Case Number: 3323964/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Sangha	**v**	**British Airways plc**

Heard at: Watford **On**: 5 & 6 December 2017

Before: Employment Judge Bloch QC

Appearances

For the Claimant: Ms J Shaw, Counsel
For the Respondent: Mr A Line, Counsel

RESERVED JUDGMENT

The claimant was unfairly dismissed by the respondent contrary to s.94 of the Employment Rights Act 1996 ("ERA") and is awarded the sum of **£19,074.88** calculated as follows:

Basic award – 22.50 x £475:	£10,687.50
Compensatory award: loss of earnings from 10 March 2016 to the date of conclusion of these proceedings, limited to 35 weeks: £500.30 x 35 =	£ 17,510.50
Loss of statutory rights:	£ 400.00
Total	£ 28,598.50
Deduction of 33⅓% under ERA ss.122(2) and 123(6) in respect of the claimant's own conduct (£9,523.13): Reduced total:	£ **19,074.88**

The prescribed element is £11,679.50 (being the compensatory award of £17,510.50 less 33.1/3%). The amount by which the award exceeds the prescribed element is £7,395.38

REASONS

1. The claimant commenced his employment with the respondent on 29 May 1995. He was employed as an airport logistics agent which included driving duties in the vicinity of aircraft. He was dismissed with effect from 10 March 2016.

2. He complained of unfair dismissal by a claim presented to the tribunal on 27 July 2016.

3. At a preliminary hearing on 14 November 2016 (at which both parties were represented by counsel) the parties agreed that the key issues for decision by this tribunal were as follows:

> "13.1 The parties agree that the reason for the claimant's dismissal was a reason concerned with his capability due to his ill health, which is a potentially fair reason within s.98 Employment Rights Act 1996. The first question is therefore whether the respondent acted reasonably, having regard to equity and the substantial merits of the case, in treating the claimant's incapacity as sufficient reason to dismiss him. The claimant contends as follows:
>
> 13.1.1 The respondent acted unreasonably in finding that the claimant was incapacitated at the date he was given notice of dismissal; and
>
> 13.1.2 The procedure followed by the respondent which resulted in the respondent dismissing the claimant was not fair or in accordance with its own policy."

(The remaining identified issues related to remedy).

4. On 9 December 2014 the claimant suffered an injury to his back and knee at work. He was thereafter signed off work for a substantial period resulting on 15 January 2015 in an invitation by the respondent to attend a "EG300 Section 4 Meeting". This was a reference to the respondent's contractual absence management policy (September 2013). It contains two separate absence management processes. Section 3 is for less serious absences although eventually at its final stage can lead to dismissal of the employee. Section 4 is entitled: "Managing absences which exceeds 21 consecutive days, or absence which affects an employee's ability to work for medical reasons".

5. Section 4.1 states:

> "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 s.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 [British Airways Health Services]. 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."

6. Under paragraph 4.3 (Medical incapacity and unable to do their job) the policy states that:

"The line manager should consider all the following matters to determine the appropriate action to take:

- the advice of BAHS, including any recommendations or restrictions they suggest relating to the employee's current job or any potential suitable alternative job;
- the effect on the employee and on the overall performance of the department if changes to the work environment are made; and
- whether it is reasonable to make changes to the work environment.

The actions that may be taken are:

- reasonable adjustments to the working environment of the employee's current job on a temporary or permanent basis;
- appropriate rehabilitation plan;
- suitable alternative job within British Airways; or
- modification of employment status on the grounds of medical incapacity…;
- termination of employment on the grounds of medical incapacity."

7. Paragraph 4.5 (Appropriate rehabilitation plan) states that:

"In some cases the use of a short term rehabilitation plan may assist an employee to recover their ability to do their job, or a suitable alternative job in the interim.
In making a decision about the appropriateness of a rehabilitation plan, the line manager should usually speak to BAHS about restrictions, recommendations and the length of any rehabilitation plan. ….
Once an employee has completed a rehabilitation plan and has either recovered their ability to do their current job or a permanent suitable alternative within BA, they should exit Section 4 of EG300."

