EMPLOYMENT TRIBUNALS

Claimant: Mr M Bell

Respondent: Jet2.com Ltd

Heard at: Leeds **On: 16 19 20 21 March 2018**
deliberations 28 March 2018

Before: Employment Judge Rogerson
Mr D Dorman-Smith
Mr M Brewer

Representation
Claimant: Mr C Milsom (counsel)
Respondent: Mr J Wynn (counsel)

RESERVED JUDGMENT

1. The complaint that the claimant was subjected to detriments on the grounds of a protected disclosure made pursuant to section 47B of the Employment Rights Act 1996, fails and is dismissed.

2. The complaint of unfair dismissal for making a protected disclosure made pursuant to section 103A of the Employment Rights Act 1996, fails and is dismissed.

REASONS

Issues

1. The issues in this case were confirmed as the 'list of issues' previously identified and agreed and are set out at page 51 in the bundle.

2. In summary the claimant relies upon three alleged protected disclosures and alleges that on the grounds of having made those disclosures he was subjected to 10 detriments, contrary to section 47 B of the Employment Rights Act 1996 "ERA 1996".

3. The claimant also complains that he was constructively unfairly dismissed contrary to section 103 A ERA 1996, in that he resigned in response (at least in part), to a repudiatory breach of contract, that was itself treatment of the claimant for the sole or principal reason that he had made a protected disclosure.

4. The first alleged protected disclosure 'PID1' (paragraph 15 and 16 of the ET1) is that on 23 January 2017 "the claimant stated to Captain Curtis (whether in actual or equivalent words):

> "*Captain Wright said we descended past 9.5 DME. I recall descending before 9.4 DME based on his prompt. We need to check the records*".

5. The second alleged protected disclosure'PID2' (paragraph 28 of the ET1) is that on 31 January 2017 the claimant stated to Captain Curtis:

> *"that he had obtained the flight data for the 23rd January flight which proved that Captain Wright had made factually incorrect statements in the training check. He added that he had been unfairly treated in subsequent line checks".*

6. The third alleged protected disclosure 'PID3' is the four paragraphs of quoted text that come from an email dated 15th of February 2017, which the claimant sent to Captain Curtis, in reply to Captain Curtis's email of the same date, which state:

> *"When an examiner makes false statements in a flight test report this brings into question his integrity or competence and therefore his suitability to be an examiner. This is a matter for the CAA to deal with in line with aviation regulations. When an examiner makes false statements thereby concealing the true causes of an incident this means that the underlying causes will not be addressed thereby increasing the risk of re-occurrence and reducing flight safety. This is a matter for the CAA to deal with.*
> *When two or other examiners disregard the documented standards at the company trains to, making up their own arbitrary standards on the day of test this is an issue of airline operating and training standards which the CAA should deal with*
> *When an examiner makes false statements in a training document, after being told that his version of events is not correct and despite having the option to verify the flight data, this indicates incompetence or an intent to make these false statements. When such false statements have financial implications, this could potentially be fraud and should be investigated by the police.*
> *Aviation investigations should be non-punitive in all cases other than intentional disregard for safety or dishonesty. The primary goal should be to enhance flight safety through improved training operating standards. There are a number of lessons which can be learned from this unfortunate situation which can be of value to the company and I'm happy to share these for the companies benefit".*

6. The agreed list of issues identifies the questions for the tribunal to decide in relation to those three alleged protected disclosures which are:

6.1 What was the information disclosed?

6.2 Did the claimant have *a reasonable belief t*hat the disclosure of that information:

6.2.1 was made in the public interest: and

6.2.2 tends to show one or more of the relevant failures set out at section 43B(1)(a) to(f)of the ERA 1996, specifically:

(d) that the health or safety of any individual has been, is being or is likely to be endangered and

(f) that information tending to show any matter falling within that subsection, has been is being or is likely to be deliberately concealed.

7. The claimant alleges he was subjected to 3 alleged detriments in the assessment process that was followed by Captain Wright and Captain Pope of:

7.1. Captain Wright's failure and/false statements contained in the training record of 23 January 2017:

7.2. Captain Wright's completion of the training record on 23rd of January 2017, without checking the data or consulting with the claimant, when it was known that the claimant challenged the same:

7.3. Captain Pope's assessment and/or false statements contained in the training record of 27th of January 2017 and his subjecting the claimant to an arbitrary set of standards.

8. The remaining 7 detriments relate to the alleged 'inadequate handling' of the grievance process by Captain Bray and Captain Wheeler of:

8.1. Captain Bray for his failure to disclose data in the respondent's possession which was supportive of the claimant's position;

8.2. Captain Bray for his attempt to ambush the claimant at the grievance hearing on 23 February 2017.

8.3. Captain Wheeler and Captain Bray for their dismissal of the grievance.

8.4. Captain Wheeler for his delay in redressing the grievance/grievance appeal.

8.5. Captain Wheeler for his attempt to source data perceived to undermine the claimant's position during the grievance appeal.

8.6. Captain Wheeler and Captain Bray, in their continued refusal to expunge the training records.

8.7. Captain Wheeler's instruction that the claimant provide a written rescission of his grievance.

9. Before we set out our findings of fact in relation to the alleged protected disclosure and detriments, by way of background we set out the following facts. Any highlighted text in these reasons reflects our emphasis.

10. The claimant was employed by the respondent as a Captain from 3 October 2016 until his resignation on 16 June 2017.

11. The respondent is a British commercial passenger airline holiday company operating 70 aircraft, employing, as at April 2017, 811 pilots of which 179

(including) the claimant were recruited and subsequently trained during the period September 2016 to May 2017.

12. The claimant describes himself as having a 'hitherto unblemished flying career of over 25 years' and as 'never having failed any assessment before his employment with the respondent'. The respondent was not in a position to challenge the claimant's previous flying record. It was very clear that keeping his perceived unblemished record was very important to the claimant

13. Although the claimant has flown a wide variety of aircraft, for a number, of different employers he is required to undergo retraining on each new model of aircraft he flies. The events in this case relate to a new jet, B737-800 which the claimant was required to fly for the respondent which he had not previously flown.

14. The training consisted of an 8 weeks conversion course, 20 sectors' line training in the aircraft for six weeks (a "sector" is a single flight between two destinations, involving one take-off and one landing) and then an assessment process which must be passed before the pilot can be considered competent to fly the aircraft. It is an important assessment the respondent is required to carry out because after the successful completion of this training, the pilot is in charge and legally responsible for flying the aircraft.

15. The assessment process is conducted by the line training captains and includes an initial line check ("ILC") and a final line check ("FLC"). Pilots are checked on one sector as "pilot flying" (PF) and on another sector as "Pilot Monitoring" (PM). Prior to that "ILC" there has been no formal assessment of the competency of the pilot flying this aircraft. The 'debrief' takes place after the return sector because a line check, must include a 'return to base' as part of the assessment. The examiner's final assessment cannot be reached until then.

