EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ray**

Respondent: **British Midland Regional Limited**

Heard at: **Nottingham**

On: **Monday 23, Tuesday 24, Wednesday 25 and Thursday 26 October 2017**

Before: **Employment Judge Legard**

Members: **Mr R Jones**
Mr P Pabla

Representation
Claimant: **Mr L Harris of Counsel**
Respondent: **Mr J Carter of Counsel**

RESERVED JUDGMENT

1. The Claimant was at the material time a disabled person within the meaning of Section 6 of the Equality Act 2010.

2. The claim under Section 15 of the Equality Act (discrimination arising from disability) is not well founded and is dismissed.

3. The claim alleging a failure to make reasonable adjustments is not well founded and is dismissed.

4. The claim of indirect discrimination is not well founded and is dismissed.

5. The claim for unfair dismissal is well founded and succeeds.

REASONS

1. Background

1.1 The Claimant, a former BMI pilot, by a claim form dated 13 January 2017 brings complaints alleging disability discrimination and unfair dismissal following the termination of his contract which took effect on 25 November 2016. Each of his complaints is resisted by the Respondent.

2. Issues

2.1 The parties, through their respective Counsel, have each provided draft lists of issues which were broadly similar. Following a brief discussion it was agreed that the Tribunal would adopt the Respondent's draft. There is no benefit in repeating the same within the body of this judgment. Suffice to say that the Tribunal was tasked with, amongst other things, determining:-

- whether the Claimant was a disabled person at the material time;
- whether he had suffered unfavourable treatment because of something arising in consequence of his disability;
- if so, whether that treatment was justified;
- whether the Respondent was under a duty to make reasonable adjustments;
- if so, whether they had failed to discharge that duty.

2.2 A potentially key issue in the case (especially given that it can operate as a defence to both the s.15 and the reasonable adjustments complaints) was whether or not the Respondent knew or ought reasonably to have known that the Claimant was a disabled person at the relevant time and, in

the case of reasonable adjustments, whether the Respondent knew or ought reasonably to have known that the Claimant was likely to be placed at the disadvantage in question.

2.3 No jurisdictional issues were identified by either Counsel.

2.4 Mr Harris, for the Claimant, recognised that such cases tend to "sit" better within s.15 and/or ss.20/21. Notwithstanding, on instructions, he wished to maintain a complaint of indirect discrimination pursuant to s.19. It is fair to say, however, that the same was not vigorously pursued either in evidence or submissions.

2.5 Finally we were tasked with determining the reason for the Claimant's dismissal and, if for a potentially fair reason, whether the Respondent acted reasonably in treating it as a sufficient reason within the meaning of s.98(4) ERA.

2.6 Neither party wished us to consider any remedy issues (including "**Polkey")** at this stage and accordingly we focussed our attention on matters concerning liability only.

3. Evidence

3.1 There was an agreed bundle comprising 535 pages. The Tribunal spent the first morning reading witness statements and all documents referred to within those statements but it was made clear to both Counsel that it was their responsibility to bring to our attention any document within the bundle that had not otherwise featured by reference to the witness statements.

3.2 We heard oral evidence from the Claimant himself and from his trade union (BALPA) representative, Mick Brade. On the Respondent's behalf we heard evidence from Mr Gill (Fleet Manager at the relevant time and Dismissing Officer); from Mr Halmshaw (Chief Pilot at the relevant time and Appeals Officer) and from Mrs Umfreville, Head of HR. All witnesses were thoroughly cross examined by Counsel.

3.3 We found all witnesses to have given truthful evidence although we have identified below where and why we have preferred the account of one over another and/or why we have reservations. As matters turned out this was not a case which turned on disputed facts. We referred to each witness by "Mr" or "Mrs" notwithstanding the uniformed "ranked" structure of the Respondent organisation. This was not intended to be disrespectful and indeed was readily accepted by the parties.

4. Findings of Fact

4.1 The following findings of fact are unanimous and are made on the balance of probability. The Respondent is an independent commercial airline which operates a fleet of 20 Embraer aircraft from various bases within the United Kingdom and Europe including Aberdeen, Bristol, East Midlands Airport, Toulouse, Bremen and Brussels. It is a relatively large organisation employing approximately 400 employees, of which approximately 150 are pilots. Of those approximately half (c.75) are Captains. Its turnover is in the region of £100m per annum.

4.2 The following facts are based on the situation that existed at the time of the relevant events and are therefore not necessarily illustrative of the position today. We recognise that the airline industry is relatively fast paced and fluid with changes to flight schedules, manning requirements and base locations and so forth a regular occurrence.

4.3 The Respondent airline carries paying passengers (i.e. members of the public) as well as operating a commercial service (i.e. transporting employees within the airline industry to their place of work). The pilots' working pattern is dictated by a rostering system depending on where the pilot is based. That may determine the amount of flying time (or "sectors") he or she is required to undertake. The pilot may him or herself be flown by others in order for him or her to be in a position for his or her rostered duty. This is known as "positioning". On occasions he or she may need to be transported by taxi or hire car to or from their base. Otherwise the pilot may be rostered on a "standby" duty which requires him or her to be within one hour's travelling time of the base for the duration of that standby duty.

4.4 Most pilot schedules necessitate “night stopping”. For example, a pilot might fly an aircraft from his or her base in, say, Chester to Bristol and then on to Bremen. The pilot may then “overnight” in Bremen before returning via the same or a similar route. Alternatively he or she may be required to overnight on consecutive “days” (indeed up to 4 in number) before returning to base and of course their home.