8. Paragraph 4.7 of the Absence Policy (Termination of employment on the grounds of medical incapacity) states that:

> "An employee's employment will be terminated on the ground 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 job is available, and …"
>
> "Line managers when considering terminating an employee's employment on the grounds of Medical Incapacity must:
>
> - Write to the employee summarising the employee's situation and explaining the reason(s) why the line manager is considering terminating the employee's contract of employment on the ground of medical incapacity and invite the employee to a meeting to discuss the situation."

9. The general tenor of these provisions is that dismissal is a matter of last resort, to be carried out only after exhausting the possibility of alternative suitable employment and reasonable adjustments or modifications to the current job. This is buttressed by paragraph 4.7 to the effect that where dismissal is under consideration, the employee should be given the reasons why the line manager is considering dismissal which includes a summary of the employee's situation.

10. By her letter on behalf of the respondent dated 15 January 2015 Sue Scheider (performance manager) told the claimant that it was now appropriate to manage his ongoing absence from work within s.4 of EG300. She said that during the meeting which was proposed for 26 January 2015 they would be able to discuss the following:

> "
> - Returning to your contractual role;
> - Any reasonable adjustments to your contractual role that may assist you;
> - Suitable alternative employment if you are not capable of carrying out your contractual role."

She added:

> "British Airways will support you back to work within a reasonable period, however if this is not possible I may need to consider termination of your contract of employment under EG300(4) as a last resort. However I sincerely hope that we will be able to support you back to work".

11. Following the meeting on 26 January 2015 Ms Scheider sent an outcome letter to the claimant quoting various sections of s.4 of the EG300 policy and stating that numerous sickness absences had occurred in relation to the claimant since 2001. She summarised the years from 2008 onwards as follows:

"2008 85 shifts;
2009 99 shifts;
2010 39 shifts;
2011 71 shifts;
2012 50 shifts;
2013 29 shifts"

12. She pointed out that in the last seven years many accidents at work had led to a high level of absence by the claimant. She concluded:

> "In light of our discussion I advised that you would be managed under s.4 EG300"

13. On 4 February 2015 BAHS advised that the claimant was fit to return and he returned to work on 17 February 2015. On 16 March 2015 the claimant was invited to a s.4 review meeting which was held on 13 April 2015. The outcome letter by Ms Scheider was dated 16 April 2015. It referred to a recent absence between 23 and 26 March 2015 but concluded:

> "You advised that since your return to work everything is back to normal and you are performing all your functions."

14. The letter concluded:

> "In light of our discussion I advised you that you would still be managed under s.4, EG300 and I would review your file in three months, or before if appropriate or necessary."

15. Around July 2015 management of the claimant's absence was transferred from Suzanne Scheider to Bulljinder Dhaliwal. However, there was no review meeting as had been indicated in the letter of 16 April 2015. Different reasons for this were explored before the tribunal including the claimant's absence abroad and the fact that the matter had been transferred to Ms Dhaliwal who no doubt had her hands full during a transition period. Although she had been employed as a people services manager since April 2015 her experience was more related to absence management procedures under s.3 of EG300. She was certainly not as experienced as Sue Scheider in relation to the s.4 process. It seems a fair conclusion that the matter of the s.4 review of the claimant's absence was simply overlooked during this transitional stage.

16. On 20 October 2015 the claimant was signed off work due to an eye infection.

17. The respondent's absence contact record in relation to the claimant (agreed bundle page 96) records a telephone call between the claimant and Ms Dhaliwal on 27 October 2015 in which he referred to having an eye infection after returning from holiday. He had been sent to an eye hospital. It would take time. He referred to a sick certificate and that he could not drive. The absence contact record refers to a further conversation between Ms Dhaliwal and the claimant on 12 November 2015 in which he was recorded

as saying that one of his eyes was "blurry". There was a further conversation on 17 November 2015 in which the claimant returned Ms Dhaliwal's call, stating that he had an optician's appointment on Thursday. He might have to go back to hospital. He would send in sick certificates. The record also states that the claimant was referred to BAHS that day.

18. The BAHS occupational health referral form dated 23 November (submitted on 17 November 2015) refers to a meeting with the claimant on 20 November in the clinic and was signed by "Maddie". It evidenced a telephone consultation and stated:

> "Hello Bushinda,
>
> I met with Mohinda today (20 November) here in the clinic. He advizes [sic] that he continues to have some residual issues, however following a routine examination in accordance with the DVLA guidelines he is fit to return to his role as a driver on 24 November. No adjustments necessary."