16. The training captain may identify "a more extensive range of matters" for comment and debrief, and as a consequence he "must exercise a wider discretion in reaching his conclusions as to the candidate's competency". A written record of the line check is made after the 'debrief'. The procedures provide that a failure "**shall** be recorded if the training Captain, in **his considered opinion is not satisfied with the demonstrated quality of airmanship** and the scale of knowledge based on his observations of the pilot". Specifically paragraph 9.10.6.1.2 provides that;

> *"In the event that the candidate is unable to show a reasonable knowledge of essential operating practices, or attempts to follow an irregular procedure, either of which in the considered opinion of the training captain, justifies the assessment that he is not properly qualified for routine service, a failure shall be recorded".*

<u>The First Disclosure</u>

17. The first assessment of the claimant as the pilot flying was the ILC on 23 January 2017, when he was assessed by Captain Derek Wright as the line training captain and 'PM' during a flight from Newcastle to Alicante.

18. Captain Wright has been a line check examiner since April 2015. His role involves checking pilots during line flying operations to ensure that required company standards are met. The claimant was expected to demonstrate the

ability to make command decisions to demonstrate good airmanship and to conduct the flight in accordance with the respondent's published operating procedures.

19. It was accepted that there were no issues about that flight until the landing at Alicante which is relevant to the first alleged protected disclosure dealt with in the ET1 at paragraph 10 -14. The pleaded case is:

> Paragraph 10: "Captain Wright **prompted** the claimant to descend at least 1 mile too early at 10.4 DME rather than 9.4 DME. Captain Wright provided the claimant with inaccurate information as to the height and distance from the airport at the time. He **instructed** the claimant to begin the descent. The claimant courteously challenged this but received the **prompt** yet again. He was presented with little option but to follow the **instruction**. This gave rise to the risk of an excessive rate of descent, and meant contrary to best practice that the aircraft did not approach the correct descent 9 .4 DME at level flight".
>
> Paragraph 11: "The claimant identified the error corrected the flight path and landed safely. The descent into Alicante, however did not follow the correct descent profile, due to the instruction from Captain Wright".
>
> Paragraph12: "The claimant flew the aircraft on its return flight to Newcastle without a word of reservation expressed by Captain Wright.
>
> Paragraph 13; "Soon after landing in Newcastle and by way of debrief Captain Wright informed the claimant that he was going to class the flight as a failure. At this stage the line check record had not been completed."
>
> Paragraph 14; "The claimant challenged this and pointed to the **dangerous instruction** from Captain Wright. He also challenged the assertion that the aircraft had descended past 9.4 DME.

20. In the claimant's witness statement he states as follows:

> Paragraph 24; "1 nautical mile before the correct descent point **at 10.4** DME Derek Wright **instructed/prompted** me "to descend". Together with this descent **prompt** he also gave a very confusing range and altitude check. I recall Derek Wright as saying 9.4 DME/1700ft".
>
> Paragraph 27; "Normally 1 mile before descent no range altitude check would be given".
>
> Paragraph 28; At 9.4 DME the correct **prompt** should be "9.4 DME top of descent… next 8 DME/8040 feet descent".
>
> Paragraph 29; "Upon receiving **the prompt/instruction** to descend at 10.4 DME I confirmed I was visually clear of my terrain. I requested Derek Wright to set the final landing flap setting and I initiated a very gentle descent of hundred feet per minute **to comply with the descent instruction** while minimising deviation from the profile".
>
> Paragraph 33; "To address Captain Wright's **incorrect instruction** to descend to early at 10.4 DME and confusing range altitude checks which

had now put the aircraft low on the published profile I reduced the rate of descent to correct the profile and land the aircraft safely".

21. One of the difficulties we had with the claimant's account of events was the inconsistency in his own evidence about whether he was prompted or instructed to descend at 10.4 DME. His pleaded case goes further and relies upon a 'dangerous instruction' from Captain Wright to descend at 10.4 DME where he had no choice but to comply, and did comply with that dangerous instruction by descending at 10.4 DME.

22. If he had any concerns about the 'safety' of the descent and believed it was dangerous he accepts the correct procedure was to operate a 'go around' the airfield and recommence the descent. The claimant did not feel a 'go around' was necessary at the time because the descent was in his words 'safe but sloppy'. He told us he never said at the time or now says that he had no choice in the matter. He was the pilot flying who was in control of the aircraft. He chose when to start the descent and the profile of that descent and he did not (contrary to his case) descend at 10.4 DME to comply with a dangerous instruction from Captain Wright.

23. A descent too early (for example above the sea) or too late (too close to the airfield) could be unsafe but those were not the circumstances on that day where the claimant accepts at 10.4 DME is 8 miles away from the airfield, which is a safe distance to start a descent if that had happened. The evidence in the grievance appeal process established based on the flight data (FDM) available that there was no descent at 10.4 DME. Descent began at 9.77 DME. Captain Wheeler found "The FDM data supports the fact that you started descent almost exactly at the correct point (not to early) and so I can only conclude that there was a degree of uncertainty or confusion with regard to the vertical profile at this point on the approach". The tribunal accepted the evidence we saw from the FDM data and the data we were asked to view by both parties at this hearing that decent began at 9.77 DME and not at 10.4 DME.

24. The claimant accepted in cross examination he had made mistakes in the descent and that he had been confused by the LIDO approach chart which he had read incorrectly which led him to believe he was 800 feet higher 9.4/1700. It was put to the claimant that it was highly unlikely that Captain Wright would give 9.4/1700 feet as a check when the plane had been at level flight of 2500 feet for several minutes. In answer the claimant said: "*at 10.4 he gave me a prompt to descend with height of 1700"*. It was put to him that it was very unlikely he would give 9.4/ 1700" The claimant's answer was "***if** given at 10.4 not 9.4 than even more confusing. I did not recall 7DME/1710. At 10.4 DME exceptionally confusing"*. He was then asked "is your case he was more confused than you for a longer period?" His answer is "my case is he is tuned into wrong VDR read wrong and made an honest mistake thought at 9.4 not 10.4".