4.5 Each airport is known by an abbreviation so that for example Bristol is “BSL”, East Midlands “EMA”, Chester “CEG”, Manchester Gateway “MAN” and so forth. Manchester is known as a ‘gateway’ airport for these purposes. That is to say there were no aircraft belonging to the Respondent based there but it was from there that the Respondent’s pilots are flown in order that they are positioned correctly for subsequent flying duties.

4.6 Due to various changes in the business model (which are too complex to outline within this judgment) the incidents of night stopping began to increase through the course of 2012/13 onwards. A typical full time rostered working pattern consisted of 4 days on, followed by one day off and a further 4 days on, followed by 3 days off.

4.7 The Claimant was a Commercial Airline Pilot in the rank of Captain and had been employed by the Respondent since January 2007. He is 57 years of age and became a pilot in 1997 following a career change. He began his flying career with the Respondent operating out of Leeds/Bradford (LBA) but, following the Respondent’s closure of its LBA operations, he moved to Chester (CEG) in 2009. The Claimant lives on the outskirts of Stoke-on-Trent. Originally the Claimant had hoped to move to East Midlands (EMA) rather than CEG following the demise of LBA given that EMA was slightly closer to home. The principle task of CEG-based crew was to service the Airbus contract, that is to say transporting Airbus employees to and from their place of work. A typical roster shows that the majority of sectors flown by the Claimant and indeed others in support of this contract were between CEG, Bristol (BSL), Toulouse (TSL) and Bremen.

4.8 The Respondent recognises BALPA for collective bargaining purposes and within the bundle we were referred to a collective agreement known as "A memorandum of agreement". Amongst other things the memorandum incorporates an agreement on part time working at Schedule Q. It reads as follows:

"1. A pilot wishing to work part time who falls within the "right to request" may apply at any time by writing to the Chief Pilot and will be given priority.

2. Pilots may apply for a part time option or return to full time by writing to the Chief Pilot. Where their request cannot be accommodated they will be placed on a waiting list in order of seniority.

3. Pilots applying in writing will receive a written response detailing the acceptance or denial of part time working or return to full time working. This response will include full reasons for refusal or a time frame to commence part time working or return to full time working."

We were informed that this policy has since been updated so as to conform more closely with the statutory Flexible Working Regulations 2014.

4.9 There is a duty upon pilots to self-report if he or she considers him or herself to be unfit to fly whether through fatigue or otherwise. In such circumstances they are referred or self-referred to an AME. An AME is an Independent Medical Adviser who has the discretion to suspend a pilot's licence to fly if he or she deems the pilot to be unfit. Over and above this self-referral process, a pilot (or indeed any member of staff) can file what is known as a "fatigue report." Such a report is designed to bring to the attention of senior management concerns regarding tiredness issues amongst crew. Aside from one passing reference to a report filed by the Claimant in or around 2011 we have not been referred to any fatigue report within the context of these proceedings. In any event the circumstances in which that particular (2011) report came to be filed are unclear. In any event, little turns upon it within the context of this claim.

4.10 As described above, through the course of 2013 onwards the incidents of night stopping increased, explained in part by a changed business model. The Claimant began to find the roster, specifically the requirement to spend 3 or 4 consecutive nights away from home, increasingly difficult to manage. It was having a detrimental impact upon his work life balance; it affected his morale and was contributing to him becoming fatigued (albeit, at that stage, not sufficiently so as to require himself to self refer to his AME.) It is fair to say, however, that his actual flying duties (i.e. "sectors" flown) were, by relative standards, fairly light.

4.11 On 5 March 2015 the Claimant e-mailed his Line Manager, Mr Gill, complaining about his roster. This complaint gave rise to two lengthy e-mails being exchanged between the two parties regarding the impact of what the Claimant considered to be insufficient rest periods between rostered duties.

4.12 On 29 April 2015 the Claimant submitted a formal request for part time working in accordance with Schedule Q. He stated that his preference would be for a 50% contract and he asked for his new pattern of working to begin on 1 January 2016. In evidence (which we accept) the Claimant stated that, although in an ideal world he would have preferred to have begun his part time working straightaway, he delayed the request 'start date' because he had in mind the potential impact upon the Respondent's operational rostering. He therefore considered that his request would have a greater prospect of success if it was tailored to come into effect during winter months. In the meantime he would have a date at which to aim (a "light at the end of the tunnel" as he referred to it) allowing him to look forward and thereby helping him maintain his health and morale intact.

4.13 The Respondent's response to his request was short and to the point. Mr Halmshaw the Chief Pilot stating as follows:

"Unfortunately the company is not in a position to offer any more part time contracts for the foreseeable future. Currently it is not viable from a business point of view to have any more part time pilot contracts. I will

keep your request on file and if the company position changes I will let you know."

4.14 Although the Claimant's request was said to be 'kept on file' in reality the Respondent (and this was acknowledged in evidence by Mr Halmshaw) had no intention of acceding to this request.

