unable to operate on the same flight, you went home and this added both to the length of your absence and created added stress for you. I asked you to provide me with the dates and destinations so that I could verify this however, I have not received any further information from you in relation to this.**
>
> **I asked you if you felt that BA have made reasonable adjustments and exhibited a duty of care towards you. You sated that you felt that BA have been supportive and that you have supplemented your recovery with treatment that you have also funded yourself.**
>
> **I asked you if you still wished to fly as Cabin Crew on Worldwide, as you had chosen not to avail yourself of the support that CTS (Career Transition Services) provides to help colleagues to find reasonable suitable alternative roles either within or beyond BA. You stated that you did not want to use CTS as you only wanted to go back to a flying role.**
>
> **I appreciate that the numerous extensions to your termination date have caused you to feel a degree of stress. However, I believe the extensions have been made in an attempt to accommodate the management of your ongoing issues and medical conditions and to support you back into the workplace, as per the EG300 policy.**
>
> **As your termination date has been extended to give you the opportunity to complete your return to work courses and return to flying, I can only conclude that BA is working hard, with your interests at heart, to get you back to working in your contractual role. Given the length of your absence and previous medical assessments and prognosis I don't believe that the previous notices of termination date have been given**

unreasonably, even more so given that management have obviously kept an open mind and reviewed any developments in your condition and your ability to fly.

90. Ms Houghton had made specific enquiries of the employee the Claimant said had put pressure onto his doctor:

> **3. No investigation into the issues you raised that your doctor was put under pressure to sign you back to work**
>
> **You stated that your doctor was placed under pressure to declare you as being fit to return to work and in your words an ensuing "cat fight" that took place between your doctor and Sue Persaud, Occupational Health Business Partner.**
>
> **As part of my investigation, I interviewed Sue Persaud who clearly advised me that she has not had any communication with your doctor at any point during your absence.**
>
> **As I have no further evidence to support this allegation, I am unable to conclude that any untoward behaviour took place or uphold this point of appeal.**

91. Mrs Houghton looked at the various other matters the Claimant was relying upon:

> **Issues with BA**
>
> **1. Your ill health was caused by BA failing to deal with historical ethical issues in connection with alleged racism and data protection breaches**
>
> **As your appeal relates to the termination of your employment under EG300, due to your absence from work I have not focussed on the causes of that absence particularly as I understand that you have raised these issues with the Legal Department and received a response to your specific allegations, and some questions in response to the allegations that are less clear.**
>
> **2. Failure to explore reasonable adjustments to facilitate your return to work or a suitable alternative role prior to proposing to terminate your contract contrary to S4.7 of EG300**
>
> **In your appeal hearing, we discussed the role and purpose of CTS. The objective of this service is to support colleagues in finding reasonable suitable alternative roles either within or outside of BA. As you had consciously chosen not to engage with CTS, post registration on the 31st August 2017, this prevented you from accessing this and therefore being supported by BA in this way. This is not a failure on BA's part given that you were given access to CTS.**
>
> **3. Failure to discuss a rehab plan prior to proposing a termination date**
>
> **My understanding from the appeal hearing is that both Harveen Gupta, Inflight business Manager and BAHS were supporting you and that the opportunity for you to undertake ground duties prior to going back to**

> **flying constituted a rehabilitation plan and was appropriate in the circumstances.**
>
> **4. BA should fully investigate all of your health issues and work- related issues to restore trust and confidence in your mental capacity to resume employment**
>
> **I have listened to your concerns and have asked you to allow me to review your BAHS assessment and update (thank you for handing me a copy of your BAHS report on the 9th October in person) to assess whether there is any likelihood that you could potentially be covered by the Equality Act 2010 and also assess whether we were acting in a manner that demonstrated a duty of care towards you.**
>
> **Having reviewed this information, I believe that until July 2018, BAHS' assessment was that they were not of the opinion that you were covered by the Equality Act. I do not believe that they were remiss in their duty of care towards you.**
>
> **In the BAHS review in July 2018, Kathy Langman, Occupational Health Business Partner, assessed your current medical circumstance and stated that she now believed that you may be covered by the provisions of the Equality Act. This was subsequently confirmed in your BAHS review of the 5th September 2018.**
>
> **I am comfortable that BA has made reasonable efforts to properly assess your medical condition. If you feel that the BAHS assessment if inadequate or incomplete I would encourage you to seek another referral to discuss this with them. […]**
>
> **Your referral to British Airways Health Service and the report received from British Airways Health Service**
>
> **I have reviewed your absence file and I can see you have been regularly reviewed by BAHS on an ongoing basis and your manager has taken this into account in managing your absence from work.**

92. Ms Houghton did not uphold the appeal. Before the Tribunal, Mr Duggan's main criticism of Ms Houghton's decision was that she had glossed over the allegations of historic racism. Whilst it is right to say Ms Houghton's exploration of this appears to have been limited, the Claimant's appeal had not included any specific incident of racist abuse and the only matter raised by him at the appeal hearing dated back to 2011. It appeared to the Tribunal that Ms Houghton made proportionate enquiries into the various grounds on which the Claimant sought to challenge his dismissal. We did not accept the characterisation of this as a whitewash.

Without Prejudice Discussions

93. Also on 24 October 2018, the Claimant wrote to Ms James again setting out various complaints. He also invited the offer of "good terms" and "reasonable quantum" for him to leave the Respondent:

> **It should come as no surprise that I have been effectively absent from the business as a result of racist slurs and assaults; a fume event; various**

administrative errors; extended leave and not the least of which is, of course, the documents which have come to my attention, which clearly confirm that my data was leaked to the Guardian newspaper by a number of BA employees past and present and deliberate attempts were made to destroy me professionally.

One particularly disturbing aspect of this situation is the disquieting relationship enjoyed currently by BA and BASSA as a result of the settlement in secret of the Taylor Hampton claim, in which I am frequently mentioned and apparently inculpated for the data breaches. British Airways knows full and well it is entirely and solely accountable for these. The attached documents are unambiguous on this. I have resisted publication of these documents as I understand the risk to the business and numerous high profile reputations. Let me be clear however, that I will not hesitate to ask for the resignations of those involved in public, should we be unable to reach an accommodation.

[…]

In summary, my career has been destroyed and damaged by deliberate acts of racism, violence and thuggery, negligence, data breaches and personal injury. I am deeply saddened and injured on many levels by the collective failures and deliberate concealments - all of which have been identified to the company in writing and with corroborating documentation. See below.