25. Captain Wright in his evidence denies instructing the claimant to descend at 10.4 DME. He told us that he "*correctly verbalised 1 mile from descent point to highlight the approaching descent point of 9.4 DME whilst physically being at 10.4 DME*" which was in keeping with the role of pilot monitoring. He "*categorically did not instruct the claimant to descend at 10.4 DME as the descent point was passed (9.4 DME) the aircraft was not descending at sufficient rate to maintain the vertical profile. Having now over-flown this point the required published latitude 7DME was verbalised to the claimant who replied asking what*

*was the value required at 9.4 DME. At no time had I ambiguously stated that a descent need be commenced at 10.4 DME. As I recall the aircraft was not descending and was correctly maintaining level flight at the 10.4 DME position……**the fact that the claimant did not seem to recognise that the 9.4 DME position had been passed was the main source of disagreement between the claimant and myself during the debrief.** His comment was that I confused him when passing advisory altitudes e.g. 7 DME 1710 feet, however the Claimant had failed to appreciate that what was behind the aircraft was irrelevant and emphasis should be on meeting the approach requirements ahead*"

26. Captain Wright's account was consistent with the evidence that at 10.4 the aircraft was at level flight and was not descending. He was entitled to conclude that the claimant failed to appreciate what was behind the aircraft was irrelevant. The emphasis should have been on what was ahead which was consistent with the claimants own account that he responded by challenging what had been said instead of focusing on the approach and the advisory altitudes that were being given by Captain Wright to assist him.

27. In cross examination the claimant did accept that he had never said at the time or now he had no choice in the matter of when to descend which was contrary to the case presented of "little option but to follow the instruction". His evidence at this hearing was that he felt under pressure to do whatever the examiner told him which still suggests he was compelled to descend at 10.4 DME and did descend at 10.4 DME, which was not the case. We found the claimant's evidence with references throughout to an 'instruction' were misleading and did not reflect what he believed was the case at the time. 'Instruction' has a completely different meaning, suggesting as the claimant suggests an 'order or command' to take action not a prompt which suggests he should be thinking about 'moving to action'. His actions at the time were consistent with a prompt not an instruction because he did not start a descent at 10.4 DME. He started a descent at a point he chose of 9.7 DME, which was safe.

28. The claimant accepts he had clear visual at the time with clear skies, he could clearly see the sea below and the airfield below. He accepts a prompt at 10.4 DME 8 miles away from the airport was not dangerous or unsafe. If he felt it was he had the option of to turnaround at Alicante and recommence descent but he did not feel that was needed at the time. The descent was described accurately by the claimant as 'sloppy but safe'.

29. This evidence was inconsistent with his witness statement at paragraphs 34 36 and 38 where the claimant refers to the respondent's operational manual and presents the events in a very different way. He states:

> "'*incident' is an event covered by the definition of an accident, which under slightly different circumstances might have jeopardised the safety of persons on board the aircraft or might have resulted in an aircraft incident.*
> *"Reporting" any crew member **must report to the commander any incident that endangered or could have endangered the safety of the operation**.*
> *"The Civil Aviation Authority (CAA) operates a mandatory reporting scheme ("MOR"), which is also detailed in the respondent's operation manual.*
> *This "incident" meets at least three of the criteria listed in that:*

- *it is an in an unintentional significant deviation from intended altitude of more than 300 feet.*
- *it is a loss of positional awareness and*
- *it is a breakdown in communications between the flight crew".*

At paragraph 41 he states "*as all three triggers had occurred on the 23 January I believed Captain Wright was under a positive duty to preserve the data and voice recordings and he was also clearly aware that I disputed what he claims to have said during the incident, so to me the imperative to preserve the cockpit recordings was greater. However, I understand from subsequent discussions that this did not happen and the cockpit voice recordings were not preserved. They would have definitely confirmed the timing and nature of* ***instructions*** *from Captain Wright to descend and my challenge of it*".

30. At this hearing the claimant suggests it was an 'unsafe situation' because there was an unsafe instruction to descend early, which on this occasion he could mitigate because he could clearly see the sea below and the airfield. It was unsafe because he could not trust his instruments and because he could not trust his co- pilot which led to positional uncertainty and unintended deviation. Finally, because of the 'steep cockpit gradient', between him and Captain Wright as the examiner which means he was more inclined to believe the examiner and comply with his instruction to descend. For ease of reference we will refer to these as the 'safety concerns.'

31. He accepts that none of these 'safety concerns' were ever conveyed to anyone at the respondent at any stage. He accepts therefore they had no knowledge of these 'safety concerns'. If he genuinely understood these to be his safety concerns he would have reported them in the way he reports them to this tribunal. He did not because they were not his concerns at the time.

32. He is correct in stating that Captain Wright did not have any reservations about safety which is why the flight returned to Newcastle 'without comment'. This is because there were no safety concerns and nothing the claimant now relies upon was reported to Captain Wright by the claimant.

33. It was put to the claimant that the facts that were conveyed at the time were more consistent with the position set out in the respondent's ET3 response in that they tend to show that what had happened was a 'disagreement' which in normal circumstances would be easily resolved between the 2 pilots and the real issue was the failure and feedback given in the flight test which was the real reason why the claimant was unhappy. Although the claimant disagreed with that suggestion in cross examination, we find that was the case. The claimant was unhappy about the failed assessment even though he also accepted that a 'fail' was a reasonable option open to Captain Wright based on the flight profile which was poor, whatever the cause. It was also reasonable for Captain Wright to fail the claimant based on his observations of the approach flown because his considered opinion was that the claimant had not demonstrated the quality of airmanship required.

34. The claimant's actions immediately after landing at Alicante were also inconsistent with the case he presents at this hearing about the alleged safety concerns which he now says existed during the approach and were in his mind at the time. When he returned to Newcastle on a flight with Captain Wright on the

same day he said/did nothing to preserve the cockpit flight voice recording which would have recorded what had been said and the 'dangerous instruction' he relies upon. He knew there was a loop system where the recording is over-written every 120 minutes unless he activated a system intervention. He is critical of the respondent for not preserving this recording but they had no reason to at the time. If the claimant's case was that upon landing in Alicante he had safety concerns and the 3 triggers for an 'incident' had occurred which were reportable to the CAA, he had every reason to preserve the data, but did nothing.

35. From Captain Wright's perspective there was a disagreement about when a prompt was given which was all that was identified by the claimant at the time. When the claimant was pressed about the difference in his account at the time and his discussions with Captain Wright and the account he now gives in his witness statement, his explanation was that he did not raise those matters at the time because upon landing at Alicante there was 'no suggestion of failure'. This answer was very revealing. It supports our view that the 'failure' and feedback were the motivating factors for the claimant which informed and influenced the subsequent decisions that he made.

36. If the claimant was genuinely concerned about the safety of the approach, he had another opportunity to report those safety concerns when he spoke to the Head of Training, Captain Curtis, after the debrief on 23 January 2017, when he knew he had failed the assessment. If he had raised any safety concerns this would have halted the assessment process and the matter would have been investigated by Captain Curtis.

37. Instead the claimant deliberately misled Captain Curtis by portraying the event in a very different way more consistent with a 'disagreement' in order that he could continue with the assessment process. We found Captain Curtis to be a credible witness. As B737 training manager he was responsible for ensuring that the company standards of all B737 pilots and instructors, was maintained. He had no personal interaction with the claimant prior to the call on 23 January 2017. His priority was to maintain a reliable assessment process and to properly address any concerns identified by either the examiner or the pilot in that assessment.