19. Maddie Davidson, who signed that document, is an occupational health adviser and not a doctor, still less an eye specialist. I accept the claimant's evidence (contrary to that of Matthew Burton who conducted the appeal referred to below) that the claimant was not seen by a BAHS doctor and certainly not a BAHS eye specialist on that date or thereafter. This appeared in the course of the hearing to be accepted by the respondent.

20. I accept the claimant's evidence that he told Ms Davidson that he still had problems seeing in the dark as a result of the glare of lights and that he did not feel that he could drive at night. In the meantime the claimant had been assessed by an optician at Specsavers in Hounslow on 19 November 2015 who referred him to the Moorfields Eye Hospital because of the ongoing effects of conjunctivitis on his vision. He saw Dr Michelle Ting, a specialist ""registrar – opthalm" at Moorfields. By her letter dated 24 November 2015 she stated that it was legal for the claimant to drive. However, he currently experienced significant glare from lights at night which was due to the resolving inflammation in his eyes. She said: "I have advised him that it is safe for him to return to work but he should avoid night driving until the glare has resolved." There is an issue as to when that letter was first given to the respondent. The claimant submitted a witness statement of (but did not call to give evidence) a colleague, Naser Moughal, to the effect that he had collected an envelope in late November from the claimant and having spoken to the duty manager had put it in an admin tray in the senior managers' office. He did not see what was in the envelope. On balance (even taking into account that the respondent appears to have lost the medical certificate of 8 December and the negative light this might cast on the respondent's record keeping) I concluded that the respondent probably did not receive the Moorfields letter until before the appeal meeting.

21. The absence contact record refers to a telephone conversation between the claimant and Ms Dhaliwal on 25 November 2015. He is recorded as reporting that he had been to Moorfields and the note stated: "Problems

driving – glare affecting eyes – driving at night." The note recorded the claimant reporting that Moorfields had said that the glare may affect his eyes and that he still had the virus. He added (as recorded) that Moorfields had provided a letter to the effect that he should not drive at night time. He also said he was not happy with the BAHS "referral" that he was "fit for work". He was recorded as saying that he could have had an accident and would have blamed BAHS.

22. Although it was submitted on behalf of the respondent that the claimant did not specifically say to Ms Dhaliwal that he was fit to return, the note of the conversation makes it plain that the medical problem was limited to driving at night time so that it was clear that the claimant was able to drive when it was not dark. On that day the claimant drove to work when it was dark and said that he was nearly involved in an accident (which is what appears to have been saying in the record of the conversation on 25 November 2015 referred to above). He informed management and left work.

23. On 4 December 2015 Ms Dhaliwal invited the claimant to a s.4 review meeting on 17 December 2015. The letter did not (as Ms Dhaliwal in evidence accepted that it should have done) refer to dismissal as being a possible result of the meeting. However it was contended on behalf of the respondent that this was obvious given the references to "dismissal" (in the earlier invitations to s.4 review meetings) and that the claimant in any event had received a copy of the policy which refers to the possibility of dismissal.

24. On 7 December 2015 the absence contact record shows that there was a further conversation between Ms Dhaliwal and the claimant. The note states:

> "Eyes not swollen – lights still affecting eyes – driving in darkness. Going back to GP. Moorfields said he might need steroids – keep eyes lubricated. He confirmed that he was attending the s.4 meeting."

25. On 8 December the claimant received a medical certificate which stated that he could return to work if he could be taken off driving duties. This document appears to have been mislaid by the respondent so that no copy of it appears in the agreed bundle. Again there is dispute as to exactly when that certificate was provided to the respondent. While it is clear that this was on 17 December 2015 (in the course of the s.4 meeting held on that date) the claimant said that he gave it to Ms Dhaliwal at the beginning of the meeting whereas she said that she received it only after an adjournment at the end of that meeting after she had announced her intention to dismiss the claimant. On balance (and based in particular on the notes of that meeting) I find that Ms Dhaliwal's recollection is to be preferred on that point.