4.15 Within the bundle there were documents relating to a number of 'comparator' pilots, fourteen in total. These were pilots who had made similar requests for part time working during the relevant period (or at least between the years 2014 and the Claimant's dismissal). One such pilot referred to within the bundle as "Employee 6." Employee 6 was stated to be a Captain based at Manchester Gateway (MAN) who made a request for part time working in January 2015. Although no witness was able to confirm his date of birth Mr Halmshaw believed that Employee 6 was approximately 3-4 years shy of retirement at the point he made his request. By e-mail dated 6 March 2015, on the Respondent's behalf, Mr Halmshaw acceded to Employee 6's request, only 2 months before refusing a similar request from the Claimant.

4.16 On 16 June 2015 the Claimant suffered an anxiety attack. He was shortly to begin a roster which would have meant at least 3 consecutive night stops. He was signed off work by his General Practitioner (the reason given being "stress at work") and certified himself as unfit to fly. He subsequently returned to work on 29 June.

4.17 We pause here to interpose a relevant feature to this case. Both within his witness statement and confirmed orally Mr Gill described the Claimant as having a "negative attitude" towards the Respondent. Indeed, very candidly, Mr Gill accepted that this attitude of the Claimant's may well have coloured his overall view when determining whether the Claimant should be dismissed. Notwithstanding the above there was no corroboration or detailed evidence put before us which indicated that the Claimant harboured or displayed a negative attitude towards the Respondent. At most there is a passing reference within an e-mail annotated by Mr Gill dated 7 October 2015 in which he describes "negativity articulated by your colleagues". The appraisal documents

contained within the bundle (which admittedly concerned the Claimant's flying skills) are exemplary. One such report, dated 4 July 2015, describes the Claimant as having very good "OPC" with excellent support of others. We understand OPC to relate to crew management skills. In the same report his leadership, management and team work skills are described as "excellent". To all intents and purposes the Claimant presented at the material time as a first class commercial airline pilot.

4.18 The Claimant's sickness absence and general deterioration in health led to a face-to-face meeting with Mr Gill in September 2015. Amongst other things, the Claimant was offered a possible transfer to BSL. This offer, we find, was on the basis of a <u>full time</u> contract and the Respondent's position with regard to part time working remained intractable and unchanged. Mr Gill concluded his e-mail summarising the face-to-face meeting with the words *"no further action required from the company with Captain Ray aware that any ongoing stress issues will have to be self managed".* This e-mail prompted a response from the Claimant who took issue with a number of comments and specifically the gloss that Mr Gill had placed upon what had been discussed at the meeting. The Claimant was quick to point out that his complaint was not about night stopping in itself but more about prolonged periods away from home without a sufficient break inbetween. The Claimant reiterated that a move to BSL was unreasonable if it was predicated on the basis of a full time contract. He concluded his e-mail by saying this:

"I understand you have a duty of care towards employees and I know I am not alone in feeling the stresses of our current roster pattern so my question to the company is "what stress coping measures are in place to help myself and others deal with our situation?"

4.19 In or about January 2016 the Respondent lost the Airbus contract and CEG was duly closed as a base. The Claimant's base then became MAN, incidentally the same as for Employee 6.

4.20 On 6 January 2016 the Claimant was invited to a meeting to discuss his original part time or flexible working request. The meeting itself took place on 13 January and was presided over by a Mr Milsted, with Mrs Umfreville

making notes. The Claimant was represented by Mark Western, the BALPA Counsel Chair. The Claimant offered to continue on a 100% full time contract until after the busy summer period (ie until October 2016) and was equally willing to consider a 75% contract if one was available. Mr Milsted mentioned a potential move to EMA but we find that this was on the basis of the Claimant maintaining a 100% or full-time contract. Mr Western asked them to speak to the Claimant if the possibility of a 50% contract arose earlier than that requested.

4.21 We now turn to a number of further comparators, namely Employees 9, 10 and 11 who were all Captains based at EMA. Each of them submitted part time working requests. Employee 9 submitted his or hers in November 2015. Like the Claimant s/he was complaining of the impact that rostering was having upon his or her mental and physical health and work life balance but, unlike the Claimant, was threatening to resign in the event that no compromise could be reached. Employee 9's 50% request was approved on 22 April 2016.

4.22 Employee 10 also applied in November 2015 and, according to the Respondent, his or her application was kept under review. No documentary evidence was presented to us detailing the eventual outcome.

4.23 Employee 11 made his or her application in November 2015 also complaining of low morale and the impact upon work life balance. His or her application was approved by letter dated 22 April 2016.

4.24 Of the other comparators, Employees 1, 2 and 3 submitted their applications in 2014, all of which were acceded to. Employee 4's application was granted in January 2015. Employee 5's application was granted in November 2014. It is not clear what rank either Employee 4 or 5 had at the material time or from which base they operated. Employees 7 and 8 were apparently First Officers as opposed to Captains based at EMA. They were each granted a specific job share arrangement working 50% contracts in November 2015. Employee 12 was a Captain in Newcastle. His request was initially refused leaving him to tender his or her resignation but the request was subsequently accommodated in

November 2016. Employee 13 also tendered his or her resignation and his or her request was acceded in February 2017.

4.25 Meanwhile, through the course of January and into February, the Claimant found himself rostered for 3 consecutive weeks with 4 night stops per week. He became ill once again, was signed off by his General Practitioner and declared himself unfit to fly. He also self referred to his AME (Dr McGhee) who declared the Claimant unfit to fly and accordingly rescinded his licence. The Claimant remained off work thereafter until his dismissal.