38. He explains that even though the approach to Alicante was poorly flown it is not unusual for the return flight to Newcastle on the same day to be completed, unless the examiner deems a candidate's performance so inadequate that it would be unsafe to operate the return flight, which was not the case here.

39. After landing in Newcastle, Captain Wright carried out the 'debrief' with the claimant. He assessed the ILC as a fail because in his view there was a below standard approach due to a loss of situational awareness. He did not feel extra practical training on another flight was required or practical training was of benefit because it was in his view a 'one off'.

40. The written record of the assessment is based on Captain Wright's recollection of the line check which is the normal process. It is not completed with reference to any data. This is because the assessments are completed immediately after the line check and debrief. It is an entirely 'subjective' assessment process based only on the examiners observation of the flight and the examiners opinion.

41. Captain Wright completed the line check training record as accurately as possible based on his recollection. He accepts he has made some mistakes in that record in light of the FDM data he has subsequently seen. He has made an honest mistake about the descent point being 'past 9.4' when the data shows it was before 9.4 at '9.77' DME. Neither the claimant nor Captain Wright, were factually correct in their recollection of the descent point. His reference to a '4-500 feet deviation above profile' is incorrect based on the FM data which he did not have at the time. It is however accepted by the claimant that there was a 'deviation from profile' which breached the approach minima demand that would render a fail a 'reasonably open' option for Captain Wright. If Captain Wright had passed the claimant then his assessment would be wrong regardless of any inaccuracies about the exact level of deviation.

42. In the assessment he does reflect the claimant's views as he understood them to be following the 'debrief'. He refers to the claimant "*citing momentary loss of situational awareness and misunderstanding of PM's advance altitude and range check had combined to confuse him"*. That is what the claimant says now that Captain Wright confused him. His final assessment comments are in our view balanced and fair based on his observation which put the failure into perspective:

> *"Despite the previously described occurrence during the approach to ALC, Mike demonstrated an otherwise robust and competent operation. Situational awareness and SOP compliance were to a good standard with NOTECHs and assertiveness demonstrated appropriately. Technical knowledge and aircraft handling skills are well developed with his previous extensive experience evident. He has worked hard to absorb operation of a new type and company procedures and I believe today's error was an uncharacteristic lapse"*

43. The claimant complains that "*Captain Wright's failure and/false statements contained in the training record of 23 January 2017 and Captain Wright's completion of the training record on 23rd of January 2017, without checking the data or consulting with the claimant, when it was known that the claimant challenged the same"* are detriments the claimant was subjected to because of his disclosure to Captain Curtis.

44. Based on our findings of fact the 'failure' result was justified correct and reasonable for Captain Wright to find based on the claimant's performance on the approach which was 'sloppy'. There were some 'inaccuracies' in the assessment in the heights recorded based on Captain Wright's recollection but we did not find that Captain Wright made 'false statements' in the training record. He made some statements based on his recollection, which when checked against data are wrong. The assessment overall was balanced fair and positive going forward. As to the process followed it was a 'subjective' process based on the examiners observation experience and opinion. The assessment is completed based on the examiners recollection only without checking the data. The claimant accepts Captain Wright has made 'honest mistakes' not false statements. Captain Wright does incorporate the claimant's view as he recalls it. The process is not 'collaborative' where the claimant has to agree to the opinions expressed. The claimant was not subjected to any detriments by Captain Wright and the assessment had nothing to do with any alleged protected disclosure made to Captain Curtis.

45. Captain Wright rang Captain Curtis to explain why the claimant had failed. From that conversation Captain Curtis understood there had been some confusion between both pilots about precisely who did what during the approach to Alicante. Captain Wright told Captain Curtis that he and the claimant had 'mostly' resolved their confusion. From this Captain Curtis understood that neither felt any remaining issues were significant and crucially both felt that no further training would be required and that the claimant should immediately sit another ILC without delay.

46. Captain Wright was not party to Captain Curtis's conversation with the claimant that followed. This gave the claimant the opportunity to say whatever he wanted to Captain Curtis about the line check. During Captain Curtis's conversation with the claimant, the claimant agreed there had been some confusion during the approach but 'lessons had been learnt' and he did not feel additional training would in any way be required. He told the claimant the usual failure procedure was to ascertain the background to the check and to establish if there were any mitigating factors behind the poor performance prior to agreeing a training package. The claimant protested saying that he "just wanted to get on with the check". Although Captain Curtis felt a bit uneasy at agreeing to this, he was persuaded by his separate conversations with Captain Wright and the claimant that it was the most appropriate way going forward.

47. For 'PID 1' the claimant relies upon saying to Captains Curtis words to the effect that "Captain Wright said we descended past 9.4 DME where as I recall descending 1 mile before 9.4 DME based on his inaccurate prompt". We accept words to that effect were said and are consistent with the disagreement that Captain Curtis recalls when he describes 'confusion' during the approach about who had done what during the approach.

48. Captain Curtis recalls the claimant did in a calm, enquiring and non-combative way say that he wanted to review the approach on Flight Data Monitoring (FDM). He was 'crystal clear' that the claimant wanted to do that in his slow time and did not want it to interrupt his further flights. Although Captain Curtis felt a bit uneasy at agreeing to just getting on with the next check, he was persuaded by Captain Wright and the claimant that is what he should do. The claimant portrays his request to view data as a 'red flag' he was waving to highlight his safety concerns. We do not agree that it was or ought to have been construed in that way in light of what was said to Captain Curtis at the time and the way he data was actually requested at the time.

49. The claimant accepts that at no point did he say to Captain Curtis, that he had been issued with a 'dangerous instruction too descend too early' by Captain Wright, nor did he raise any of the safety concerns he now relies upon. Had he done so we have no doubt that Captain Curtis would not have permitted any further flights and would have halted the assessment process and investigated the matter further. The claimant's only concern at the time was to persuade Captain Curtis to let him move on to the next ILC without having him halt the process and without undertaking any extra training. He probably thought at the time he would pass the next line check, and that he would be able to put this failure behind him but that was not the case.

50. The decision made by Captain Curtis to continue the process is confirmed in the assessment form which was completed by Captain Wright on 23 January 2017 at 23;02 and acknowledged by the claimant on 25 January 2017 17;53. It

records Captain Curtis's on 25 January 2017 15;03 stating "*After speaking at length to both examiner and the candidate, I was persuaded that what occurred on this flight was an uncharacteristic aberration and no extra training is required. I have therefore put the candidate up for another immediate ILC".*

51. The system also provides for the 'crew records officer' to file the record made which takes place on 26 January 2017.Once the records have been filed they cannot be changed, that is the flight record. Paragraph 4.4.2 of the respondent's training procedures provides that once the fleet training manager has electronically signed off the form including his comments then you cannot go back and amend or add further statements. An amendment statement can be added by way of further separate auditable comments. The form can only be deleted if there is a major error check such as incorrect candidate selected or date of check is wrong. In those circumstances the form can only be deleted by a request from the flight training manager to the EVOKE team (the system developers) who are a separate organization to the respondent.