26. Notes of the critical meeting which took place on 17 December under s.4 of the absence policy appear at page 98-105 of the agreed bundle. It was attended by the claimant and his trade union representative, Ian Tiller. I found the evidence of both the claimant and Ms Dhaliwal not entirely satisfactory as to exactly what occurred at that meeting. While I do not

believe that either of them wished to mislead the tribunal, it appeared to me that the recollection of each was (perhaps subconsciously) guided by retrospective wishful thinking. In those circumstances, I preferred to rely principally on the note itself including some not entirely legible writing on the note which was to large extent deciphered during oral evidence.

27. Much of the note was printed in advance of the meeting. The handwriting on the printed pages is that of Ms Dhaliwal. Some of the handwritten information concerns a debate about whether the claimant was still under s.4 review or whether he had exited it, given the absence of the proposed review meeting in about July 2015. Much was made of that point on behalf of the claimant but in my view the absence of a review in July and its effect was not a material matter for me to consider. Even if the initial review period had come to an end and the claimant had "exited" that procedure, the respondent could simply have recommenced the procedure.

28. During the meeting Ms Dhaliwal read the most recent memo from BAHS dated 23 November to the effect that the claimant was fit to return to work and the claimant said that BAHS were wrong in that he had nearly injured himself and someone else when he had driven to work in the dark. He stated that there was no way they should have said that he was fit to return to work. He pointed out that Moorfields had told him not to drive. The glare made him unable to see. After the near-accident he had waited until it was light, after which he had returned home with permission.

29. Mr Tiller stated that the claimant needed to go back to BAHS if he was struggling to drive in the dark. He added that cargo agents could work anywhere. When Ms Dhaliwal asked whether the claimant was able to work he said, to be honest, no, it was a struggle. At a later stage the claimant emphasised that it was not a BAHS specialist who had seen him. Later on, following the pre-printed question: "Have you any comments regarding your sickness record?" he answered he was not happy with his record, he did not want to be injured. Mr Tiller said that it was "horrendous" but that he could work elsewhere. He emphasised later on (bottom of page 103 of the agreed bundle) that the claimant could do alternative jobs. There was a further discussion about what appears to be the Moorfields letter (dated 24 November 2015), with the claimant saying that he did not think it was needed for the meeting and thought that BAHS would have forwarded it to the respondent. Then, the pre-printed part of the document states: "Take Adjournment – to make decision" and adds: "Your records show that you are unable to maintain good attendance". In handwriting Ms Dhaliwal is recorded as saying that the decision on the day from BAHS was correct and thereafter in handwriting appears: "term date (presumably meaning termination date) – three months' notice 16/3/15". After that is added (in handwriting) : "Paperwork can be reviewed. I will reconsider my decision throughout the 3 month notice period". The handwritten notes then refer to BAHS and the hospital having said two different things and that BAHS was happy with their decision – "eye surgeon". This was an apparent reference to (what I hold to be a misunderstanding on the part of Ms Dhaliwal and the respondent more generally) the claimant having been seen by an eye surgeon in regard to the BAHS assessment on 20 November 2015 leading

to its report on 23 November 2015 that the claimant was fit to return to work. The notes go on to record at the end: "Letter given saying cannot drive in dark." That seems to be a reference to the Moorfields letter of 24 November 2015 referred to above.

30. While it is difficult to form a clear view of exactly what was said in regard to alternative duties at the meeting on 17 December 2015, I conclude that:

    30.1 Mr Tillman was very clear about the need for the respondent to consider the claimant for alternative duties;
    30.2 The claimant was somewhat coy in this regard;
    30.3 The claimant would have been prepared to do daylight-only driving if offered to him and probably other alternative duties depending on their nature;
    30.4 Ms Dhalliwhal was not willing to consider or investigate either form of alternative duties (this was in part because she considered that the claimant was "swinging the lead"; the approach of Mr Burton at the appeal stage referred to below was no different)

31. The dismissal was confirmed by Ms Dhaliwal's letter to the claimant of 23 December 2015.

32. The letter said that the claimant had told BAHS that he was not happy driving and that is why after attempting to attend work on 25 November 2015 he had declared that he was not fit enough for duty and left to go home. She added: "You confirmed to me that no point did you say to anyone that you were fit for alternative duties." That may have been true in relation to what the Claimant's own statements at the meeting on 17 December but is at odds with the references to alternative duties made by Mr Tiller at the meeting as a possible solution to the problem.