If I am to leave the company "on good terms' - as we are both keen to achieve - I invite you to consider what a reasonable quantum would be against the potential devastation to the good name of British Airways. I am attaching numerous documents for your consideration as they clearly evince the behaviours and omissions, which BA is entirely accountable for.

It would be unreasonable for you to offer me a tokenistic gesture given that (a) not only have my lifestyle and career been taken from me as a result, but also, (b) that I have been incapacitated as a consequence. I am only fifty-three and my career has over a decade to run assuming that the default retirement age remains the same and is not raised.

Therefore, I trust you will factor into your calculations all of the above including the loss accumulatively of fifty per cent of my contract and its pension growth exponentially over the same period.

I look forward to receiving your call and/or meeting with you tomorrow and that we can part on mutually agreed terms in good faith. I would like to reassure you of my reasonableness but would respectfully remind you of the offense and injury sustained as well as the neglected duty of the company to act. Effectively, this is our very last chance.

Review Meeting

94. A BAHS report of 6 November 2018 provided:

Tel call with Nick today- states on 22/10/18 he developed significant physical health symptoms that warranted hospital attention. He was thoroughly investigated, was discharged on 23/10/18 to rest & be followed

> **up by specialist & GP. States was unable to get GP appt until 30/10/18. GP has signed Nick off until Nov 26th 2018 and although is waiting for the NHS appt with the specialist, Nick is being extremely proactive and is arranging to see the specialist privately- appt planned for tonight. Nick is putting into place helpful interventions to help himself as best as possible. His medications remain as before. His status of likely to be covered by the disability discrimination provisions of the EA 2010 remain in place as previously indicated. He is extremely keen to be getting back to his flying role yet is aware of his termination date set for Dec 13th 2018 and is dealing with understandable stress that such a situation brings. Nick therefore is unfit for all duties at present whilst specialist appt is due- he is happy to update me tomorrow re: update of tonights specialist appt where I will then be able to provide more information.**

95. A further review meeting took place on 7 November 2018 with Mrs Gupta and the Claimant. The Claimant had his trade union representative present, who took the discussion back to earlier events. During this meeting Mrs Gupta agreed it had not been the Claimant's fault with respect to the first CRB / ID incident but said this had been taken into account by further extending the termination date. The Claimant referred to the "racist pilot" (i.e. the 2011 matter) which Mrs Gupta understood was part of the matters the Claimant had taken to legal. The Claimant explained he had suffered a suspected stroke and was waiting to undergo further medical treatment and was not fit to return to work. The Claimant's TU rep said that all of these matters had impacted on his health. The Claimant complained about Ms Houghton's appeal outcome. As with previous meetings, the Claimant expressed his gratitude to Mrs Gupta. With respect to a return to work or termination, the meeting included:

> **HG I thank you for bringing the issues to light, it is not going to go away, what you have to decide is are you well enough to return to work, given all that you know. If you are well enough you need to be able to do the role and all it involves.**
>
> **NGS All I can tell you is that I will know more by later on today when I have attended the appointment**
>
> **HG What I want you to understand not brushing away - hands of legal and AJ and your lawyers, let them deal it, we cannot deal with here. I am managing your absence from work. The reason I have confirmed. Where we are with EG3OO, the prognosis unfit all duties, TD 13th December 2018, as things stand today that will remain. If after tonight you have update or between now and the 13th December, that can be moved. Can be extended/moved/postponed.**
>
> **NGS You have been really fair with me I will say that but I cannot say anything further other than what news I will get today**

96. Mrs Gupta did not, however, agree to postpone the termination date. She suggested re-registering the Claimant with CTS and he agreed. She summarised their meeting in her letter of 15 November 2018:

> **At our last meeting on 12th September 2018, there was a positive change in your health, so I moved the termination date from the 13th September 2018 to the 13th December 2018, to allow you time to return to your role as Cabin Crew. Since then you have successfully completed your return**

> **to work course however, unfortunately, you have not been able to return to your flying duties due to a change in your health. You were referred to BAHS for support and you are also seeking support from your specialists, however at this time you remain unfit for all duties. Given the time passed since you last flew in your contractual role of cabin crew and the support provided to date, I advised you that with the information available to me, the termination date set will remain for the 13th December 2018.**
>
> **I advised you that if anything changed in your health between now and the 13th December 2018,1 would review the situation, which included the termination date set. You said you understood and expressed how you felt I had been very fair with you but was not well to fly.**

Termination Date (extended to 21 December 2018)

97. In the period prior to the termination date of 13 December 2018, the Claimant did not provide any information about his health to Mrs Gupta, or any other information which might have caused her to revisit the decision made. There were, however, in parallel, without prejudice discussions ongoing with the legal department.

98. On 11 December 2018, Ms James of legal contacted Mrs Gupta to advise her to postpone the termination date for a very short additional period, until 21 December 2018. Accordingly, Mrs Gupta wrote to the Claimant on 12 December (i.e. on what would otherwise have been the last day of his employment) extending the termination date to 21 December 2018.

Claimant Reports Fit to Fly

99. On 18 December 2018, the Claimant rang the Respondent's Operational Control department, to say that he was fit for flying duties. The Tribunal notes this appears to be inconsistent with the previous occasions when the Claimant returned to work after a long period of sickness absence, where that had been part of planned return to work and began with a period of ground duties. No new medical information was offered. The Claimant must have known the Respondent could not simply roster him to fly and a BAHS assessment would be necessary. Furthermore, given the Claimant's poor health at this time and the numerous unresolved workplace issues he said were operating as a barrier to his return, his self-declaration of fitness to fly is very surprising.

100. As Mrs Gupta was on leave at this time, Renata Caruso Lorenzo, Area Manager, stepped in. Unsurprisingly, in circumstances where the Claimant had not resumed flying duties in more than two years (since August 2016) she wished to refer him to BAHS to assess his fitness for flying and the prospects of this being sustained. Ms Caruso Lorenzo spoke with the Claimant about a referral and he confirmed he would look out for a call from BAHS.

101. Ms Caruso Lorenzo then spoke with Kathy Langman, the Occupational Health Business Partner, to arrange a consultation on 20 or 21 December.