4.26 In or around June 2016 the Claimant revisited the possibility of returning on a part time basis. By this time, and for the sake of his health, he had ruled out any possibility of returning on a 100% full time contract. He asked John Russell, a BALPA official, to speak to Paul Schutz, the Respondent's Chief Operating Officer about it. There is a dispute as to what, if anything, was agreed between these two individuals and neither was called as a witness. On balance we find that Mr Schutz did nothing more than to undertake to consider the request albeit, in doing so, he gave Mr Russell a positive indication that it would be considered in a favourable light. In his e-mail addressed to Mr Gill dated 9 June the Claimant reiterated his position, namely that the cause of his ill health was the impact of a full time roster including as it did consecutive nights away. He concluded by saying as follows:

"We are now somewhat at an impasse. I do not feel able to fulfil a full time role. My concerns are that the stress will have a long and lasting impact on my health and not least of all my ability to operate as the commander of a public transport aircraft. Unless I can return on a 50% contract I will have no option as I do not otherwise consider myself fit enough to return."

4.27 In evidence Mr Gill claimed he was confused by the Claimant's position. We find nothing confusing about it at all. The Claimant was simply making the point that he could accommodate night stopping even on consecutive nights provided he was working part time and therefore had a double recovery period. Night stopping per se was not, nor was it ever, the problem.

4.28 Later in July the Claimant was referred to and seen by a Occupational Health Physician. Within the report the Claimant is described from suffering from "situational anxiety". The author goes on to say as follows:

"The main issue is his concern about a lack of life work balance due to the duty roster. He reports a lack of response to resolving the situation as being a contributory factor to his current level of anxiety and frustration."

And further on:

"It is recommended that management meet with Mr Ray to understand his concerns and address issues raised. If this is done promptly and effectively then the prognosis for a return to work within the next 3 to 6 months is very good."

In the opinion of the physician the Claimant was able to return to work but only on resolution of the situation and *"on a phased return working at reduced hours ie no more than half normal time".* In response to the question as to whether or not the Equality Act was likely to apply the author of the report states simply *"unlikely to apply".*

4.29 At this point in time the Claimant was at something of a low ebb. He felt particularly deflated after being informed that Mr Schutz had made no guarantee of part time working which was contrary to his understanding and that which had been communicated to him by Mr Russell. He underwent cognitive behavioural therapy (CBT), attending his first assessment on 26 July.

4.30 On 15 July 2016 Mrs Umfreville wrote to Mr Gill citing the OH report and saying as follows:

"Nothing unexpected here – but at least we have a report from an independent OHP that says he isn't coming back anytime soon and more particularly only if it's part time."

4.31 On 2 August the Claimant's union Representatives were written to by a Representative of HR stating as follows:

"We have sought medical advice recently… who reported that the individual will not be in a position to return to work unless we can offer them reduced working hours. On the basis that this from a crew resource perspective at a time when we are struggling to recruit for the vacancies we have, will not be possible for the foreseeable future we are minded to terminate the individual's employment."

4.32 The Claimant was duly called forward to what has been referred to as an 'absence review meeting' which took place on 9 August 2016. We are informed that such a meeting is in line with the memorandum of agreement and we have seen nothing to contradict this. Meanwhile the Claimant's contractual sick pay was due to expire with effect from 12 August 2016. Mr Gill conducted the meeting with Mrs Umfreville in attendance as a note taker and HR adviser. The Claimant attended and was represented by Mick Brade.

4.33 A non-verbatim summary of the meeting is included within the bundle. Amongst other things, Mr Gill is quoted as saying as follows:

"What we are expecting is an imminent return to work or if not we will have to consider dismissal."

"We need his imminent return to a full time roster."

"Right now the company is not in a position to offer [the Claimant] a reduced working pattern."

Mrs Umfreville later sought to explain the logic behind this refusal stating that the Respondent *"could not accommodate those requests because we could not backfill those positions".* In response the Claimant said as follows:

"If he returned to work full time he would end up back at square one fairly quickly."

Mr Gill went on to say that it was not in his gift to change working patterns.

4.34 In terms, had the Claimant indicated a willingness to return to 100% full time contract, he would not have been dismissed. It was expressed as an ultimatum and there was no prospect whatsoever of the Respondent considering a reduced working pattern. In essence the parties had reached stalemate. The Respondent was implacably refusing to consider a part time working request and the Claimant was incapable of working to a full time roster. Accordingly the Respondent's case is that they had no option other than to terminate his employment there and then. The actual decision to dismiss was, we are told, taken or rather 'confirmed' by Mr Schutz, Mr Gill lacking the ostensible authority so to do. Nevertheless it was Mr Gill who presided over the hearing and it was Mr Gill who ultimately presented the recommendation for dismissal based upon his findings and reasoning which are set out in his report. It was also Mr Gill who authored the dismissal letter. Therefore we find it appropriate that Mr Gill is presented to the Tribunal as "the decision maker" for the purposes of a **Burchell** enquiry. Within his report to address to Mr Schutz, Mr Gill recommended dismissal on the basis that there were *"no alternative employment options open to us".*

4.35 Of note within the dismissal letter is Mr Gill's assertion that Occupational Health had confirmed that the Claimant could have returned to work if the Respondent was able to grant reduced hours. That, however, was contradicted in oral evidence given by Mr Gill. Whilst we recognise the authorship of such letters generally rests with HR, nevertheless we find, notwithstanding Mr Gill's protestations to the contrary, that his understanding at the time was that Occupational Health had made it clear that a return to work would only be possible on part time hours.