33. Under the heading in that letter "Return to own role or suitable alternative role" Ms Dhaliwal stated that she considered whether any further adjustments could be made that would enable the claimant to continue to do his contractual role or a suitable alternative role but concluded as follows:

> "Given that BAHS have declared you fully fit for all duties on 20 November 2015 yet you have remained off sick I do not believe there are any changes that could be made that would significantly improve your attendance in either your current job or a different role within the company."

34. Under the heading "Sickness" she set out the days sick since 2010 and arrived at a much larger number of days absent, namely 106 days, than had been set out in the letter (referred to above) by Ms Scheider. That was because Ms Dhaliwal included days during a sickness period (for example over weekends) when the claimant was not actually rostered to work. Although this different method of calculation was not necessarily wrong, it does in my judgment indicate an intention on the part of Ms Dhaliwal to portray matters in the most serious light.

35. Under the hearing "Outcome" the letter stated that: "Unfortunately, because you remain off sick by your GP, are unable to return to your full contractual duties and have been unable to demonstrate a sustained improvement in your attendance, it is with regret that I will be terminating your contract of employment…". The letter went on to say that BAHS had said that they did not require the claimant to attend a further assessment with them unless any new information came to light. If that was so, (Ms Dhaliwal said) she would review her decision and reserve the right to revoke or look to extend the termination date. She then added that following an adjournment the claimant had returned to the meeting and his representative had submitted a medical certificate which said that the claimant could return to work if he could be taken off driving duties. Ms Dhahilwhal said that she had asked why the claimant had not mentioned this to her earlier in the discussion and he had said that he did not think to do so. Ms Dhaliwal added that the certificate was dated 8 December yet the claimant had not made her or anyone else in the company know of the changes in his circumstances until the 17 December meeting. When asked about this the claimant had said that he thought he would wait and share the information now.

36. Ms Dhaliwal concluded: "This failure to provide a timely update on your changing situation indicates to me that you are not genuinely trying to return to the workplace at the earliest opportunity and supports my belief that you are unlikely to maintain improved attendance going forward."

37. The claimant appealed by letter dated 28 December 2015 against Ms Dhaliwal's decision on the basis that:

    - the decision relied heavily on the BAHS evidence and did not take into account the medical evidence provided by the Moorfield eye hospital;
    - the minutes of the meeting were not reflective of what was discussed…
    - there was no endeavour made for me to return to work without having to drive in darkness for a short period of time.
    - In the letter dated 16 April… it stated that a review of section 4 EG300 will be done in July 2015."

38. An appeal meeting was held on 1 March 2016 with Mr Matthew Burton presiding. He had been employed as general manager for British Airways World Cargo since 2012. In his witness statement (paragraph 17) Mr Burton stated that he had established by speaking to Ms Dhaliwal that the claimant had in fact been seen by a BAHS doctor, not a nurse, and that the doctor in question was actually an eye specialist. He considered the BAHS assessment that the claimant was fit to resume work on 20 November 2015 was reasonable. He also stated in evidence (witness statement paragraph 21) that he "noted that the claimant had submitted medical certificates throughout his long term absence which stated that he was unfit to carry out any work. I understood that Ms Dhaliwhal had discussed alternative work

options with the claimant during their previous meeting and that the claimant had not felt able to commit to undertaking alternative work.".

39. Mr Burton decided to dismiss the claimant's appeal, upholding the original dismissal decision. He concluded that the claimant's absence record since 2010 was unacceptable and unsustainable. He referred to the fact that a "BAHS eye specialist had declared him fit to return to work". He was also concerned by the fact that the claimant had visited Moorfields Eye Hospital on 24 November and been declared fit to return on restricted duties but had failed to declare this until the appeal meeting. Furthermore, the claimant's GP had declared him fit to return from 8 December 2015, however he did not return to work and did not produce a certificate until the s.4 meeting on 17 December 2015. In the notes of the meeting Neil Willoughby (regional officer) who attended the appeal with the claimant, stated that he could not believe that there were no alternative duties that could have been offered such as duties in the warehouse. While these notes were not approved by the claimant, they provide in my judgment reasonable evidence as to what occurred at the meeting.