Claimant Refuses BAHS Assessment

102. Ms Langman spoke with the Claimant 5 times. He was unwilling to participate in an assessment. The crew history entry for 21 December 2021 provided:

> **Unable to progress**
>
> **I spoke to Nick twice yesterday and again today on three separate occasions. He has advised me that his lawyer remains in dialogue with the BA legal team and as such feels that until an agreement can be reached he will not be able to engage in an OH referral. Therefore I am currently unable to proceed with this referral.**

103. We note the Claimant's stance was inconsistent with him having contacted Operational Control on 18 December 2018, which would imply that he was both able and willing to fly. The Claimant's rationale for refusing this assessment is difficult to understand. The fact of him being engaged in without prejudice negotiations would not act as a bar to him taking part in an occupational health process, nor would such an assessment mean the parties could no longer explore settlement. The Claimant's approach, declaring himself fit in circumstances where he knew the Respondent would need to verify that through BAHS and then refusing the assessment, appears to be a holding measure, intended to avert dismissal but not result in an immediate return to flying. Furthermore, in light of the medical evidence we will discuss below, we do not accept the Claimant's fitness to fly at this time.

104. Ms Caruso Lorenzo understood the Claimant's lawyers and the Respondent's legal team were engaged in without prejudice discussions but she was not a party to those.

105. Ms Caruso Lorenzo decided not to further extend the Claimant's termination date. Of all the witnesses who gave evidence at this hearing, Ms Caruso Lorenzo was by far the most direct. Her answers were on point, addressed the question, and she offered clear explanations for her own actions and for disagreeing with certain propositions put to her by Mr Duggan. We accept her reasons are as she set out in her witness statement:

> **The termination date had already been extended on a number of occasions and the Claimant had not engaged with CTS, BAHS or given any confidence that he would be able to return to and sustain his full contractual duties. I felt that engaging with BAHS for a telephone consultation was not an unreasonable request in the circumstances and was not something that was overly onerous. Ultimately avoiding the termination date was in the Claimant's control. He had said he was fit to return and undertaking a short BAHS telephone assessment to confirm this would have avoided his employment terminating.**

EDT

106. On 21 December 2018, Ms Caruso Lorenzo wrote to the Claimant advising this was the last day of his employment and saying:

> **I am aware that you phoned in fit for contractual duties on the 18 December 2018 following your meeting with Amy James. As per our**

attendance policy and your conversation with Harveen, I called you on the 19 December 2018 to confirm I would be referring you to British Airways Health Services to assess your fitness and outlined the questions I would be asking.

Kathy Langman (Occupational Health Business Partner) advised me today that she was unable to progress the BAHS referral and of the following outcome;

"I spoke to Nick twice yesterday and again today on three separate occasions. He has advised me that his lawyer remains in dialogue with the BA legal team and as such feels that until an agreement can be reached he will not be able to engage in an OH referral. Therefore, I am currently unable to proceed with this referral."

Therefore, given that we are unable to assess your fitness to return to and sustain contractual flying duties your termination date remains in place.

It is most unfortunate that your medical circumstances have prevented you from continuing to work for British Airways and I would like to recognise the contribution you have made to the airline.

Claimant's Medical Evidence

107. The Claimant obtained a psychiatric report from Dr Taylor, dated 13 September 2019. This includes:

The incident which initially led to his being off sick from work occurred when he was acting as cabin crew on a 747 which had just left New York. There was, he states, a problem with engine 3 and he was overwhelmed by smoke and fumes and struggled to breathe, and staff present felt that he was having a heart attack although this was not in fact the case. This incident happened in June 2016 and following this he has essentially been unable to work as a cabin crew member on flights because of anxiety symptoms and claustrophobia. He says he has similar symptoms in any enclosed space. For example, if he uses the underground system.

Prior to this he tells me that he has been a hardworking individual who claims he has had very little time off sick from the workplace before 2016. He was allegedly targeted by the unions when he refused to go on strike. He told me that his car was reportedly vandalised.

In 2018 he reported stress related symptoms, for example, the left-hand side of his body episodically felt numb. He had an essentially normal MRI brain scan (with the exception of some minor small vessel disease) performed around that time. He has also had testing for nerve damage, and none was found. He reports impairment of his sleep and reports flashbacks regarding the engine fumes incident. He had tried to get back to flying on a couple of occasions and went on some short haul flights with a supportive friend. He went as a passenger but found he struggled with anxiety symptoms and was agitated and nervous and had to talk throughout the flight to try to maintain his composure. He had also been seeing a hypnotherapist with a view to stress management.

He alleges that he has been threatened with termination of his employment on four separate occasions by his employers. He alleges

> **experiences of bullying and racism. He tells me that he was keen to get back to work but felt that he could not face flying but would accept a ground-based job, say in an airport terminal.**
>
> **[…]**
>
> **In my opinion he had significant symptoms of a Post-Traumatic Stress Disorder at that time and I felt met the diagnostic criteria. He had flashbacks regarding the in-flight incident of 2016, he had unexplained left sided numbness in the face of a normal MRI brain scan which was almost certainly a stress related symptom. He had features of hyperarousal such as irritability, impaired sleep and poor concentration. He was fearful and avoidant of flying and described heightened anxiety and feelings of claustrophobia when in enclosed spaces. He was not on any psychotropic medication, but I referred him for Eye Movement Desensitisation and Reprocessing (EMDR) a form of treatment for Post-Traumatic stress disorder PTSD. Mr Singh-Garcha has also been in receipt of session of individual based cognitive behaviour therapy (CBT) which he self-funded.**
>
> **[…]**
>
> **In my opinion he currently meets criteria He appeared to have made some progress following EMDR and CBT treatments and had returned to work albeit in an airport terminal and had apparently agreed with his then employers BA, to return to cabin crew on short haul flights. He tells me this never happened as he was states BA only ever offered him a long-haul flight from London to Dakota which he felt unable to contemplate at that time. He told me that he has not been on a flight since that 2016 incident.**
>
> **In my opinion he does meet criteria for an International Classification of Diseases version 10 (ICD10) diagnosis of Post-traumatic Stress Disorder. This is the diagnostic system commonly routinely utilised in clinical settings within British Psychiatry (although its criteria are less stringent than the American DSM-5 categorisation).**

108. There is an obvious tension between the matters recorded by Dr Taylor and what the Claimant told his employer contemporaneously about the short flight he took with a friend. His employer was given to understand this went well, whereas the psychiatrist was told it was very difficult, necessitating the Claimant having to talk throughout to cope. Given that the Claimant was suffering with anxiety, claustrophobia and in particular, became flight avoidant, it is difficult to reconcile that account with him reporting fit to fly on 18 December 2018 and we find that he was not then so fit.

Comparators

109. The Claimant asserted that comparators have been off work on sick leave for longer periods than he was without being dismissed. The Respondent has provided anonymised comparator information pursuant to an order of the Tribunal. The information provided by the Respondent does not support what the Claimant believes.