4.36 At no point within the dismissal process was any alternative to dismissal discussed nor any compromise or alternative working pattern considered (even on a temporary basis, be that at a 75% contract, 50% contract or otherwise). There was no offer to look into any job share arrangement even if that meant a base move to say EMA or BSL.

4.37 There were a number of pilots, including Captains, working in accordance with part time rostering. Some appear to have been working on a job share basis and others not. Not one of these individual cases was considered at the time of the Claimant's dismissal to see if he could have been accommodated in a similar way, irrespective of whether he was threatening resignation or nearing retirement. The recommendation of Occupational Health, as interpreted by the Respondent, was effectively ignored.

4.38 The Respondent's case, namely that a part time working request from the Claimant would cause insurmountable problems for the Respondent or, as they put it in their ET3, "*the Respondent was not in a position to accommodate this request due to issues with backfilling the gap in resource this would leave,"* was both unevidenced and unexplained. There was passing reference to an increased cost burden but, once again, that was wholly unevidenced and in any event appears to have played no part whatsoever in any of the decision making process at either the dismissal or appeal stage. Indeed the Respondent's witnesses struggled to defeat the logic of the argument advanced on behalf of the Claimant namely that in circumstances where there were pilot recruitment shortages a pilot working 50% of his contract was bound to be more advantageous to the Respondent than a pilot working 0% of his contract. Put another way it was less onerous on the Respondent to "backfill" 50% of a pilot's unfilled contract than 100%.

4.39 The Claimant appealed his dismissal by letter dated 29 September 2016. There were 3 grounds of appeal; the first that the Respondent failed to deal with his flexible working request in a reasonable manner or within a reasonable period of time. Second that the Respondent had discriminated against him by failing to make reasonable adjustments and third by incorrectly assuming that he was incapable of fulfilling his role as a Pilot. The hearing duly took place on 6 October 2016 was heard by Mr Halmshaw, Chief Pilot. During the course of the hearing the Claimant argued that there was a "business case for 50%." Mr Halmshaw, very early in the appeal hearing, stated explicitly that he disagreed with the Claimant. Mr Halmshaw stressed the company's position, namely that it

would not offer part time hours and the Claimant repeated his position, namely that a pilot on part time hours would go someway towards alleviating the company's severe recruitment crisis as alleged. The Claimant was unable to articulate his discrimination allegation, simply stating that it had been included on advice of his solicitor. The Claimant indicated that he would be fit to return to work within a few weeks if the company could accommodate his flexible working request.

4.40 In his witness statement at paragraph 28 Mr Halmshaw said as follows:

"The only roster pattern we could offer him returning on was full time. We simply did not have the luxury of resources to consider part time working…"

4.41 In the outcome letter dismissing the Claimant's appeal Mr Halmshaw went a stage further and sought to play up a potential safety issue by arguing that, even if the Claimant was allowed back to work, the fact that he had perceived difficulty in sleeping when away from home presented a potential risk to passengers. This was not something which the Claimant had been given a proper opportunity to challenge. It was not something about which the Respondent had obtained specific and up to date medical advice and, whilst we freely acknowledge the safety critical aspect of a pilot's job, we find this rationale something of an after thought put forward in an attempt to bolster the case for dismissal. In oral evidence Mr Halmshaw described the sleep issue as a major factor in his decision to dismiss the appeal.

5. Relevant Law

Disability

Statute

5.1 Section 6 Equality Act 2010:-

"(1) A person (P) has a disability if:-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

5.2 We took time to consider both the Code of Practice on employment (insofar as it concerns the question of disability) and the 2011 Statutory Guidance. Within the guidance there are a number of examples given to assist a Tribunal in determining whether or not as the case may be, the impairment in question has a "substantial adverse effect" and also provides useful guidance on the meaning of "normal day to day activities", see paragraphs D2 to D23 and specifically paragraphs D4 to D7. We have also considered the appendix to the guidance where there is a non-exhaustive list of factors where it would either be reasonable or not reasonable as the case may be to regard as having a substantial adverse effect on normal day to day activities.

5.3 The guidance suggests that the Tribunal may look at, amongst other things, the time taken for an individual to perform the day to day activities; the cumulative effect of conditions where there are more than one; the extent to which a person might reasonably be expected to modify his behaviour by coping strategies for example.

<u>Case Law</u>

5.4 Detailed guidance on the approach to be adopted by Tribunals in determining the disability question was provided by the EAT in *Goodwin v Patent Office [1999] IRLR4*. Amongst other things the Tribunal is encouraged to take a purposive approach to legislation and be careful not to lose sight of the overall picture. An effect is substantial if it is more than minor or trivial (see s.212(1) EA: B1 of the guidance and also *Aderemi v LSE Railway Limited [2013] ICR 591*.

5.5 Tribunals are encouraged to concentrate on what a Claimant cannot do or

can only do with difficulty, see *Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19*. It is not appropriate to confine an evaluation of day to day activities by reference to a normal day to day environment and disability is to be determined by reference to the circusmtances that existed at the time of the relevant acts or omissions that are alleged to be discriminatory, not the hearing itself - *Cruickshank v VAW Motorcast [2002] IRLR 24*.

Discrimination arising from disability (s.15)

5.6 Disability-related discrimination (s.15) arises where an employer, because of something arising in consequence of a disabled person's disability, treats that disabled person unfavourably, and the employer cannot show this treatment was justified. The EAT in *IPC Media Ltd v Millar [2013] IRLR 707* confirmed that s.15 EA 'does much the same job as was done prior to the decision of the House of Lords in *Lewisham v Malcolm* by s 3A DDA'.