52. The claimant had the option on 25 January 2017, when he saw the written assessment to tell Captain Curtis whatever he wanted to tell him about the approach or the content of the assessment form.

53. The other contemporaneous document we saw is the email requesting the flight data the claimant sent on 31 January 2017. The reason the claimant requests this data is clear "*I had a recent flight and I was not happy with the VOR approach that I flew…I hope the data may help me learn from the experience and improve my operation in the future"*. This was consistent with the 'lessons learnt' comment the claimant made to Captain Curtis at the time.

54. The next ILC, 'the re-sit' takes place on 26 January 2017 with Captain Fahey which the claimant passed. Although he passed this ILC he was unhappy and disagreed with some of the feedback given in the line check record.

55. The third alleged detriment complaint is made against Captain Pope in relation to the final Flight Check ("FLC") he conducts on 27 January 2017. Captain Pope became a Line Training Captain in January 2005 and has been an examiner since June 2014. He had not met the claimant prior to the FLC on 27 January 2017. He found the claimant's performance on this flight was below the required standard in 2 key areas and assessed the claimant as failing the assessment.

56. The claimant in his witness statement suggests that because this followed so closely after his alleged disclosure to Captain Curtis on 23 January 2017, he was being victimised by Captain Pope for challenging Captain Wright. In cross examination Captain Pope's evidence was clear and convincing he had no knowledge of (using the words put to him in cross examination) the 'prompt to descend too early'. It was suggested that he had spoken to Captain Wright after 23/1 and before 27/1. He denied this and we accepted his evidence. There was no reason why any such discussion would have taken place.

57. Captain Pope had no knowledge of the alleged protected disclosure when he completed the flight check on 27 January 2017 and he completed it based on his understanding of the assessment process and his recollection of his observations of the claimant. We refer to his 'understanding' because as part of the claimant's grievance he complained that Captain Pope should not have made some of the

interventions that he did during the assessment. In the claimant's grievance appeal Captain Wheeler agreed there were some interventions incorrectly recorded as such and that this feedback has been given to Captain Pope for the future as a 'learning outcome' from the grievance.

58. With Captain Fahey's report, even though the claimant passed the assessment, he alleges at paragraph 72 of his witness statement that Captain Fahey like Captain Wright "*had caused a problem, then penalised the test candidate in his report for the problem caused*". Although there is no complaint about that assessment as part of this claim, this demonstrates the claimant's mindset towards any negative comments made about him in the assessment whether he passes or fails that assessment. This then informs his view as to the competency of the examiner.

59. On Monday 30 January 2017, Captain Curtis was informed the claimant had failed his FLC on 27 January 2017 with Captain Pope. He rang the claimant to reassure him in case he felt under pressure having failed another line check. Captain Curtis was confident the claimant would still get through the assessment process because of his experience, providing a remedial training package could be agreed to assist him to pass the line checks.

Second Disclosure

60. In a telephone conversation on 31 January 2017 the claimant spoke to Captain Curtis. By this time he had obtained some flight data and had created his own graph of the descent profile which he discussed with Captain Curtis.

61. The 2nd PID is "the claimant stated to Captain Curtis that he had obtained the flight data for the 23rd January flight which proved that Captain Wright had made factually incorrect statements in the training check. He added that he had been unfairly treated in subsequent line checks".

62. This account was consistent with Captain Curtis's recollection and the email the claimant relies upon for the third disclosure which we will refer to later in the chronology. Captain Curtis recalls the claimant telling him the data supported his view of what had occurred and that he was unhappy about a comment Captain Fahey had made in his second (successful) ILC. Captain Curtis told the claimant these matters could be discussed at the review meeting.

63. On 13 February 2017, the review meeting took place. Captain Curtis had left the claimant to review the FDM data which he had not viewed. Unfortunately, as soon as the review started it became apparent the claimant was making serious accusations as to the conduct of the training captains who had conducted the line checks and was not interested in considering further training. He was advised by HR that in those circumstances the meeting served no further purpose and should be terminated to allow the allegations to be dealt with by way of the grievance process.

64. The focus at the time for the claimant was about his unhappiness at what he perceived to be unjustified 'negative' feedback in the assessments it was not about any genuinely held safety concerns about the approach to Alicante which were not raised with Captain Curtis.

65. After this meeting, Captain Curtis wrote to the claimant by email dated 14 February 2017 at 15:54 to follow up from the meeting. The relevant paragraphs state:

> "You have indicated that you wish for these concerns to be resolved prior to any further training commencing and I can confirm you concerns will be investigated under the company grievance policy a copy of which I have attached for your reference
>
> I would be grateful if you could please confirm by return email whether you would like me to raise the concerns you have highlighted as an official grievance and if you are happy for the information you have provided to be used as supporting documents in our investigation"

Third Disclosure

66. It is only after Captain Curtis requests confirmation that the claimant is raising a grievance that the claimant makes any reference to 'flight safety in the 4 paragraphs of text relied upon for PID3. We note the preceding paragraphs to that alleged disclosure with our comments to put some context to the facts conveyed:

> *"Thank you for the meeting which we had on 13 February 2017.This meeting took place after our telephone discussion on 23 January 2017, during this conversation I had explained to you that* ***I disagreed with Derek Wright's version of events*** *and that I felt the flight data should be reviewed.*
>
> **(This is consistent with our findings of facts conveying a disagreement)**
>
> *We had a further telephone conversation on 31st January 2017. During this conversation I explained that I had flight data for the flight with Derek Wright and this* ***proved he had made factually incorrect statements*** *in my training report. I also explained that during my two following line checks that I felt unfairly treated and* ***marked down*** *based on the arbitrary opinion of the examiner rather than being evaluated against documented standards or standards which I was trained to.*
>
> **(The factually incorrect statements are only identified when the flight data has been obtained. The process of assessment is based on the arbitrary opinion of the examiner. The claimant is clearly complaining about being marked down whether he passes or fails the line check)**
>
> *I was therefore disappointed to find at this meeting that* ***none of these concerns*** *had been investigated and therefore we were not able to address these issues and reach resolution. I do not think the grievance procedure is the correct format to deal with this matter. The company grievance procedure is based in labour law. Most aspects of this investigation do not relate to labour law and therefore fall outside the remit and authority of a company grievance procedure."*
>
> **('The 'concerns' referred to are identified in the first 2 paragraphs and not the safety concerns the claimant now relies upon)**

There then follows the 4 paragraphs relied upon for PID 3 which identify reporting matters to the CAA, when examiners make false statements in a flight test report:

> *"when an examiner makes false statements in a flight test report this brings into question his integrity or competence and therefore his suitability to be an examiner. This is a matter for the CAA to deal with in line with aviation regulations. When an examiner makes false statements thereby concealing the true causes of an incident this means that the underlying causes will not be addressed thereby increasing the risk of re-occurrence and reducing flight safety. This is a matter for the CAA to deal with.*
>
> *When two or other examiners disregard the documented standards at the company trains to, making up their own arbitrary standards on the day of test this is an issue of airline operating and training standards which the CAA should deal with*
>
> *When an examiner makes false statements in a training document, after being told that his version of events is not correct and despite having the option to verify the flight data, this indicates incompetence or an intent to make these false statements. When such false statements have financial implications, this could potentially be fraud and should be investigated by the police.*
> *Aviation investigations should be non-punitive in all cases other than intentional disregard for safety or dishonesty. The primary goal should be to enhance flight safety through improved training operating standards. There are a number of lessons which can be learned from this unfortunate situation which can be of value to the company and I'm happy to share these for the companies benefit".*

67. We noted that in cross examination when Captain Bray and Captain Wheeler were taken to the letter it was specifically to the part that states "when an examiner makes false statements thereby concealing the true causes of an incident this means the underlying causes will not be addressed thereby increasing the risk of reoccurrence and reducing flight safety. This is a matter for the CAA to deal with". However the claimant accepts the 3 triggers of an incident/safety concerns he now relies upon were never raised with anyone at the respondent for them to identify them in this disclosure.

68. Captain Curtis passed the matter to Captain Bray to deal with as part of the grievance process. As a result, of this 3rd disclosure the claimant says he was subjected to 2 detriments by Captain Bray for "*his failure to disclose data in the respondent's possession which was supportive of the claimant's position*"; and his "*attempt to ambush the claimant at the grievance hearing on 23 February 2017*".

The Grievance Process

69. Captain Bray held a grievance meeting with the Claimant on 23 February 2017. During this meeting further extraction of data from the FDM system was discussed. Captain Bray had the DME data to whole digits and had obtained that

data 3 days before the grievance hearing. The quality of the information that could be extracted improved as the grievance process progressed and Captain Bray based his decision on the data that was available to him at the time.

70. When Captain Bray told the claimant that he had managed to get the data to display DME information to whole digits the claimant's response was he "*would like to see that as a gross error check of his own calculations"*. The claimant had by then already obtained and analysed the data he had obtained to reach his own conclusions. There was no further reference to data extraction at the hearing or any complaint raised by the claimant who was then provided with the data on the same day to carry out his 'gross error check'. He was more familiar with the data than Captain Bray and his response does not indicate that he felt the data was used to ambush him. He was not 'ambushed' or put at any disadvantage. He was provided with it the same day in light of his response at the time.

71. Captain Bray wanted to understand what the issues were before he considered that data so the context was provided by the claimant to enable him to view the data with an open mind after the meeting. He had not reached any conclusions about the data before the hearing and did not deliberately withhold information. The claimant could have requested an adjournment if he wanted to review the data before any further discussion took place but he did not. He could also have reported back to Captain Bray after completing his gross error calculations, if he had wanted to.

72. Captain Bray sent the claimant a grievance outcome letter dated 17 March 2017, responding to the claimant's concerns about the 3 Line Checks. It sets out all the documentation that was reviewed the interviews he conducted with all 3 training captains, the findings made and conclusions reached regarding each line check.

73. It is clear from the outcome letter that Captain Bray could not determine accurately the point of descent based on the data that he had, but he believed descent occurred between 10 and 9 DME. None of the safety concerns the claimant now raises were raised with him. He was asked why he did not suggest a 'MOR' at any stage. His answer was that there was no safety context raised in relation to the approach if there had been he would have asked the claimant if an MOR had been reported but the claimant never said there were any safety concerns.

74. He acknowledges there was a different interpretation of events between Captain Wright and the Claimant relating to 9.4, 8 and 7DME distances but without access to the cockpit voice recorder which was not available due to the elapsed time since the flight, he could not definitely conclude what was said and when. His letter states "**you said Captain Wright had confused you so I am inclined to believe that regardless of what was said situational awareness was temporarily reduced/lost contributing to the outcome of the approach"**. He disagreed with the claimant's deduction that descent occurred at 10.4 DME.

75. He did not agree that Captain Fahey's intervention was inappropriate. He agreed that Captain Pope's intervention was not 'flight safety critical' and should not have been recorded as such and that section of the check report had been completed incorrectly.

76. As a next step he recommends line check training and a further final line check, with line training captains who had not previously been involved with a final line check to be conducted by a Senior Line Check Captain.

77. The claimant alleges that Captain Bray 'dismissing his grievance' is a detriment he was subjected to on the grounds of his protected disclosure. In cross examination it was put to Captain Bray that he had 'minimised the impact of findings in the claimant's favor' which is not the pleaded detriment of 'dismissing the grievance'. Captain Bray's answer to that question was "no I looked at his concerns I carried out an investigation I recorded the areas where I had found/had not found in his favour". His answer reflects exactly what a grievance process is all about. He was doing exactly what he was being asked to do.

78. The complaint that the grievance was 'dismissed' is not made out on the facts. Captain Bray upheld in part the complaint made against Captain Pope and gave detailed rationale to support the conclusions reached and also suggested an appropriate course of action for the future. He did not deal with 'expunging' the training records in relation to Captain Pope's interventions because the claimant had not asked for that to be done and because his outcome had not been accepted. The line check record could (as far as he understood) not be changed. He could not simply expunge the training records which would remove any record of the line check ever having occurred because the respondent was required to keep an auditable trail of the training record for the flight.

79. The claimant appealed the outcome on 5 grounds:

- Incorrect technical details used by Captain Bray leading to misunderstanding of some events.
- Interpretation of ambiguous company documentation
- Including events which I have no grievance about in the report thereby distracting from the issues which the grievance is actually about.
- Making rulings on issues which Captain Bray confirms cannot be confirmed with data thereby accepting one person's word versus another.
- The final judgment and the way forward.

80. In his appeal letter dated 26 March 2017, he also states that Captain Bray's analysis was 'flawed because his DME information was out by one nautical mile' He suggests this could be 'gross incompetence/incompetence or a deliberate attempt to misrepresent the facts by providing incomplete information'.

81. His grievance appeal was heard by Captain Wheeler. The grievance appeal hearing took place on 11 April 2017. The alleged detriment is the "*attempt to source data perceived to undermine the claimant's position during the grievance appeal*".

82 Captain Wheeler explained that he requested more precise data on 28 March 2017 to see if the data could be interrogated to increased accuracy. He was provided with some information that day which would require analysis but he was unable because of other commitments to consider it in any detail. He did ask for the data to be provided to 2 decimal places which was provided on 10 April 2017.