110. The Claimant identified two individuals who he said had more sick leave than him without being dismissed. In connection with one of these two, the Claimant says that person was on sick leave for more than 10 years without being dismissed. He also says, however, that this person was seconded to Unite. An individual who remains an employee of the Respondent and is seconded to work with or for another party is, quite plainly, not on sick leave. The Respondent says and we accept comparator (A) took no sick leave in the period from 1 July 2015. As far as comparator (B) is concerned, that person's had much less sickness absence and far fewer missed flying days than did the Claimant.

111. Separately from the two principal comparators the Claimant sought to rely upon, the Respondent produced information relating to others, which shows:

    111.1 other employees were issued with termination dates, which were then extended;

    111.2 other employees were dismissed with far shorter sickness absence or periods of missing flying duties;

    111.3 although there was one comparator (F) who had more than one BAHS refusal before dismissal, she had not declared a change in her medical position / fitness to fly.

Law

Unfair Dismissal

112. In order to find the reason for dismissal, it is necessary to look into the mind of the decision maker. The reason for dismissal is "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"; see **Abernethy v Mott [1974] ICR 323 CA**.

113. Pursuant to section 98(1)(a) of **the Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the reason for the Claimant's dismissal was potentially fair and fell within section 98(1)(b).

114. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA.

115. ERA section 98(4) provides:

> **In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

116. In a case where the employee is incapable of doing their job by reason of ill health, the basic question to be answered when looking at the fairness of the dismissal is, in all the circumstances, whether the employer can be expected to wait any longer before dismissing and if so, how long.

117. The employer will be expected to consult the employee about their ill health, the effect this has on their ability to do their job, how this might change in the future and any alternative role the individual might undertake instead; see **East Lindsey District Council v Daubney [1977] IRLR 181 EAT**.

118. Factors which may be relevant to incapability cases may include:

    118.1 whether steps were taken to clarify the nature of the employee's ill health, the prognosis and prospects for a return to work;

    118.2 whether support could be provided which would assist with a return to work;

    118.3 the effect the employee's absence has on other employees in the business, the needs and resources of the employer;

    118.4 whether there was any suitable alternative employment.

119. Where an employer's conduct is alleged to have caused the employee's ill health that might require the employer to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable, but it does not follow that a dismissal will be unfair; an employee in such circumstances will have their right to pursue a personal injury claim in the civil courts, which may include loss of earnings, the employment tribunal is trying a different issue, see **McAdie v Royal Bank of Scotland [2007] IRLR 895 CA**.

120. In connection with the importance of affording a right of appeal, the Tribunal was referred to **Gwynedd Council v Barratt & Hughes [2021] EWCA Civ 1322**, per Bean LJ:

> **36 There is no general rule that any dismissal on the grounds of redundancy without an appeal must be unfair where no internal appeal mechanism is provided for in the contract of employment, as the Northern Ireland Court of Appeal held in Robinson v Ulster Carpet Mills [1991] IRLR 348. The court in that case attached importance to the fact that the employees' handbook, compiled by the management in consultation with their trade union, expressly made provision for an internal appeal against dismissals for misconduct but not against dismissals for redundancy. Robinson is not of assistance in a case where an internal appeal mechanism is provided for in the contract of employment, or is incorporated into the contract of employment by statute, and the employee is nevertheless denied the opportunity to appeal.**
>
> **37. Mr James relied on some dicta of Lady Smith giving the judgment of the EAT sitting in Scotland in Taskforce (Finishing and Handling) Ltd v Love, 20 May 2005, unreported. She said:**

> **"31. We are satisfied that there is no rule, in a redundancy case, that the employee has a right to be accompanied at any consultation meeting. Nor is there any rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one. The matter was specifically tested in the case of Robinson where three employees dismissed on grounds of redundancy claimed that they had been unfairly dismissed in circumstances which did not give them a right of appeal against the redundancy situation although employees dismissed for misconduct were afforded such a right. The Court of Appeal in Northern Ireland, taking account of the decisions in two Scottish cases, clearly determined that, in the absence of special facts, an appeal procedure was not required before a dismissal for redundancy could be found to be fair. Further, even in redundancy cases, the absence of appeal or review procedure does not of itself make a dismissal unfair; it is just one of the many factors to be considered in determining fairness, as was determined in the case of Shannon. Accordingly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to provide an employee with an appeal hearing. Similarly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to have an appeal hearing conducted by someone other than the person who took the original redundancy decision. [emphasis added]**
>
> **38. This decision of the EAT remains unreported 16 years after it was given and is not even referred to in the six volumes which currently comprise Harvey on Industrial Relations and Employment Law. That suggests that it does not lay down a general principle. I agree with the proposition that in redundancy cases the absence of any appeal or review procedure does not of itself make the dismissal unfair - that is to say, if the original selection for redundancy was in accordance with a fair procedure the absence of an appeal is not fatal to the employer's defence. But the sentence I have italicised goes too far unless it is qualified by saying that it would be wrong to find a dismissal unfair only because of the failure to provide the employee with an appeal hearing. As Lady Smith had said in the previous sentence, the absence of an appeal is one of the many factors to be considered in determining fairness.**

121. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal.

Direct Discrimination

122. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **39 Employees and applicants**
>
> **[…]**
>
> **(2) An employer (A) must not discriminate against an employee of A's (B):**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment.**

123. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

124. EqA section 13(1) provides:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

125. The Tribunal must consider whether:

125.1 the claimant received less favourable treatment;

125.2 if so, whether that was because of a protected characteristic.

126. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

127. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless be of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

128. As to whether any less favourable treatment was because of the claimant's protected characteristic:

128.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

128.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason.

129. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

130. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent.

131. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not.

Discrimination Arising

132. Insofar as material, EqA section 15 provides:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

133. As to whether unfavourable treatment is because of something arising in consequence of disability; this involves the Tribunal looking at three matters: matters:

133.1 whether there was unfavourable treatment;

133.2 whether the treatment was because of "something";

133.3 whether the something arose as a consequence of the disability.

134. The causal connection between treatment and disability was considered in **Pnaiser v NHS England, Coventry City Council [2016] IRLR 170**, per Simler J:

> **31. In the course of submissions I was referred by counsel to a number of authorities including IPC Media Ltd v Millar [2013] IRLR 707 , Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 , as indicating the proper approach to determining section15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:**
>
> > **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
> >
> > **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
> >
> > **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572 . A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).**
> >
> > **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15 , namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15 " by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15 .

(i) As Langstaff P held in Weerasinghe , it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

135. Justification involves two stages: firstly, the identification of a legitimate aim and then secondly, a consideration of whether proportionate means were adopted in its pursuit.