40. According to the notes, Mr Burton asked why between 8 and 17 December 2015 the claimant had not produced the medical certificates and asked what action he had made to ensure that the company was aware that he was fit to do alternative duties. The claimant is recorded as saying that he did not do anything. Mr Willoughby is recorded as saying that "we understood" that the claimant could have done more. He did request alternative duties. In the appeal outcome letter dated 3 March 2016 Mr Burton reiterated that the claimant had been seen by an eye specialist when he had visited BAHS. He also stated that at no point did the claimant tell anyone in his management team that he felt able to carry out any alternative duties. In fact he had declared himself unfit on his return to work and driven home and then regularly submitted a number of medical certificates throughout his long term absence, each stating that he remained unfit to return to work. He added: "Once you and/or your GP have declared that you are unfit to attend work, alternative options can no longer be considered by the line management on shift." He also referred to a point made on behalf of the claimant that a colleague had handed the letter from Moorfields to Ms Dhaliwal and yet no action was taken by the company. Mr Burton said that there was no record of this occurring and the letter from Moorfields was only produced after the s.4 meeting had taken place. Ultimately, said Mr Burton, the letter did not provide any new information as it simply confirmed that although the claimant's eyesight was checked and medically met the requirements to comply with driving standards, he himself reported that he was suffering residual discomfort following his bout of conjunctivitis. In his conclusion, Mr Burton stated his concern that when the claimant had visited his doctor on 8 December and was advised that he was fit to return to work on restricted duties, he failed to declare this to the company until the meeting with Ms Dhaliwal on 17 December 2015.

41. The first question which arises for decision is what was the reason for the dismissal in the mind of the respondent? Under ERA s.98(1) it is for the

employer to establish that reason. In this case it was conceded on behalf of the claimant at the preliminary hearing that the reason under ERA s.98(2) related to the capability of the claimant (and not his conduct) and there was never any attempt to withdraw from that concession That said, at various stages of the evidence it seemed that there was a real question as to whether the reason for dismissal was capability or conduct. In particular great emphasis was, as appears from the facts set out above, laid upon the fact that the claimant was allegedly fit to work (according to the BAHS assessment and later according to the medical certificate of 8 December) and that he did not disclose the medical certificate of 8 December until (late during) the meeting of 17 December with Ms. Dhaliwal. Mr Line, on behalf of the respondent, referred me to the case of Davis v Tibbett & Britten Group plc UK EAT/460/99 in which the EAT (per HHJ Collins CBE) stated (at paragraph 6) that: "It is well established by previous decisions at this tribunal that incapacity or persistent absenteeism for a variety of unconnected ailments in themselves minor, may be an admissible reason for dismissal and in those circumstances whether or not the employer [sic] is at fault being immaterial…" (It is clear from the context that the Judge was referring to possible fault on the part of the employer, not the employer). Mr Line also referred me to the decision of the EAT in Lynock v Cereal Packaging Ltd [1988] ICR 670 where at page 675 (per Wood J) the EAT held: "There is no principle that the mere fact that an employee is fit at the time of the dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture".

42. Mr Line also submitted that the respondent was entitled to take into account the claimant's non-disclosure of evidence that he was fit to work during a period when he was telling the respondent that he was unfit. That did not detract from the reason relied on for the dismissal on 17 December 2015 because this was relevant to the respondent's belief that he was not likely to demonstrate regular attendance in the future.

43. In all the circumstances, I concluded that whilst conduct and capability were running in parallel as reasons for the dismissal in this case, the respondent has shown that the principal reason for the dismissal was capability (as contended by the respondent and accepted on behalf of the claimant at the preliminary hearing). The point is not easy but while latterly the belief on the part of the respondent that the claimant was "swinging the lead" seems to have taken firm hold, nonetheless the respondent throughout the absence procedure was concerned about the claimant's sickness record over a long period whatever the particular sickness and his capability of avoiding a continuation of this pattern in the future – even if (ironically) they were insisting that he was fit to work by the time of his dismissal.