83. Captain Wheeler shared this information with the claimant at the grievance appeal hearing. The alleged detriment the claimant relies upon of 'attempting to

source data perceived to undermine the claimant's position' is unclear because Captain Wheeler requested data and received the data and could not in any way influence the content of the data provided. Whether the data undermined/supported the claimant's position, it was the data. He considered the data a 'vehicle' to help him establish, as best as he could the outline of events he was considering at the Appeal.

84. The detailed outcome of the grievance appeal is sent to the claimant by a letter dated 10 May 2017. Given the detailed investigation that was required which is reflected in the detailed outcome letter the delay is explained and was not substantial. There was a large volume of documents to consider and Captain Wheeler provided the claimant with a progress report on 24 April 2017 to explain the delay and the progress made. He had also informed the claimant at the appeal hearing about existing commitments and leave that had been booked to manage the claimant's expectations of the process. None of those reasons had anything whatsoever to do with any alleged protected disclosure.

85. The grievance appeal lists the 18 documents considered, the grievance, the unresolved matters, the 3 'line checks' and is thorough and comprehensive. Captain Wheeler addresses each of the 5 grounds of appeal.

86. Captain Wheeler acknowledges that in relation to the first ground that "*with the benefit of more precise FDM data he had been able to determine a far more accurate sequence of events about the approach to Alicante on 23 January 2017". He confirms the descent begins at 9.7 DME which is commensurate with the procedures (0.3nm prior to the descent point at 9.41 DME)"*. He acknowledges that in the appeal letter the claimant has referred to "*Captain Wright, making a number of factually incorrect statements, and that his synopsis was exactly the opposite of what happened"*. He concludes that "**in comparing both versions to FDM data and my calculation, I conclude there are inaccuracies leading to incorrect conclusions in each"**. Point by point he explains how he has interpreted the data and the events which clearly demonstrates Captain Wheeler was considering the data objectively, having regard to both the claimant and Captain Wright's account of the approach.

87. At the end of the letter, Captain Wheeler sets out his recommendations and next steps. He suggests a 'facilitated meeting' with those instructor examiners to 'clear the air' in a positive and productive way. He refers to the final words of the claimant's appeal where the claimant expressed his hope to "*have the matter resolved in an amicable manner which will make my continued employment possible"*. His outcome letter responds to that request by stating:

> *"In the context of my involvement with this grievance I am rather disappointed at the evocative and confrontational language that has been directed at not only those examiners carrying out the checks but also those management pilots who have made it their business to facilitate your concerns. Words and phrases such as "lack of competence", "deliberate attempt not to include relevant information" "deliberate attempt to conceal the fact", "falsely documenting events", "deliberate attempt to discredit me", "falsify information", "it may be simple incompetence", "this could be gross incompetence on his part" and so on do not sit well with me whatever the perspective of the grievance. I find these comments unwarranted and wholly unsubstantiated. Moving on within the company, I will therefore require you to rescind these remarks in writing"*

88. The alleged detriment relied upon of Captain Wheeler giving an 'instruction that the claimant provide a written rescission of his grievances" is not made out on the facts. He is expressly required to rescind the specific remarks identified which are evocative and confrontational. The reference to 'rescission' is clearly in relation to the personal remarks the claimant has had made about individuals involved as a way of moving things forward in an amicable way in response to the claimant's request. The reason why Captain Wheeler requires this is clearly explained in his letter because "from whatever perspective of the grievance" you are coming from, the phrases used by the claimant were not conducive to repairing relationships moving forward, if that was what the claimant really wanted to do.

89. In response, the claimant's solicitors sent a resignation letter on behalf of the claimant dated 12 June 2017. In that letter they incorrectly refer to the recent request that the claimant should 'rescind his concerns' as the last straw. We found the reason the claimant resigned was that he was not happy with the outcome of the grievance. He had clearly misinterpreted the outcome as a last straw by requiring him to rescind his grievances, which was not the case. He chose to resign in those circumstances rather than continue his employment with the respondent which would have involved retraining and retaking the assessments.

90. The final detriment we have to deal with is "the continued refusal to expunge the training records" by Captain Bray and Captain Wheeler as part of the grievance process. Captain Bray and Captain Wheeler confirmed that if the claimant accepted the outcome of the grievance/grievance appeal where it was found that the line check completed by Captain Pope's had highlighted 'interventions' that should not have been made, an 'addendum' with the claimant's agreement could have been added to that effect, to the existing record. The records of the actual line check of 27 January could not be 'expunged' because the actual record had to be kept as part of the audit trail. The line training records completed by Captain Wright and Captain Fahey were not affected by the outcome of the grievance process. In relation to Captain Wright the claimant accepts the 'fail' was a reasonable outcome open to Captain Wright based on his 'sloppy' approach to Alicante and Captain Fahey had in fact 'passed' the claimant in his line check. The respondent was not subjecting the claimant to a detriment in the grievance process by not expunging the training records in their entirety and thereby removing all trace of the line checks. They could not do that in accordance with the procedures and it would not have been appropriate or reasonable for them to do so for the reasons they have given.

Applicable Law.

91. The applicable law is contained in sections 43A, 43B, 47B and section 103A ERA 1996, with the specific questions in this case that the tribunal needs to address identified in the list of issues.

92. Section 43A is headed 'Meaning of 'protected disclosure' and states;

> *"In this act a protected disclosure" means a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C to 43H".*

93. It was agreed that it was a disclosure to the employer made in accordance with 43C of the ERA 1996 the dispute was whether it was a qualifying disclosure in accordance with 43B.

94. Section 43B ERA sets out the disclosures which qualify for protection. Sub-section(1) provides that "*a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the discourse, is made in the public interest and tends to show one or more of the following:*

> *(d) that the heath or safety of any individual has been, is being or is likely to be endangered,*
>
> *(f) that information tending to show any matter within any one of the preceding paragraphs has been, or is likely to be deliberately concealed".*

Submissions

95. Both counsel provided written submissions which we considered before reaching our decision.

96. Mr Milsom also provided a bundle of 'authorities' he relied upon which were:
1. Norbrook Laboratories (GB) Ltd-v- Shaw (UKEAT/150/13).
2. Babula-v- Waltham Forest College 2007 EWCA CIV 174.
3. Chesterton Global Ltd and another-v- Nurmohammed.
4. Shammon-v- Chief Constable of the Royal Constabulaory 2003 UKHL11.
5. Fecitt and others –v- NHS Manchester 2011 EWCA CIV 1190.
6. Croydon Health Services NHS Trust-v- Beatt 2017 EWCA CIv 401
7.Wilson Solicitors LLP-v- Roberts 2018 EWCA Civ 52.
8.International Petroleum Limited and others-v- Osipovand others UKEAT/0058/17.