136. Proportionality requires, a balance between the discriminatory effect of the treatment on the claimant on the one hand, as against the reasonable needs of

the business on the other. Relevant to striking that balance will be a consideration of:

136.1 the nature and extent of the discriminatory impact upon the claimant;

136.2 the more serious the impact, the more cogent must be the justification;

136.3 whether the employer's aim could have been achieved less discriminatory means.

Reasonable Adjustments

137. Insofar as material, EqA section 20 provides:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **[…]**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

138. An Employment Tribunal cannot say what adjustments were necessary to prevent a PCP placing the disabled person at a substantial disadvantage until it has first identified:

138.1 the provision, criterion or practice applied by or on behalf of an employer;

138.2 the identity of non-disabled comparators (where appropriate); and

138.3 the nature and extent of the substantial disadvantage suffered by the claimant.

139. The Equality and Human Rights Commission ("EHRC") EqA Code of Practice identifies factors which may be relevant to the reasonableness of a proposed step:

> **6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> **• whether taking any particular steps would be effective in preventing the substantial disadvantage;**
>
> **• the practicability of the step;**
>
> **• the financial and other costs of making the adjustment and the extent of any disruption caused;**
>
> **• the extent of the employer's financial or other resources;**

> **• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
>
> **• the type and size of the employer.**

140. A claimant does not, however, need to go so far as to show a 'good' or 'real' prospect, it is sufficient if there is 'a' prospect the disadvantage will be removed or reduced.

141. A one-off step may amount to a PCP where it is indicated that the same approach would be followed in the future; see **Ishola v Transport for London [2020] ICR 1204 CA**, per Simler LJ:

> **38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.**

Conclusion

Unfair Dismissal

Reason

142. The Claimant was dismissed for incapability. There is a question as to whether the decision to dismiss was taken by Mrs Gupta when she set and then postponed the Claimant's termination date, or whether it was Ms Lorenzo Caruso on 21 December 2018, when she decided not to further postpone the Claimant's dismissal. The result is, however, the same, whichever mind into which we look. Mrs Gupta set a termination date because the Claimant had a very long sickness absence, had not undertaken flying duties for a considerable period and despite several extensions, had been unable to demonstrate a return to flying. Mrs Caruso Lorenzo decided not to further postpone the termination for, essentially, the same reason. In both cases this amounts to incapability, which is a potentially fair reason for dismissal within ERA section 98.

Grounds

143. The Claimant had begun a period of sickness absence in August 2016. Although there was an improvement in his health in late 2017 / early 2018, for the reasons set out above, he did not actually fly during that time. Then, sadly, his health deteriorated again, in particular from October 2018. By the time of his dismissal in December 2018, he had not returned to flying for more than 2 years.

144. There was very little, as at 21 December 2018, to suggest that the Claimant was then able and willing to fly, or that such a position was about to be achieved.

Whilst the Claimant reported that he was fit to fly on 18 December 2018 that was immediately undercut by his refusal to participate in a BAHS referral.

145. The health obstacles preventing the Claimant from returning to work had not been static, rather they varied over time. For the greater part of the period from August 2016, the cause of sickness and obstacle to flying was physical illness of one sort or another, although we pause to note this did not appear to include diabetes. From July 2018, the obstacles to the Claimant returning then included his mental health and work-related issues (i.e. the various complaints about the Respondent and BASSA, going back to 2003). As far as the latter were concerned, the Claimant had raised these to some extent in the absence management process or grievance / appeal and then separately with the Respondent's legal department. It is clear he was not satisfied with the responses received and the removal of this obstacle did not appear imminent or likely.

146. We are satisfied the Respondent had reasonable grounds for its belief in the Claimant's incapability.

Procedure

147. Mr Duggan argued that the Respondent failed to apply its own absence management procedure or acted in breach of the same because this does not provide for a termination date to be set and then varied. It is certainly correct that there is no reference in the policy to dismissal dates being postponed. We note, however, that the Respondent's policy does not expressly exclude the variation of such dates and it is apparent, not least because it has been done in several other cases, that this is part of how the procedure is applied in practice. Mr Duggan said that such an approach was fundamentally unfair because it placed an improper burden on a sick employee to prove that they were well in order to avoid dismissal. Whilst that may appear harsh, in substance it is in the nature of any employer's absence management scheme, that once an employee has accumulated sufficient sickness absence to enter the process, then unless their health improves and they are able to return to work, they will likely face dismissal at some point.

148. In one respect the Respondent's approach is different to that followed by many employers, who make enquiries, set review dates, warn that dismissal may follow and then in the event there is no improvement after several such meetings, set a dismissal date which is not changed (save unless there is a successful appeal). In this case, when the Respondent did set a dismissal date, it then scheduled further review meetings before the dismissal took effect, at which it considered whether to vary the termination. It is important to note, however, the Respondent did not move immediately to give the Claimant notice of dismissal as soon as he entered Section 4. The Claimant began a period of sickness absence on 29 August 2016. There were then repeated BAHS referrals and review meetings. Only on 31 August 2017 (12 months later) when despite an improvement in his health the Claimant still had not flown, was a termination date set. At this point the Claimant was given notice to expire on 5 January 2018, which would be more than 1 year and 4 months after he became sick and ceased flying.

149. Having set a termination date, the Respondent's intention was to review the position before the Claimant's employment expired. This is, in the Tribunal's experience, a somewhat unusual approach. Novelty does not, of course, mean there was unfairness. The Respondent's approach did have the benefit that if there were a change, an improvement in health and prognosis for a return to flying, then this could be taken into account without the need for the Claimant to appeal.

150. The Claimant said he found this approach caused him a great deal of worry and stress. He likened it to be put on 'death row'. Mr Duggan was vigorous in arguing that the employee should not have the burden of proving his fitness to avoid dismissal. Our view is that this is a matter of form rather than substance. Long term sickness absence and not performing contractual duties will inevitably put an employee at risk of dismissal and the employer will not proceed fairly unless it clearly advises the employee of that prospect. This will almost inevitably be a cause of stress to the employee because the position will be that if their health does not allow a return to work then dismissal is likely to follow. The Claimant in this case was told that the termination date set might be postponed or revoked if it appeared likely or he were in fact able to return to his duties.

151. We cannot say the approach followed here, of setting a termination date and then putting that back to allow the Claimant a further opportunity to return to work, was a procedure that no reasonable employer would adopt.