44. However, in my judgment, the respondent did not act reasonably in treating that reason as a sufficient reason for dismissal within the meaning of ERA s.98(4). My reasons for this conclusion are as follows:

    44.1 The respondent did not give the claimant any fair or proper warning or caution that the outcome of the meeting on 17 November 2015 could well be dismissal. That was not only a matter of general

fairness but also because of the specific wording of the respondent's own policy quoted above. In my judgment, it was wholly insufficient to rely upon the references to unfair dismissal in the earlier invitations to s.4 meetings in this regard. There was nothing to indicate to the claimant in advance of the meeting that not only was dismissal a possibility but that it was actively under consideration so that a real possibility of dismissal existed. In this regard I had no difficulty in accepting the claimant's evidence that he was taken completely by surprise by this outcome of his meeting that day;

44.2 In my judgment Ms Dhaliwal approached the meeting with a closed mind as to its outcome. By this I do not mean that she had decided in advance that dismissal was the inevitable outcome but rather that there was very little that would have persuaded her not to go down that route. This was evidenced by a number of matters including the nature and structure of the pre-prepared note for the meeting which strongly suggested that dismissal was the likely outcome as well as her approach to the question of daylight (only) driving and other alternative duties to which I now turn;

44.3 There was no proper consideration by Ms Dhaliwal (or Mr Burton) of the possibility of the claimant driving only during daylight or assuming alternative duties. The driving in daylight only alternative should have been considered both as a matter of reasonableness under ERA s98 and the respondent's own (contractual) absence procedure. This was truly the "elephant in the room", with both Ms Dhaliwal and Mr Burton seeming to ignore it by focusing instead on the late submission of the medical certificate and the Moorefield's letter (while, in the case of Ms Dhaliwal) at the same time asserting that events during the notice period after the decision to dismiss could result in revocation of that decision. Plainly they were not prepared to take into account the clear message of those two documents, because, so it seems, of their perception of misconduct on the part of the claimant in asserting that he was unfit to work. Throughout the process Ms Dhaliwal seems to have ignored or minimised to the point of extinction the fact that the claimant had told her very clearly in the course of the telephone conversations that the problem he was continuing to experience related to night driving only. Even if he did not say so expressly, it was obvious from what he was saying that he could have assumed driving duties during the day or alternative duties. There was no suggestion that it would not have been possible to limit the claimant's hours to driving during daylight hours, nor does there seem to have been any real exploration (given the substantial size of the respondent's operation) of the possibility of alternative duties as repeatedly suggested by Mr Till and emphasised in the EG300 procedure. Instead, Ms Dhaliwal seems to have taken a rigid view of matters and even if, as I have found, the medical certificate was not handed to her until a late stage of the meeting, it is clear from Ms Dhaliwal's letter of dismissal dated 23 December 2015 (page 6) that the medical certificate stated that he could: "return to

work if you could be taken off driving duties". The same can be said in relation to the Moorfields letter of 24 November. Even if (as I find likely) that letter was only produced for the purposes of the appeal meeting, that letter made it abundantly clear that it was safe for the claimant to return to work but he should avoid night driving until the glare had resolved. Although there is some uncertainty on the evidence as to how keen and in what circumstances the claimant was amenable to alternative work, nonetheless it is as plain as a pikestaff that the only problem in relation to the performance of the claimant's duties was in relation to night driving and it also clear that to have limited his driving duties to driving during times when it was not dark was not something that was difficult or impossible to achieve. Ms Dhaliwal (and Mr Burton) either closed their minds to these alternatives (especially that of daylight only driving) or did not investigate this properly;

44.4 The belief of the respondent (and particularly that of Mr Burton at the appeal stage) that the BAHS had solid grounds for saying that the claimant was fit to work because he had seen an eye specialist was quite simply wrong and was in any event not a reasonable one for the respondent to hold It was not reasonable for the respondent to give the BAHS response that the claimant was fit to return to work greater weight than that of the clear evidence contained in the sick note of 8 December 2015 and the Moorfields letter of 24 November 2015. Given the easily available channels for ascertaining this simple fact I conclude that:

44.4.1 That the respondent's investigations in this regard were inadequate; and

44.4.2 This is another indication of the "closed mind" of the respondent in regard to the outcome of the absence procedure in relation to the claimant. Ms Dhaliwal was keen to see the BAHS assessment that the claimant was fit for duties as supporting a conclusion that there were no suitable available modifications or alternative duties, rather than focussing on the broader medical evidence that the claimant was fit for duties, except night driving

45. I take into account the fact that Ms Dhaliwal indicated that she was prepared to review matters during the notice period and if necessary revoke the decision to dismiss. That was an entirely reasonable and appropriate approach. That said, in my judgment, that was more theoretical than real in the light of the evidence to which I have referred. It seems most unlikely that given the respondent's belief regarding the misconduct of the claimant that the respondent would have changed its mind about dismissing him.