97. Mr Wynne has provided us with copies of:
1. Blackbay Ventures Ltd –v- Gahir 2014 IRLR 416.
2. Cavendish Munro Professional Risks Management Ltd-v- Gelduld 2010 IRLR 38
3.Kilraine-v- London Borough of Wandsworth2016 IRLR422
4. Chesterton Global Ltd-v- Nurmohamed 2017IRLR837

Conclusions

98. It is clear based on our findings of fact that we have not found that the claimant was subjected to any of the 10 detriments he relies upon. His complaint that he subjected to those detriments on the grounds of making protected disclosures must therefore fail. For the unfair constructive dismissal we found the claimant resigned because he was unhappy with the grievance outcome and did not want to carry on working for the respondent. We did not find he resigned in response (at least in part), to a repudiatory breach of contract, that was itself treatment of the claimant for the sole or principal reason that he had made a protected disclosure.

99. However we will set out our conclusions on the 3 disclosures relied upon having regard to the guidance given in Blackbay Ventures Ltd –v- Gahir by addressing the basis upon which the disclosures are said to be protected and qualifying. In International Petroleum Ltd the president of the EAT, Mrs Justice Simler highlights at paragraph 25 that "the statutory question is simply whether the disclosure is a disclosure of information. If it is also an allegation, that is

neither here nor there. Whether the words used amount to a disclosure of information will depend on the context and the circumstances in which they are used, and ultimately is one of fact for the tribunal which hears the case".

100. The first disclosure relied upon is verbally made to Captain Curtis during a telephone call on 23 January 2017.

> "Captain Wright said we descended past 9.5 DME. I recall descending before 9.4 DME based on his prompt. We need to check the records".

Mr Milsom invites the tribunal to conclude that "an instruction or prompt to descend too early carries with it inherent dangers beyond the immediate flight. Before during and at the end of this hearing the claimant's position is still ambiguous about whether he says he was given a prompt /instruction. Mr Milsom submits that "it axiomatically **tends to show that the safety of an individual is likely to be endangered,** particularly where the supposed cause of this is a breakdown in flight deck communication. He states that "the request for flight data in the **context of a statement that there was a dispute as to the point of landing** amounted (or ought to have amounted) to a red flag in the mind" of Captain Curtis.

101. It is clear from our findings that we do not agree there was any inherent danger in a prompt to descend given by Captain Wright at 10.4 DME in the approach to Alicante. The disagreement was about the actual the point of descent which was the only information disclosed to Captain Curtis. What the facts conveyed, tend to show was a disagreement about the point of descent. There was no 'red flag' raised by the claimant. His request to obtain and check the data was in order to examine how he had flown and how he could improve this **for himself** in the future. He deliberately misled Captain Curtis in order to persuade him to continue with the next line check rather than halting the process. If he genuinely and reasonably believed there were safety concerns likely to endanger an individual, why didn't he convey that information to Captain Curtis No facts were conveyed to anyone from the respondent which tends to show that the safety of an individual has been or is likely to be endangered (in the future).

102. We also find the first disclosure was not made in the public interest it was made in the personal interest of the claimant because he was unhappy with the failed assessment he had been given by Captain Wright.

103. In relation to PID 2 the disclosure of information by the claimant to Captain Curtis on 31 January *"that he had obtained the flight data for the 23rd January flight which proved that Captain Wright had made factually incorrect statements in the training check. He added that he had been unfairly treated in subsequent line checks".*

104. This was also not a disclosure that qualified for protection. The timing of this disclosure is important. By this stage the claimant has failed the assessment process and retraining was the next stage before another line check could be undertaken. He disagreed with Captain Curtis about the point of descent. He disagreed with Captain Fahey's assessment (even though he passes). He disagreed with Captain Pope's assessment. He is conveying facts about his continuing disagreement and unhappiness with the negative feedback/assessments that he has been given. He found it difficult to accept negative comments made in an assessment regardless whether he passed or

failed. His desire to have the records expunged was part of that challenge in order to remove the entire record as if the assessment had never happened. This disclosure was all about his private interests and nothing about the public interest. The claimant accepts he has not conveyed any information about the safety concerns he now relies upon to Captain Curtis or to anyone at the respondent. The information disclosed does not show in the claimant's reasonable belief "*that the heath or safety of any individual has been, is being or is likely to be endangered" or "that information tending to show that has been, or is likely to be deliberately concealed" and does not qualify for protection.*

105. The 3rd disclosure is the email written by the claimant in response to Captain Curtis's request for confirmation that the claimant is raising a grievance. We have set out in our findings, the context to that email in which the previous 2 disclosures are relied upon which we have found, were not qualifying disclosures but were disclosures about disagreements with the examiners assessments.

106. At the beginning of the email there is reference to the disagreement with Captain Wright. Just because the claimant believes his version of events is right and the examiner (Captain Wright) is wrong, that is the nature of a disagreement. It does not mean either of them is making a false statement. The claimant did not reasonably believe Captain Wright was making false statements at the time, he believed they were incorrect when he was able to check them against the data. Captain Wright made an honest mistake based on his recollection in the same way the claimant had made mistakes recalling his version of events about the approach to Alicante. This is exactly what Captain Wheeler found in the grievance appeal outcome when he concluded "**in comparing both versions to FDM data and my calculation, I conclude there are inaccuracies leading to incorrect conclusions in each"**.

107. The claimant knew the written assessment was completed without reference to any data when he saw it on 25 January 2017. In fact he had not seen any data himself at that stage. It was completed based on the 'considered opinion' of the examiner. The information disclosed in this email is an expression of the claimant's personal view that all the examiners were making false statements and were incompetent in their assessment of his competency as a pilot. The information disclosed only tends to show a disagreement with the examiners, (whether they passed or failed him) and no facts are conveyed that tend to show *that the heath or safety of any individual has been, is being or is likely to be endangered*. The information was disclosed not in the public interest but in the claimant's interest only in order to challenge and expunge the records. By this stage retaining and re-sitting were the only other options if the claimant continued with his employment.

108. On the 'concealment point' having not found that any information was ever conveyed to the Respondent about any safety concerns it is difficult to see how the claimant makes his case of a relevant failure by the respondent deliberately concealing facts relevant to that health and safety matter. Based on our findings of fact we did not find the third disclosure qualifies for protection.

109. None of the 3 disclosures qualified for protection in accordance with section 43B ERA 1996. None of the 10 detriments were made out because based on our findings of fact. The assessment process and grievance process were carried out in accordance with the respondent's procedures as they should have been and the outcomes provided were the reasonable management responses to that

assessment/grievance process, which Captain Wright, Captain Pope, Captain Bray and Captain Wheeler were tasked to deal with.

110. The claimant resigned voluntarily because he was unhappy with the grievance appeal outcome letter and did not want to continue to work for the respondent. The respondent had comprehensively dealt with his grievances by this point. The claimant had not been subjected to any detriments and there was no 'repudiatory' breach by the employer that was itself treatment of the claimant for the sole or principal reason that he had made a protected disclosure. The complaint of constructive unfair dismissal therefore also fails and is dismissed.

Employment Judge Rogerson

Date: 4 May 2018