152. The Claimant was afforded a right of appeal against the decision to dismiss and exercised this. Notwithstanding the debate over whether this was a grievance or appeal, for the reasons set out above we found it was in substance an appeal. The Claimant appealed against the decision of Mrs Gupta to terminate his employment, with effect from 31 July 2018. The Claimant's grounds of appeal were set out in his letter of 19 July 2018 and developed or added to at the hearing on 5 September 2018 (by which date his employment had been extended to 13 September 2018). We were satisfied the Claimant was given a full and fair opportunity to challenge Mrs Gupta's decision, albeit much of what he set out did not directly address the decision she had made and her reasons for that. We were not persuaded the appeal was a whitewash, on the contrary and given a widely-drawn challenge to his termination, Ms Houghton made reasonable enquiries and came to a decision which was reasonably open to her.

153. Subsequent to the appeal and following a late extension of termination, whilst the parties had without prejudice discussions, the Claimant declared himself fit to return to flying. Because Mrs Gupta was absent from work, Mrs Caruso Lorenezo dealt with this and decided not to further postpone termination. Mr Duggan said the dismissal was unfair because the Claimant did not have a right of appeal against Ms Caruso Lorenzo's decision, the grounds of which appeal would have been that she should have contacted the Claimant and told him that his employment would be terminated if he refused to speak with BAHS and / or that she should have postponed his BAHS referral and termination until after Christmas and / or pending the outcome of the without prejudice negotiations.

154. We were not persuaded the dismissal was unfair because there was no subsequent right of appeal, with respect to Ms Caruso Lorenzo's decision. This latter decision was merely not to interfere with the decision to dismiss previously

made by Mrs Gupta, against which the Claimant had appealed, unsuccessfully. The possible new grounds identified by Mr Duggan added very little to what had gone before, as they did not address the Respondent's reason for terminating the Claimant's employment, namely incapability due to sickness absence and because he had not returned to flying. The Claimant already knew his employment was about to terminate and did not need to be told this again. Whilst the Respondent might choose to extend employment to allow for without prejudice negotiations (this was the reason the Claimant gave for declining the BAHS assessment) it was under no obligation to do so. The Claimant had already exercised his right of appeal against the substantive decision to dismiss.

155. We were satisfied the Respondent followed a fair procedure.

156. We should add, had we reached a decision that the Claimant's employment was unfair because he was not afforded a subsequent right of appeal, we would also have found there was no prospect that this would have been upheld. The Respondent would, fairly, have concluded that the decision to dismiss was appropriate given the Claimant's long-term sickness and absence from flying, coupled with the lack of any requirement this be extended for without prejudice negotiations. We are also satisfied, for the reasons set out above and below, he was at the time dismissal and in the period up to which he saw Dr Taylor (September 2019) unfit for flying.

Fairness Generally

157. Mr Duggan says that given the Claimant had to take accrued annual leave and then the Respondent was at fault over the ID / CRB issue, the period of his absence from flying should be viewed as shorter. As far as the paid annual leave is concerned, this is something the Claimant was entitled to but not obliged to take. The ID / CRB incident is unclear although given the view expressed by Mr Lloyd, it would be difficult to exclude fault on the part of the employer. Given these matters, in our view if the Respondent had simply allowed dismissal to proceed on the termination date then set (31 March 2018) that may have been unfair. In the event, however, the Respondent postponed termination. To the extent the Claimant missed his chance to demonstrate fitness to fly in late 2017 or early 2018, he was given a further opportunity thereafter. His employment was extended several times after this point. By 21 December 2018, the Respondent had allowed a further 11 months (from the ID / CRB incident) for a return to flying.

158. Part of the Claimant's argument was that as a 50% part-time employee, he should be afforded twice as much time to get better as a full-time equivalent, as this would then involve the same number of lost working days. This argument misunderstands both the Respondent's concern and what it was looking for from him. The Respondent was concerned the Claimant was unable to fulfil his flying duties. The Respondent wished to see him return to flying and then sustain that position. The Respondent wished to ascertain whether he was likely to be able to render consistent service in his role and had to consider how long it would delay before concluding that it could wait no longer. The number of working days in a given period was not material. The issue was not the number of days lost, it was how long was it reasonable for the Respondent to have to wait before deciding it could wait no longer. It was reasonable to look at the calendar start

and end days for this purpose. Having waited for more than 2 years, on the Claimants' logic the Respondent should have waited 4 years. We do not agree.

159. Mr Duggan argued that the Respondent had caused the Claimant to be unwell and this was relevant to the fairness of his dismissal. We accept, given the diagnosis of work-related stress, that the Claimant's perception of workplace matters contributed to his poor mental health in 2018 We do not, however, make a finding that this illness was caused by any unlawful or otherwise culpable behaviour by the Respondent at that time. In any event, even if the Respondent had been expected to go the 'extra mile', it did so by waiting for more than 2 years of absence from flying duties before dismissal. Others were dismissed following shorter absence.

160. Whilst the Claimant had performed some ground work as part of a phased return, he did not perform his flying duties for considerably more than 2 years. This was a very lengthy absence and certainly not a case where the Respondent could be said to have rushed to dismissal. The Claimant suggested that his dismissal was sought by the Respondent for various reasons, not only his race and protected acts but also because he was seen as a troublemaker. We noted, however, that the Respondent had numerous opportunities in this case to dismiss him sooner and did not do so.

161. The Respondent delayed before first setting a termination date and then postponed this several times. We are satisfied that the reason for the delay and the extensions in this case was in order to give the Claimant a further opportunity to demonstrate that he was able to fly. The Respondent was not rigid in its approach. When the Claimant reported he was undergoing treatment or a new investigation was to take place, his dismissal was postponed to await the outcome of this. Unfortunately, despite several extensions and a period of more than 2 years passing, the Claimant did not return to flying at all, let alone sustain this.

162. The Respondent made appropriate enquiries with respect to the Claimant's health. He was assessed by the Respondent's occupational health advisors on a regular basis. The information he provided was taken into account. When the Claimant advised of medical treatment he was undergoing, his employment was extended to allow for this and for any new information bearing upon his health and prognosis to be obtained. We are satisfied that reasonable enquiries were made.

163. The reason the Claimant wanted a further extension after 21 December 2018 was not due to his health, rather it was because of the ongoing without prejudice negotiations. Whilst the Respondent might agree to extend for that purpose, it was under no obligation to do so. It was not unreasonable for the Respondent to treat without prejudice discussions as a separate track and not one that need hold up the proper application of its attendance management process.

164. The Claimant's absence affected the Respondent's staffing resource. Although we were not provided with statistical evidence in this regard, we accept that the Respondent seeks to manage sickness absence for its large workforce and the absence of the Claimant will have impacted upon the cabin crew resource available to be deployed to flights. When the Claimant was unable to fly,

someone else would have to be found to do so in his stead. After 2 years, the impact would be a significant one. Even a large employer cannot be expected to accommodate sick leave indefinitely.