5.7 s.15(2) EA provides that there will not be discrimination arising from disability if A shows that A did not, and could not reasonably have been expected to know, that B had the disability.

Proportionality

5.8 The test for justification is objective, and so it is not relevant if the respondent has inadequately considered the issue. Even if the poor standards of the employer's behaviour have partly caused the disability in issue, it is still possible for him to show that his treatment was justified. It will be an error of law for a tribunal to take the incompetence and failure of the employer to get to grips with the disability from which the claimant suffered as a reason for rejecting a justification defence: *HM Prison Service v Johnson [2007] IRLR 951.*

5.9 In the ECJ case of *Bilka-Kaufhaus GmbH v Weber von Hartz*, *[1986] IRLR 317* (cited with approval by the Supreme Court in *Homer v Chief Constable of West Yorkshire Police*, *[2012] IRLR 601*) the test for

justification was said to be: was the treatment 'necessary and in proportion to the objectives pursued by the employer?'

5.10 The test to be applied then is an objective one, and not, as in unfair dismissals, a band of reasonable responses approach - *Hardy & Hansons plc v Lax [2005] IRLR 726* (a case concerning alleged indirect discrimination). The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. But see also *O'Brien v Bolton St Catherine's Academy [2017] IRLR 547, CA.*

5.11 There is nothing to prevent an employer relying on 'after the event' justification which was not actually considered at the time - *Cadman v Health and Safety Executive [2004] IRLR 971*. There is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer.

5.12 The availability of alternatives to the discriminatory means being considered will be relevant to the question of whether the means adopted are proportionate - *Harrod v Chief Constable of West Midlands Police [2014] EqLR 345*.

5.13 In considering what evidence is required to establish justification, the EAT in *Chief Constable of West Yorkshire Police v Homer [2009] IRLR 262*, (considered on other grounds by the Supreme Court) stated (at para 48):

"… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions'.'

5.14 Similarly at EAT level in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT*, Elias P stated (at para 73):

"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the

employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."

(this decision was later affirmed by Court of Appeal and the Supreme Court).

Duty to make reasonable adjustments

5.15 A failure to make reasonable adjustments can amount to, of course, a separate cause of action. Whether or not an employer failed to discharge its duty to make such adjustments tends to be a fact sensitive issue for the Tribunal. It goes without saying that this area of law has produced a plethora of caselaw. Put shortly, an employer's duty to make reasonable adjustments arises where a provision, criterion or practice ('pcp') is applied by the employer which does or might place the disabled employee at a substantial disadvantage by comparison to those not disabled. If so, it is the duty of the employer to take such steps as it is reasonable to take (in all the circumstances of the case) for it to have to take in order to prevent the 'pcp' having that effect – s.21(1) EqA.

5.16 'Discrimination' within the meaning of the Act includes a failure to comply with this duty. Knowledge (or rather lack of) is a defence and the question of what the employer knew or could reasonably be expected to know is a question of fact for the Tribunal – *Hanlon v University of Huddersfield (1998) EAT/166/98*.

5.17 *Southampton City College v Randall [2006] IRLR 18* makes clear that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly - see *Smith*

v Churchills Stairlifts plc [2006] IRLR 41 and Collins v Royal National Theatre Board Ltd [2004] IRLR 395 (both Court of Appeal).

Ill health and unfair dismissal

5.18 The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

5.19 As the EAT has pointed out in *Edwards v Mid-Suffolk District Council [2001] ICR 616* the tests to be applied when assessing whether a dismissal is unfair under the ERA 1996 and unlawful under the Equality Act are different.

5.20 Another case of interest is *B.S v Dundee City Council [2013] CSIH 91.* It concerned an employee with 35 years of unblemished service, dismissed for ill health incapability. He had been off work for approximately 1 year and the OH report had described him as 'making progress' with a possibility of a return to work within a 1-3 month timeframe. The Court of Session, in remitting the matter, held that the Tribunal had attached too much importance to the need to obtain further medical opinion.

5.21 *Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09* (Lady Smith) concerned a production manager dismissed for capability. The Claimant in this case was keen to return to work and had been certified as fit to return to work by his GP at the date of his dismissal. There were competing medical opinions before the dismissing panel but both appeared to suggest that there was a risk of further setback in the event of him being re-introduced into a stressful working environment. Phased return had been considered but rejected. In overturning a finding of unfair dismissal, the EAT criticised the Tribunal for having substituted their view for that of the employer. It was for the employer (not the Tribunal) to

reach its own conclusions on the medical evidence and it was entirely reasonable for that employer to have concluded, in the circumstances, that there was a significant risk of the claimant succumbing to further periods of stress-related illness if he returned to his pressured role.

5.22 Sometimes the employee's ill health may have been caused by the conduct of the employer. However, this does not mean that a dismissal of the employee is thereby unfair. The Court of Appeal in *McAdie v Royal Bank of Scotland [2007] IRLR 895* upheld the decision of the EAT that if an employee's ill health was caused by the employer's treatment, that might justify a tribunal requiring the employer to demonstrate extra concern before implementing a dismissal ("going the extra mile"). However, there were then two significant limitations. First, Underhill J made clear that it would be odd if a culpable employer was never able to dismiss a missing employee, whereas the unfair dismissal test is whether the employer behaved reasonably in all the circumstances. Secondly, on the facts the decision of the tribunal was reversed on the basis that it had fallen into the trap of considering not what a reasonable employer would have done, but whether it should have got into that situation in the first place. Thus, a balance has to be struck in these cases and the EAT judgment concludes by saying that, although it had sympathy for the employee, it had to be remembered that this was not a personal injury claim.

6. <u>Submissions</u>

6.1 We were presented with written submissions from both Counsel to whom we are indebted. On the Respondent's behalf Mr Carter took us through the relevant law on disability including the principles to be applied in determining actual or constructive knowledge. He went on to argue that, even if disabled, the Respondent could not reasonably have been expected to know that he was and even if he was wrong on that the treatment of the Claimant was at all material times a proportionate means of achieving a legitimate aim. Mr Carter argued that no PCP was applied but, even if it was, reasonable adjustments were made. He contended that the Claimant's dismissal was for capability, a potentially fair reason

and that in the absence of any sustainable alternative to working a hundred per cent contract, dismissal was a fair outcome and certainly one taken in accordance with medical advice and one which fell well within the band of reasonable responses.

6.2 On the Claimant's behalf Mr Harris invited us to find that the Claimant was a disabled person by reference to the contents of his impact statement and other contemporaneous evidence, medical or otherwise. He cited in support the case of Gallop v Newport [2014] IRLR 211. Mr Harris argued that a PCP was applied (British Airways against Starmer [2005]) and that there was a clear failure on the part of the Respondent to comply with its duty to make reasonable adjustments. It was entirely reasonable for example for the Respondent to have accommodated the Claimant's part time working request. Similar arguments were made in support of the Section 15 complaint. Indirect discrimination was not pursued with any real vigour and, insofar as the unfair dismissal complaint was concerned, amongst other things Mr Harris pointed to the fact that the Respondent had failed to resolve any ambiguity within the occupational health report in the Claimant's favour. He also pointed to evidence which suggested that Mr Gill's decision was tainted by his view of the Claimant's negative attitude.

6.3 Both Counsel made extensive submissions on the nature and relevance of various comparators.

7. Conclusions

Disability

7.1 Overall we found the Claimant to be a truthful and convincing witness. His impact statement details the extent to which his normal day to day activities were affected and/or curtailed at the relevant time (it being agreed between the parties that the relevant time was June 2016 until his dismissal which took effect in November the same year). In particular we noted the effect upon his ability to concentrate, his memory problems, his lack of motivation, indecisiveness and his tendency to breakdown and cry over otherwise relatively mundane matters. Some of these (specifically

lack of motivation) was referred to within the Occupational Health report, albeit in passing. He deliberately and consciously avoided conventional antidepressant medication so as to preserve his flying status but did, albeit for a short period, try St John's Wort, a herbal remedy. He underwent a number of CBT sessions through the course of 2016. We note the Therapist's letter (p75) in which the Claimant is described as having presented with symptoms of work related stress including panic attacks, agitation, irritability, indecisiveness, increased emotional reactions and feeling overwhelmed. That said we have also read and taken into account the follow up letter dated 31 October which indicated that the Claimant's symptoms were improving.

7.2 We have referred back to the contemporaneous medical records and have considered all the above against both the statutory definition and the relevant guidance. All in all this was, we find, a borderline case but we are satisfied on balance, albeit by the narrowest of margins, that the Claimant does quality as a disabled person within the meaning of s.6 for the relevant period. We find that his diagnosis of situational anxiety did amount to a mental impairment. It was likely to last 12 months or more and it had more than a trivial effect upon his ability to carry out normal day to day activities within the relevant period.

s.15 EA ('discrimination arising')

7.3 As agreed by both parties, the unfavourable treatment complained of is the Claimant's dismissal. The Claimant was ostensibly dismissed because he was incapable of working to a full time roster. It was his disability that prevented him from doing so and accordingly we were satisfied that he was dismissed because of something arising in consequence of his disability (the 'something arising' being the inability to work a full time roster.) The Respondent has not advanced a legitimate aim but we are prepared to accept, notwithstanding this apparent oversight, to proceed on the basis that "maintaining a roster of qualified pilots" is a legitimate aim.

7.4 The proportionality 'defence' can, of course, be made ex post facto. That said, the onus of discharging the burden of proving proportionality rests

with the Respondent (see s.15(1)(b)) and we find that they have singularly failed to discharge it. There was a host of alternatives available to the Respondent to consider, explore, consult upon and implement. There was a distinct failure on the part of the Respondent to fairly consider the possibility of job share/part time working at alternative locations; the reason for treating comparator pilots more favourably was unexplained and the Respondent, whether deliberately or otherwise, chose to interpret the Occupational Health report (the only medical evidence available to them) in as disadvantageous a light as possible. The most discriminatory way of dealing with the Claimant's predicament was to dismiss him. The decision was predetermined and made with the minimum of consultation and was peremptory. The Respondent failed to show that dismissal was a proportionate means of achieving a legitimate aim.

7.5 However we then turn to the issue of knowledge. There was precious little contemporaneous evidence before the Respondent at any time prior to dismissal or indeed appeal which flagged the possibility that the Claimant might have been a disabled person. We have concluded that the Claimant was a disabled person (by the narrowest of margins) following a detailed analysis of the medical notes and the impact statement, none of which was, of course, available to the Respondent. The Occupational Health report before the Respondent said in clear terms that the Equality Act was "unlikely to apply". That by itself is, of course, no answer to the knowledge issue. However the same report was generally positive in its outlook and, save for a passing reference to "lack of motivation," gave nothing that might have signposted a Respondent towards disability or indeed further investigation. The fit notes simply state "stress at work" and the Respondent's had no knowledge at the time that the Claimant was taking medication or undergoing CBT. The Claimant himself volunteered very little in any conversation or at meetings. When he did, it was in generally positive terms and we note that both the Claimant and his TU representative gave a strong indication at both the dismissal and appeal stages that he was fit to return to work, albeit on a part-time basis. He was represented at all times by experienced trade union officials at various meetings and none of them raised the possibility of the Claimant being a disabled person. In the appeal letter the Claimant's first reference to potential discrimination arises. However he was unable to articulate this

and made it clear that it was only included on the advice of his solicitor. In cross examination he agreed that he himself had not considered himself to be a disabled person. It is of course possible for the Respondent to have followed up this reference at the appeal stage by ordering a further Occupational Health report in order to ask the question again but, on balance, we find that their failure to do so was not, in all the circumstances of the case, unreasonable. Overall we concluded that the Respondent did not know nor could they reasonably have been expected to know that the Claimant was a disabled person at the material time and accordingly, on this finding, the s.15 claim must fail.

Reasonable adjustments (ss.20/21 EA)

7.6 We disagree with Mr Carter on the issue of the PCP. We find that the Claimant was employed on a full time contract, that it was a requirement for him to work in accordance with a full time 100% roster and that such a requirement is capable of constituting a PCP within the meaning of s.20(3). The Respondent recruited all pilots on full time contracts and the fact that they thereafter permitted a number of pilots to work part time hours is nothing to the point.

7.7 This PCP placed the Claimant, a disabled person, at a substantial disadvantage in comparison to a non-disabled person in that he was incapable of fulfilling his contractual obligation to work full time hours so long as his situational anxiety rendered him a disabled person. The duty under ss.20 and 21 therefore arose. For reasons articulated above we find that the Respondent failed to comply with this duty. It was a reasonable adjustment to reduce the Claimant's working hours, the logic of which was accepted under cross examination by Mr Gill. It was reasonable for the Respondent, a relatively large organisation, to have accommodated the Claimant's part-time working request and the reasons put forward for not doing so do not withstand scrutiny. There was ample evidence that others in the same or similar predicament had their applications granted. It was a reasonable adjustment to permit the Claimant to enter into a job share arrangement with the Manchester based Captain. It was a reasonable adjustment to consult the Claimant with a view to looking at a reduction in night stops and/or a base move.

7.8 Once again, however, we find that the Respondent could not reasonably have been expected to know that the Claimant was a disabled person and similarly could not reasonably have been expected to know that he was likely to be placed at a disadvantage by being required to work in accordance with a full time roster. Accordingly the Respondent has a defence to the claim and the claim fails.

s.19 (indirect discrimination)

7.9 This complaint was not advanced before us with anything other than lip service being paid to it. In any event we were provided with no evidence, statistical or otherwise, that could assist us in making a finding on disparate treatment or the effects thereof for the purposes of a s.19 complaint. Accordingly we dismiss this complaint.

Unfair dismissal

7.10 We are satisfied, albeit by a narrow margin, that the reason for dismissing the Claimant was capability, a potentially fair reason. We then turn to the question of whether the Respondent acted reasonably in treating capability as a sufficient reason within the meaning of s.98(4) taking into account, amongst other things, its size and the administrative resources at its disposal. We find unhesitatingly that the Respondent did not act reasonably. There was little, if any, attempt to engage with the Claimant in a meaningful or constructive manner on the subject of part time working. This was in stark contrast, we find, to the majority of comparators referred to within the bundle. We find that Mr Gill was implacably hostile towards the Claimant and more specifically his request for part time working. To a large extent this hostility arose in consequence of his perception that the Claimant was a negative influence. There was, however, no evidence presented to us that the Claimant was anything other than a competent and well regarded pilot. In essence, the Respondent set its face to the Claimant's repeated request to consider part time working. There was no attempt at meaningful consultation on that subject. There was no attempt to consider alternatives and the actual decision to dismiss was predetermined. Far from curing any defect, the appeal, if anything, made

matters worse by importing such things as potential sleep related safety issues, none of which had been raised or explored with the Claimant or with his medical advisers and on which subject the Claimant was not given any opportunity to challenge. The medical evidence itself was misinterpreted, whether wilfully or otherwise, to the Claimant's disadvantage.

7.11 There was little, if any, evidence to support the Respondent's intractable and, we find, somewhat illogical position which led to the stalemate and/or ultimatum, namely that it was 100% contract or dismissal. The Claimant, with 9 years exemplary service and who made it repeatedly clear that 100% working was contributing to ill health, was left with no alternative to consider let alone be consulted upon. We therefore find that the Respondent did not act reasonably within the meaning of Section 98(4) and the dismissal is accordingly unfair.

7.12 At the insistence of both parties we have not gone on to consider any remedy issues (including "**Polkey**") and these therefore must be the subject of a further hearing, which will be listed administratively in due course, with a time estimate of one day.

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Employment Judge Legard

Date 14th November 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.S.Cresswell...

....17/11/17...

FOR EMPLOYMENT TRIBUNALS