46. I therefore conclude that the respondent's dismissal of the claimant was unfair.

47. That said, I conclude that the claimant's dismissal was to a significant extent caused or contributed to by his own actions so that it is just and equitable that the compensatory award should be reduced. I see no reason for not applying the same reasoning to the basic award (despite the differences in

wording of these sections. The contribution to his dismissal was in the following respects:

47.1 His delay in disclosing the medical certificate of 8 December. He did seek to explain away the delay but in my judgment he could and should have disclosed this certificate to Ms Dhaliwal at an earlier stage than late during the meeting of 17 December. That is to be weighed against the claimant having told Ms Dhaliwal about the letter from Moorfields Eye Hospital which referred to his need to avoid night driving (only) but producing the medical certificate, which was on any basis vital to that meeting, only after (as I have found) Ms Dhaliwal had announced her decision to dismiss him indicates that by the time of the meeting on 17 December he was happy or even keen to remain off sick;

47.2 He was also dilatory or lax in submitting the Moorfields letter of 24 November 2015; again, this is consistent with ambivalence about returning to work;

47.3 His approach towards alternative duties at the meeting with Ms Dhaliwal seems to have been coy or even resistant, notwithstanding that Mr Tillman was making it clear that the claimant wished to be considered for such duties.

48. Finally, the respondent relied on the fact that the claimant chose not to work during his notice as the respondent offered to him and that again might have provided the possibility for him to improve his absence record and persuade the respondent to revoke the dismissal. As I have indicated, I do not rate that prospect as substantial and in any event it is difficult to see that this could be fairly described as blameworthy behaviour.

49. In all the circumstances, I concluded that a contribution of 33⅓% was appropriate. This is broadly reflective of my judgment that there was significant culpability on the part of the claimant but materially less than that of the respondent.

50. Finally, I turn to the question of mitigation of loss. The claimant was in this regard subject to rigorous cross-examination by Mr Line and for good reason. There were large periods of time during which there was no evidence at all of any mitigation having been made and in the ensuing months after his dismissal it seems that the claimant was only applying for jobs of a managerial level when that had not been the level of work which he had been doing on behalf of the respondent. He sought to justify the evidence of reasonable attempts to mitigate against loss by saying that he had poor computer skills and had to rely upon a relative to assist him with his applications. However, his own CV referred to his good computer skills. This (even allowing for the “hype” sometimes found in such documents) contradicted what was in any event an unpersuasive point. In all, I found the claimant’s evidence in regard to mitigation as wholly unpersuasive. That said, I am conscious that the onus of proof in this regard is upon the respondent and the claimant has no “duty” as such to mitigate but merely cannot claim loss for which he is himself responsible. There was no

evidence before me as to how long (if he had exercised reasonable skill and diligence which I find he did not) it would have taken the claimant to find comparative or less skilled or lower paid work. There were no job adverts or other evidence of available jobs. In all the circumstances it was a very difficult task (particularly for an employment judge sitting alone) to determine an appropriate period for mitigation of loss. There can be no science in this and doing the best I can, I concluded that within approximately eight months, of the end of his employment the claimant could (making reasonable efforts to find an appropriate job) have found reasonable alternative employment at around the same level of pay. In part I relied upon the fact that the claimant's skills were generic and that he was still of an age which he could do driving or cargo moving type activities. To this falls to be added the striking absence of evidence of appropriate efforts to mitigate against his loss. In all these circumstances a period of 35 weeks seems an appropriate period at which to cap the claimant's losses flowing from his unfair dismissal. In my judgment 6 months (as submitted by the respondent) seems too strict whilst twelve months seems to generous a period.

51. In relation to the calculations of the award I have relied for the underlying figures on the claimant's schedule of loss, in the absence of any challenge to these figures.

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Employment Judge Bloch QC

Date: ……24/01/2018

Sent to the parties on: ...06/02/2018

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For the Tribunal Office