165. In terms of whether the Respondent waited long enough before dismissing the Claimant, we remind ourselves that on this question as on all aspects of the decision to dismiss for incapability, the band of reasonable responses applies. Only if we conclude that no reasonable employer would have considered this period sufficient is the dismissal unfair for that reason. We cannot say the period waited in this case was too short or that a good reason for a further extension emerged prior to termination.

166. Another important consideration is the extent to which the availability of suitable alternative employment was considered. Having been registered with CTS, the Claimant did not engage with that service. He wanted to return to flying and was not interested in the alternatives. In any long-term sickness absence case, the employer should consider suitable alternative employment. We note also the expectation in paragraph 4.6 of the Respondent's policy that the line manager will assist. There is not, however, much that can be done in a case where the employee has no interest in pursuing alternatives. The Respondent has a service the entire purpose of which is to help unfit or displaced employees find new roles. The Claimant was given the benefit of this service. He was registered with CTS at an early point, frequently reminded of it and declined to engage.

Conclusion

167. For all of the reasons set out above, we are satisfied that the decision to dismiss was within the band of reasonable responses.

Wrongful Dismissal

168. There was cross-examination and much argument before the Tribunal about the Respondent's authority to give and then vary notice.

169. It is trite law that notice of termination once given cannot be varied or revoked unilaterally. However, an agreement to change the date need not be express and can be implied from conduct.

170. Neither party said there was in fact a termination of the Claimant's contract before 21 December 2018.

171. We are satisfied that on 13 December 2017 and subsequently, when the Respondent told the Claimant that his termination was varied to a later date, this is something he agreed to. Later in the chronology, two of the extensions were proposed by the Claimant himself.

172. On all occasions, up to 21 December 2018, both parties continued to perform the contract and conducted themselves as though bound by the same, which evidences several agreements having been reached to vary the termination, by postponing it to take effect on a later date.

173. Having been given a longer period of notice in the first instance than was required under his contract of employment and the termination date later having been varied by consent, there was no breach of contract.

Race Discrimination

174. The Claimant was subject to the alleged detriment, namely dismissing him for incapacity in circumstances where he had communicated his fitness to return to work and resume his contractual duties.

175. The comparators the Claimant relies upon do not fall within EqA section 23(1) as there were material differences:

175.1 Comparator A had no sick leave at all in the period from 1 July 2015;

175.2 Comparator B had far less sickness and flying absence than the Claimant;

175.3 Comparator F had no new medical information and had not informed the Respondent she was fit to fly.

176. The appropriate comparator would have been a non-Asian member of long-haul cabin crew, who was absent for the same period as the Claimant for the same reasons, had not resumed flying duties, had been given notice of termination which was extended by agreement and then, a few days before their contract was due to expire, self-reported as fit for flying but refused to undergo a BAHS assessment. There is no evidence to support a conclusion that such a person would have avoided dismissal by having their employment further extended.

177. We are not, therefore, satisfied that there are facts from we could decide, in the absence of any other explanation, that the Claimant was treated as he was because of race. There is nothing in or surrounding the decision to dismiss which points to race.

178. We should add, however, that we accepted the evidence of Mrs Gupta and Ms Caruso Lorenzo, as to the reasons for the decisions they took, which was not to any extent because of the Claimant's race. There were several other employees who had been dismissed following shorter periods of absence.

179. The race discrimination claim does not succeed.

Victimisation

180. The Claimant was subject to the detriment of being dismissed, with effect from 21 December 2018.

181. Whilst the Claimant was not offered a further right of appeal, this did not amount to a detriment. He had already been afforded and exercised a right of appeal against the substantive decision to dismiss. We do not find the Claimant was subject to a detriment, with respect to not being offered a further right of appeal. Any sense of grievance the Claimant might feel in this regard would be unjustified.

182. For like reasons as set out above in connection with race discrimination, there are no facts from which we could decide, absent an explanation, that the Claimant was dismissed because of his protected acts. No comparator has been identified who was treated more favourably in similar circumstances, indeed others were afforded less latitude than the Claimant. There is nothing in or surrounding the decision to dismiss which points to this having been made or not further extended because of a protected act.

183. Again, however, we do in any event accept the evidence of Mrs Gupta and Ms Caruso Lorenzo as to the reasons for their respective decisions, which did not include, to any extent, the Claimant's protected acts.

184. Although we did not find the absence of a subsequent appeal amounted to a detriment, we should add that there was nothing whatsoever to support this having been because of a protected act. The Respondent's practice of setting a termination date and then, in some cases varying this to allow the employer more time to demonstrate a return to work, was applied to others, not just the Claimant. There was no evidence of any other employee being afforded a right of appeal against dismissal before the EDT and then another after this had taken effect.

185. The victimisation claim fails.

Reasonable Adjustments

186. The Respondent applied the PCP of having to prove fitness to fly by 21 December 2018. Fitness to fly was a contractual requirement and the Claimant had been given notice of termination expiring on that date because he had not been able to fly.

187. The PCP did put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability because he was unable to comply with it and at risk of dismissal. Although he reported as fit, the Claimant's declared position cannot be reconciled with the report from Dr Taylor. Given what is recorded there about his anxiety and flight avoidant behaviour, there would appear to have been no realistic prospect of the Claimant being able to return to flying duties at this time.

188. The duty to make reasonable adjustments did not, however, arise because the Respondent did not know and could not reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage. This is because the Claimant told the Respondent he was fit (despite the true position being otherwise). The Respondent sought to confirm the Claimant's fitness with BAHS, which was a necessary precursor to flying and he refused to cooperate with this step. The Claimant's refusal was expressed to be because of the without prejudice negotiations and not, therefore, something connected with his disability.

189. In case we are wrong about the Respondent's knowledge, we have gone on to consider whether there were steps that it was reasonable for the Respondent to take to avoid that disadvantage.

190. The Respondent did make reasonable enquiries into alternative employment, in that it referred the Claimant to CTS. The obstacle, however, was the lack of engagement on the Claimant's part. Had the Claimant been open to exploring this option, had he said something about the sort of job he would be willing to consider, then it might have been possible for the Respondent to have done more. As it was, there was nothing more that it was reasonable for the Respondent to have to do.

191. The Respondent had delayed and postponed the Claimant's termination date repeatedly. On each occasion this was done in order to give him a further opportunity to demonstrate he was fit and could sustain a return to his contractual flying duties. The positive duty under EqA may call for a longer period of sickness absence and opportunity to demonstrate fitness to return to be accommodated in the case of a disabled person than for a non-disabled person. In practice, of course, very many long-term absence cases do involve disabled people. The Claimant did benefit from being allowed a longer period of absence before being dismissed than were his similarly placed colleagues.

192. Ultimately the purpose of making reasonable adjustments is to assist an employee in accessing work and the workplace, not simply to remain on indefinite sick leave. If there were no reasonable adjustments that would allow the Claimant to sustain a return, then at some point a decision might, reasonably, be made to terminate his employment. We find that point had been reached and it was not reasonable to have to take the step of further extending the termination date.

193. Rearranging the BAHS referral was not a step that it was reasonable for the Respondent to have to take. There was no prospect of this removing the disadvantage to the Claimant of being unable to fly. Furthermore, the Claimant's refusal of the BAHS assessment was not connected with his disability, rather it was because of the without prejudice negotiations. The Claimant was just as able to go through with a BAHS referral as would have been a non-disabled comparator.

194. There was no failure to make reasonable adjustments.

<u>Discrimination Arising</u>

195. The unfavourable treatment relied upon by the Claimant is said to be the requirement for him to complete an immediate occupational health referral on 19 December 2018 to avert dismissal on account of his disability related absence. This involves two linked elements.

196. As to the first part, the Claimant was required to participate in an occupational health assessment. We are not, however, satisfied this was unfavourable treatment. The requirement for such an assessment following a period of sickness absence was well known to the Claimant and the Respondent could not simply dispense with it. The assessment was for the benefit of both parties, to ensure the Claimant was well enough to come back. The assessment would take place by telephone and would not inconvenience the Claimant. The only reason given by the Claimant for his refusal was to allow the without prejudice

negotiations to continue and we do not consider this makes an otherwise innocuous and supportive request into unfavourable treatment.

197. As to the second part of the alleged unfavourable treatment, this is less straight forward. The Claimant's case is predicated upon an assumption his employment would have been extended. Ms Caruso-Lorenzo said his dismissal could have been averted by participation in a BAHS referral to confirm his fitness to fly. She assumed, however, the Claimant was, as he declared, fit to fly and BAHS would have confirmed this. We do not find this was at all likely to have been the position, in the event the Claimant had cooperated with BAHS. We do not accept the Claimant's health had improved at this time and / or that BAHS would have been satisfied of his fitness to fly. If the Claimant had attended the OH assessment, given his underlying health problems at this time, there is no reasonable prospect he would then have been certified as fit to fly. The realistic best-case scenario would have been a recommendation by BAHS of a period of ground working before flying could be considered, which is what they had done previously. Given Ms Caruso Lorenzo's rationale for not interfering with the decision to dismiss – based on the length of sickness and absence from flying without any confidence he could sustain a return to his duties – it is most unlikely she would have extended the Claimant's employment in response to such advice, given that a phased return had already been tried several times before without it leading to any actual flying.

198. On this basis, we are not satisfied the Claimant has established the unfavourable treatment he relied upon, as the first part was not unfavourable and the second part would not have followed. On this basis, his EqA section 15 claim fails.

199. In case we are wrong on the unfavourable treatment, we have gone on to consider the remaining elements of EqA section 15.

200. The requirement for the Claimant to attend a BAHS assessment on 20 or 21 December resulted directly from and was because of his sudden and unexpected declaration of fitness to fly on 19 December. The Claimant's declaration of fitness to fly was not, however, something arising from his disability, irrespective of how many links in the chain are considered, rather it arose from his wish to prolong his employment whilst the without prejudice negotiations over his exit continued.

201. In these circumstances, the alleged unfavourable treatment was not because of something arising from the Claimant's disability.

202. Separately, we are satisfied the Respondent had legitimate aims, namely:

    202.1 to support staff on long term sickness absence so far as reasonable, managing staff absence to facilitate a return to work with regular and sustained attendance and considering termination fairly where absence can no longer reasonably be supported;

    202.2 requir[ing] a stable workforce and employees who are capable of attending work and carrying out duties that are valuable and meaningful to the Respondent.

203. We also find the requirement made of the Claimant to participate in a BAHS assessment was a modest and proportionate step. The assessment would be completed by telephone, as on previous occasions, with minimal inconvenience to the Claimant. This was something he could have done and chose not to. The Claimant's disability did not prevent him from undertaking the BAHS assessment or impede him in this. The discriminatory affect of the treatment on the Claimant was, therefore, nil. The Respondent on the other hand was obliged, on this occasion as previously, to satisfy itself of the question of fitness to fly. This was necessary not only so that the Respondent could make an informed decision about whether to extend the termination date, but also to ensure that any return to flying was safe (for the Claimant, passengers and crew).

204. Had the Claimant's disability prevented or made it more difficult for him to undergo the BAHS assessment at this time, it might have been arguable the Respondent should have postponed it until the Claimant was well enough. That was not, however, the position. That the Claimant wished to pursue without prejudice negotiations is understandable but the Respondent was not obliged to halt its attendance management processes for that reason.

205. It follows, therefore, even if we have been satisfied the unfavourable treatment was because of something arising in consequence of the Claimant's disability, we would have gone on to find the treatment was justified, being a proportionate step in pursuit of legitimate aims.

Indirect Discrimination

206. In connection with indirect discrimination, the PCP the Claimant relies upon is the same as the unfavourable treatment for his EqA section 15 claim. It follows, therefore, we are satisfied the first part of that was actually applied, namely the requirement to participate in an occupational health assessment on 20 or 21 December 2018, but not the second part, that in so doing he would have averted dismissal. This distinction does not, however, effect our conclusion with respect to the remaining elements of indirect discrimination, which would be determined in the same way irrespective of whether we are right about only the first part of the PCP applying, or the Claimant is right and both parts of his linked PCP were applied.

207. The Respondent would have applied the same PCP to a non-disabled employee who had been on a lengthy sickness absence, not flown for a prolonged period and who then suddenly reported as fit to fly a few days before their employment was due to terminate.

208. The application of this PCP would not, however, put persons with the same disability as the Claimant at a particular disadvantage. The Claimant's refusal to participate in a BAHS assessment had nothing to do with his disability. He refused because of the ongoing without prejudice discussions. The Claimant's disability did not prevent or impede him in any way from complying with the Respondent's request he participate in an OH assessment.

209. Although we do not need to go this far, had it been necessary we would have found the PCP was justified for the same reasons as set out above in connection with the EqA section 15 claim.

210. Accordingly, the indirect discrimination claim does not succeed.

Employment Judge Maxwell

Date: 19 November 2021

Sent to the parties on:

30 November 2021

For the Tribunal Office: