EMPLOYMENT TRIBUNALS

BETWEEN

Mr Matthew Guest **(Claimant)**	**and**	**Flybe Limited** **(Respondent)**

Held at: **Birmingham**

On: **24, 25 and 26 September 2018**

Before: **Employment Judge T Coghlin QC (sitting alone)**

Representation:

Claimant: **Rebecca Tuck, counsel**

Respondent: **Jason French-Williamson, solicitor**

JUDGMENT

The judgment of the tribunal is that

1. **The claimant was unfairly dismissed by the respondent.**

2. **Had the respondent acted fairly there was a two thirds chance that it would have dismissed the claimant; and any compensatory award would be reduced accordingly.**

REASONS

Introduction

1. The claimant was employed as a pilot by the respondent airline from 29 August 2007 until 24 March 2017. His employment ended due to concerns held by the respondent about an anxiety-related condition which affected him from late 2014 onwards. The claimant claims that his dismissal was unfair.

2. I heard the case over the course of three days. I heard evidence from the claimant himself, and from four witnesses for the respondent: Anthony Stuart, a People Partner (an HR Business Partner role); Mark Firth, a Pilot Manager and the claimant's line manager from September 2015; Lee Goreham, who at most relevant times was Head of Pilot Management; and Luke Farajallah, Group Chief Operating Officer. Each of these witnesses gave evidence by way of written witness statement and oral cross-examination.

3. There was an agreed bundle of documents running to a little over 400 pages.

4. Ms Tuck and Mr French-Williamson represented their respective clients skilfully and effectively. I thank them both for their helpful presentation of their clients' cases and for the chronologies and high-quality written and oral closing submissions which they provided to me.

The facts

2007-2014

5. The claimant began employment with the respondent on 29 August 2007. He was employed under a pilot's contract (page 37). He flew as a First Officer. For the first seven years of his employment he flew on the respondent's Dash-8 Q400 turboprop airliner (referred to variously as "the Q400" or the "Dash" or "Dash 8"). After a year based in the Isle of Man, he thereafter flew the Q400 from a base at Birmingham West Midlands Airport. Over seven years he clocked up 4,000 hours on the type. He was an able pilot with a good record.

Promotion to the Embraer

6. The respondent also operates jet aircraft produced by Embraer (variously referred to as "the Embraer", "the jet" or the "Ejet"[1]). Like the Q400 it is crewed by a Captain and a First Officer. Flights tend to be of longer duration in the Embraer than in the Q400. The ascent and descent phases are of similar duration in either aircraft, the difference is in the duration of the cruise, when the aircraft is cruising at altitude and there is relatively little for the pilots to do.

[1] The respondent operates two Embraer variants, but there is no relevant distinction for the purposes of this case; both were referred to before me as "the jet" or "the Embraer".

7. In October 2014 the claimant was promoted to fly on the Embraer, based at Birmingham. This was something he had wanted to do for years and he was delighted. He trained in the autumn of 2014 and completed his line check on 10 December 2014. This meant he was allowed to fly alongside a regular Captain rather than a training Captain as had been the case in the later stages of his training.

8. Once he began flying the Embraer, the claimant stopped flying the Q400. To return to it, he would have needed to retrain.

Early incidents

9. On 13 December 2014, a few days after he completed his line check on the Embraer, the claimant had an unsettling experience while flying. Half way through a flight to Florence, he suddenly felt sick and dizzy. A later report (p186) notes that he "felt anxious to be on the plane, hot, dizzy, churning stomach." In a welfare meeting in March 2016 he described feeling though he had "air sickness, feeling woozy, hot."

10. He told his Captain that he felt unwell. He quickly recovered and the remainder of the flight passed without incident, as did the return flight. He thought this was an episode of airsickness, which struck him as odd since he had not suffered from it before. He told me that he had not heard of another pilot suffering from airsickness and it is clearly something that he found embarrassing.

11. A further incident occurred on 27 December 2014 when the claimant was driving to Birmingham airport to report for duty. He had a feeling of impending doom or dread and a terrible feeling in the pit of his stomach. He later described this as feeling like severe butterflies or stomach cramp. He called in sick and returned home.

12. The claimant spoke to his manager, Captain Mike Rainford, during December 2014 and told him that he was suffering from airsickness. Captain Rainford was supportive and encouraged him to keep a log of his experiences, which he did.

13. The claimant continued on occasion to suffer symptoms of air sickness and anxiety in early 2015.

Incident on 17 February 2015; first period of absence

14. On 17 February 2015 the claimant was due to fly to Keflavik in Iceland. He felt anxious. He told his Captain before take-off that he did not feel well enough to fly.

15. Every pilot is assigned an Aeromedical Medical Advisor (AME) designated by the Civil Aviation Authority (CAA) whose role is to certify the pilot as fit to fly. A Class 1 medical certificate is required to fly commercial aircraft.

16. The claimant informed his AME, Dr Ken Dawson, of his situation by email that day. He explained that his home life was not easy at that point since he had a

toddler going through the “terrible twos” and a three-month-old baby. Dr Dawson told the claimant that he would almost certainly have to be recorded as temporarily unfit to fly and recommended that he speak to his GP as a starting point.

17. The claimant saw his GP on 26 February 2015. She wrote a letter that day to the respondent (addressed to “whom it may concern”) stating that the claimant

> “has developed an increasing phobia and anxiety about long-distance flights and being trapped on the aeroplane. He is fine with short-haul and is coping with his symptoms but is struggling now with a fear of the fear and I would be grateful if he could be considered for CBT.
>
> This seems to have been set off by having two small children and spending his weekends being stressed by his interaction or lack of with family.
>
> Past medical history – nil of note.”

18. I assume the GP’s letter was sent to Dr Dawson. The claimant also spoke to Dr Dawson by telephone.

19. On 27 February 2015 Dr Dawson wrote to the claimant confirming that his medical certificate was temporarily suspended due to what Dr Dawson referred to as “panic attacks” (an expression later also used by Professor Robert Bor (p263) and Sara Sanders, psychotherapist (p277)).

20. Between February and April 2015 the claimant underwent six CBT sessions. His medical certificate was reinstated by the CAA on 27 April 2015, with a 6-month Operational Multicrew Limitation (OML), which meant that he could fly only with a Captain aged under 60 and with no medical restriction.

The first return to work: April to July 2015

21. With his medical certificate reinstated, the claimant returned to normal flying on 28 April 2015. After this he sometimes felt a bit sick during flights: occasionally at first, but with increasing frequency. He also had a gradual increase in feelings of anxiety before flights.

22. During this period the claimant saw a cranial osteopath and underwent a mindfulness course.

23. On 14 July 2015 the claimant was due to fly to Salzburg. Shortly before take-off he began to feel, as he put it in his witness statement, “very sick and jumpy”. He felt shaky with an increased heart rate and hyperventilation (as recorded by Prof Anthony Cleare at p171). He could not bear the idea of spending the next two hours flying. He told his Captain that he did not want to go ahead with the flight, and he was de-planed. He was understandably very distressed. He later described this as an “anxiety attack” (p170, p186) and a “panic attack” (p172).

Second period of absence: July 2015 to April 2016

24. The claimant took a few days' annual leave and then returned to work on 21 July 2015. Unfortunately, as he put it in his evidence, he "really struggled". In a note made the following February (p194) he wrote that in at the peak of his unwellness in the summer of 2015 he was struggling with anxiety even as a positioning passenger on an aircraft, and even with a night stop.

25. He saw his GP on 27 July and was signed off with anxiety and began a second period of absence.

26. During this period the claimant attended CBT sessions, hypnotherapy and acupuncture and was prescribed sertraline. Sertraline is an SSRI antidepressant medication which it is permissible for pilots to be prescribed whilst retaining CAA medical certification.

27. The claimant was assessed on 25 September 2015 by Professor Anthony Cleare, the CAA's Consultant Advisor in Psychiatry, who produced a report on 29 September. Prof Cleare noted that:

> "[T]he focus of his anxiety appeared to be around social issues rather than flying *per se*. He told me that when he is not actively involved in flying he does not feel anxious; instead it is during the downtime when the aircraft is cruising that he feels susceptible to fear of embarrassing himself or making a fool of himself in front of others. For this reason he has felt most anxious about long flights, with the correspondingly longer cruising periods."

28. Prof Cleare noted that the claimant had been treated with more intensive therapy for anxiety than on the previous occasion of absence, including six sessions of CBT and a prescription of 50mg of sertraline per day since August 2015.

> "Although, as is often the case, there was a brief period of exacerbation of anxiety upon using sertraline, thereafter he has found this very helpful and now feels back to his old self in terms of anxiety symptoms. He has not had any further symptoms of anxiety for the month of September. There are no ongoing side effects from sertraline therapy."

29. Prof Cleare wrote that the claimant had suffered from some mild depressive symptoms during the summer but that these were secondary to his anxiety which remained the predominant problem, and his mood symptoms "had improved concomitantly with the anxiety symptoms after the prescription of sertraline."

30. Prof Cleare concluded:

> "In summary, he experienced a recurrence of social anxiety following the low intensity treatment he had previously. He has now had a higher intensity of treatment which has led to a remission of symptoms. There is a significant risk that symptoms may recur again in the future and I would like to keep him under regular review in the clinic at the CAA. In addition, I would like – before my next appointment with him – to see a report from his CBT therapist.
>
> On discussion with Dr Dowdall, we thought he could be managed according to the protocol for SSRI prescription in depression. Therefore he would need a satisfactory medical flight test before he could be considered fit. He would also need an operational multi-crew limitation whilst taking sertraline … I would like to see him again in three months as per protocol."

31. Dr Nigel Dowdall, a consultant in occupational and aviation medicine from the CAA, wrote to the claimant on 2 October 2015. Dr Dowdall said that, having read Prof Cleare's report, he was satisfied that the claimant would be fit for Class 1 medical certification with an OML, subject to a satisfactory Medical Flight Test (MFT).

32. The claimant took the MFT on 9 October 2015. This is a ground-based test in a simulator. The test was designed to check that the claimant's medication did had no adverse effect on his flight and operational performance, so its focus was on testing his communication, concentration, memory, reaction to emergencies, and other flying skills. There are limitations of this kind of test: the claimant later said that it felt "artificial really, not like the real thing, like a video game".

33. The claimant passed the test well. So the CAA from this point regarded the claimant as fit to fly; and his Class 1 medical certificate, with an OML, was reissued on 22 October 2015. But he did not return to flying at that stage. While the decision as to medical certification is one for the CAA, a decision as to whether a pilot would actually return to the cockpit is one for the airline. As Mr Farajallah emphasised in his evidence, it is the airline, not the CAA, which would potentially be liable in the event of a disaster.

34. The claimant in his evidence was criticised the respondent for "dragging its feet" during this period. I am not sure that that criticism is well-founded, but in any event the pace at which the respondent moved at this stage is irrelevant to the fairness of a dismissal a year later.

35. The claimant underwent a consultation with the respondent's occupational health doctor, Dr Joanne Browne, on 6 January 2016. Dr Browne drafted a report, which was reviewed and signed (by "pp") in her absence by Dr Yousef Habbab, consultant occupational health physician[2]. Dr Browne wrote:

> "Matthew's initial symptoms may have been triggered by his concerns in his new role in the jet aircraft cockpit. However, the symptoms did not seem to relate to the specific activity of flying. Indeed, he describes his symptoms as disappearing as soon as things needed doing. It also appears that his anxieties began to relate more to his fear of having symptoms – such as stomach churning or feeling hot and dizzy, than to any on board triggers."

36. Dr Browne noted that Prof Cleare had reached the same view. She continued:

> "Because Matthew's symptoms relate to strongly to the process of flying, it is not possible to determine whether he is now 'cured' since he hasn't been in a plane for 5 months. Certainly he demonstrated no anxiety or depression symptoms or signs during our consultation. He scored only 4 out of a possible 56 on the Hamilton Anxiety Rating Scale."

37. Dr Browne nevertheless advised that the claimant was

[2] A point developed by Ms Tuck in re-examination of her client, but which seems to have been overlooked (or at any rate not seen as significant) by all concerned prior to that point, is that curiously, and not entirely satisfactorily, Dr Habbab, who did not actually meet the claimant, added certain substantive remarks to the report, which appear in brackets.

> "currently fit for return to work with a possible adjustment … To facilitate Matthew's return to work, I would suggest shorter flights – less than two hours until the first CAA review."

38. She continued:

> **"Future capacity for regular and efficient service**
>
> I can offer no opinion on this because he has not yet been re exposed to the cockpit flying environment around which his anxieties occur.
>
> **Specific Questions Asked**
>
> 1. *Have the reasons for his recent anxiety been fully resolved? If so, how?*
>
>   I am unable to answer this question as he has not been back to the cockpit environment to test whether his anxieties are recurrent.
>
> 2. *Is there any likelihood of this recurring?*
>
>   Yes. But the likelihood could be very small or could be quite significant. I am unable to say."

39. Later in the report, there was this:

> **"The role of a pilot can be demanding at times, how can he ensure that he is fit and well to do the job from a psychological point of view, given the requirement to manage unforeseen events?**
>
> (As above, he is expected to remain under follow up from CAA to ensure that he remains fit to fly. It is difficult to predict how he will react to unforeseen events, but it is hoped that the psychotherapy he has accessed will help him develop the appropriate coping mechanisms to deal with stressful events. You may wish to consider offering him regular support meetings …)"[3]

40. Both the claimant and the respondent were dissatisfied with this report: the claimant because he felt Dr Browne had not taken his situation seriously, and the respondent because it felt the report was overly equivocal and added little. Nonetheless this was a relevant document and remained so, in the sense that it formed a part of a paper trail which may have been scrutinised in the event of a later accident.

41. The report was read on 28 January 2016 by Siobhan Duffy (a human resources advisor) and Mark Firth, the claimant's line manager. Based on the report, they both saw no reason why the claimant could not return to work. However Ms Duffy passed the report up the chain of command for a decision, and it eventually came to Mr Farajallah, the respondent's COO, who took the opposite view. He replied by email on 28 January 2016:

> "We will have to review – There is a sentence within the document that states 'Because Matthew's symptoms relate to strongly to the process of flying, it is not possible to determine whether he is now 'cured' since he hasn't been in a plane for 5 months'.

[3] This response, in brackets, seems to have been written by Dr Habbab rather than Dr Browne.

> That sentence alone, in a disclosable document, is sufficient to prevent us from giving him a green light to proceed – Were he to be involved in an incident, this document, which becomes instantly disclosable, puts us in an impossible position. His own medic[4] is saying that he can't determine if he is cured.
>
> For now, we cannot proceed further other than to hold an ERG on this specific case."

42. "ERG" stands for Event Review Group. ERGs had been used within the airline industry for some years to discuss safety related issues, usually after a safety breach has taken place. Mr Farajallah was introducing ERGs within the respondent for the purpose of discussing the return to work of pilots who had been off work with mental health issues and assessing the associated risks. The trigger for this was the Germanwings disaster in March 2015 when an aircraft crashed with terrible loss of life. By the end of 2015 authoritative reports had started to emerge suggesting that the Germanwings pilot had suffered from mental health problems and had deliberately crashed the aircraft.

43. An an ERG meeting took place on 3 February 2016, the purpose of which was to discuss the claimant's position and his proposed return to work. It was attended by Mr Farajallah, Colin Rydon, Director of Flight Operations, who reported to Mr Farajallah, and Lee Goreham, Pilot Relations Manager, who reported to Mr Rydon. To explain the hierarchy further, one of Mr Goreham's direct reports was Mark Firth, Pilot Manager, to whom the claimant reported.

44. It is unclear what exactly was discussed at this meeting. The only record of it is a memo dated 7 April 2016, which refers, apparently incorrectly, to the date of the ERG as having been 7 (not 3) February. No decisions or action points are recorded.

45. This lack of record-keeping became a theme of the case. I was struck by the respondent's failure to take or keep notes from any of the (at least three) ERGs which were convened to discuss the claimant's position. There was little or no documentary evidence of who attended, of what documents they were provided with, or of what outcomes were agreed. For a process which involves the assessment of risk in a highly regulated and safety-conscious environment, I found these failures surprising and difficult to understand. The lack of a documentary record naturally made it harder for me to understand with clarity exactly what had taken place, why, and when. There is some uncertainty even about the number of ERGs and the dates on which they were convened.

46. The claimant attended a welfare meeting with Mr Goreham on 15 March 2016. Also present were Anthony Stuart (HR Business Partner), David Kilby (who was accompanying the claimant), and a note-taker. There was a discussion of Dr Browne's report and the claimant's condition and its causes. The claimant explained that he thought his condition may have arisen due to pressures at home in late 2014 and 2015. He said that things had now improved on that front, and his home life was far less demanding and more stable than it had been six months before. He said that in 2014/15 he (or his situation) had been "really hyper", but now was "back to normal"; "things have changed a lot."

[4] This was an error; Drs Browne and Habbab were the respondent's occupational health advisors.

47. In late March 2016 the respondent asked the CAA if it could arrange a consultation with a CAA psychiatrist "to facilitate the return to work process with a set of work-based questions". The CAA said no.

48. Another ERG took place on 7 April 2016. The decision was made that the claimant would return on a phased basis: the first month training, the next three months consolidating that training, and thereafter returning to normal duties. After the first month of training this was to be part time (70%) to help the claimant's work/life balance. The claimant was to have three monthly psychiatric reviews.

The second return to work: April to June 2016

49. The claimant returned to work on 26 April 2016. It went well at first. After the first month he worked part-time, with a pattern of 5 days on, 5 days off. He undertook training. He spent time sitting on the jump seat on flights, re-familiarising himself with flying; and he spent time flying with a supernumerary pilot on the jump seat who could take over if he became unwell.

50. On 1 June 2016 the claimant had a discussion with his manager Mr Firth. It is the claimant's evidence that during this discussion Mr Firth remarked, in passing, that he was glad that the claimant was better because "the company [had] wanted rid". I accept that this remark was made, but I do not think that much turns on it for present purposes; it was anyway obvious, from his email of 28 January 2016, that Mr Farajallah had significant reservations about the claimant returning to flying; and the claimant had anyway been allowed on this second occasion to return.

51. Between March 2015 and September 2015 the claimant had undertaken a course of therapy with a counsellor, Ms Melanie Ayers. The purpose of the counselling was to reduce anxiety, to identify triggers, to identify and reduce safety behaviours, to learn anxiety management and relaxation techniques, and to identify and challenge anxiety-provoking thoughts. Ms Ayers had a telephone review with the claimant on 27 May 2016 and concluded, as recorded in a report dated 6 June 2016, that the claimant "is no longer experiencing symptoms and has been discharged from treatment."

52. The claimant returned to normal duties on 1 June 2016 (p227), still working 5 days on, 5 off. After flying on 2 June 2016 he completed a note saying "Fine. Elated when I got home 'I'm cured!'" But subsequent flights were more mixed: on 9 June he noted "relieved when flight under 2 hours, or reason to fly faster"; on 10 June "mindful but no problems"; on 11 June "more wary halfway there remained confident and distracted self." The claimant described to Professor Cleare that during this period there was

> "a gradual return of what seemed to be anxiety about anxiety or, in his own words, 'a fear of embarrassing myself by being embarrassed.' He began to feel wary about the longer flights…"

The third period of absence: June 2016 onwards

53. Things came to a head on 17 June 2016. The claimant learned that he was due to fly to Kefalonia the next day. This was a long flight (4 hours). He called Mr Goreham and asked if the roster could be changed. Mr Goreham said that

he would need to call the chief pilot if the claimant was unable to carry out the flight. The claimant felt that this was a threat, though I do not think that was how Mr Goreham intended it. The claimant called again an hour later since he still had concerns about going. Mr Goreham, in what I think was an effort to be supportive, suggested that during the cruise phase of the journey the claimant might pass the time by reading a book or doing a crossword (as pilots frequently do). The claimant agreed to carry out the flight, but that evening continued to have concerns and he called in sick the following day. His roster was then cleared without reference to him. He remained off duty and was not to return to work before the end of his employment in 2017.

54. The claimant saw his GP on 18 June 2016. On 5 July 2016 his GP issued a "fit note" certifying that, by reason of anxiety, the claimant had been and would be fit only for ground duties for a month starting on 18 June 2016. A subsequent fit note made the same recommendation extending to 16 August 2016.

55. The claimant saw Professor Cleare again on 8 July 2016. In a report on 21 July 2016, Prof Cleare wrote:

> "We discussed a number of issues that continue to trouble him. He continues to feel a significant lack of confidence and esteem, often asking himself 'am I worthy' of flying. He finds himself feelings humiliated about the possibility that he may not know everything there is to know about the aircraft he is flying and guilty that he does not yet feel ready to be a captain, which he feels he should be. He finds himself being excessively critical of others and also of himself. He feels he is still troubled by perfectionist tendencies.
> …
> My understanding is that he does not have symptoms of anxiety in other situations.
> …
> He repeated to me the concern that he would still have about flying longer flights and these still relate to the process of feeling scrutinised during the downtime period of longer flights.
>
> The anxiety he experiences does appear specific to flying and to the periods described. It is however something that has recurred for a third time and I think it is now a significant worry. I think it is clinically significant and renders him currently unfit for Class 1 purposes."

56. Prof Cleare advised treatment based on a combination of psychological and pharmacological approaches. He noted that to date the claimant had been on a low dose of sertraline and that he had not had any of the other allowable SSRI medications which might be beneficial. He noted that

> "The condition is particularly difficult because it is only apparent whether symptoms are cured when he is actually back at work and having to face exposure to longer flights."

However he felt that specifically tailored therapy and more aggressive pharmacological therapy might be beneficial.

57. He continued:

> "I do think he would need to be fit for all aspects of flying, including longer flights and the downtime periods before he could be considered fit for holding a Class 1 licence again, particularly given that this is now the third recurrence of symptoms. As such we did discuss that this was potentially something that

> could threaten his longer term career and he told me that he is aware of this and does have contingency plans. Nonetheless, as noted above I do think there are options for further treatment that could well have a more beneficial effect and bring the symptoms back under control.
>
> I suggest that I review him once he feels in a position following further treatment to be able to consider a return to flying in all its aspects (ie not just shorter flights)."

58. On 25 July 2016 Dr Dowdall wrote to the claimant confirming that in light of Prof Cleare's report the claimant's medical certificate was suspended due to "anxiety related to flying".

59. On 2 August 2016 the claimant submitted to Mr Goreham a further fit note, which confirmed that he was fit only for ground duties (his condition now being described as anxiety with depression). The claimant expressed the view in his covering email that

> "Upon reflection I believe that a successful return to work will involve moving back to the Dash [ie the Q400], having flown this aircraft for seven years with no issues."

60. The claimant saw the respondent's doctor, Dr Adrian Renouf, on 9 August 2016. Dr Renouf wrote a short report that day (and he subsequently sent a materially identical report to the respondent on 21 August). He noted Professor Cleare's proposal of increased medication said that the claimant would not be able to be made fit until he was on a stable dose of medication which would take three months. He went on:

> "Assuming this works, and there is no reason to not, then you should be able to return to work on an agreed phased programme…
>
> If you anxiety returns when flying normal duties, if Flybe is able to let you go back to the Dash, then this may solve the problem. If it doesn't, or Flybe is not able to let you do this then I think your flying career may be over – subject to a consultant psychiatric final report."

61. On 10 August 2016 the claimant forwarded Dr Renouf's report to his manager Mr Firth. He wrote:

> "I am eager to shorten the steps [Dr Renouf] describes in his report and will happily return to the Dash immediately if the company agrees. If that doesn't work out then that will most probably lead to the end of my flying career. However, I feel quite confident with the idea of returning to the Dash. I had 4000 happy hours on that, which contrasts starkly with the 400 hours of struggle I've had with the Embraer."

62. He added that he hoped to speed things up by increasing his existing medication rather than starting on new medication, and that he was seeing Prof Cleare on 4 November when he hoped to be passed fit.

63. On 2 September 2016 the claimant's GP signed him off work with anxiety until 4 November.

64. The respondent arranged for the claimant to be seen by an specialist aviation psychologist, Professor Robert Bor[5]. The claimant saw Prof Bor on 26 September 2016, who produced a detailed report on 4 October.

    a. He summarised the claimant's account of how his condition had developed. Professor Bor observed that the claimant's anxiety would either be in anticipation of the flight or would become more prominent after the climb and as the flight settles into the cruise phase. As soon as the point of no return in a flight is reached, the symptoms abate.

    b. He drew out one aspect that had not been seen in earlier reports, which he linked with the claimant's upbringing:

        > "in my assessment, the anxiety is less about the inactivity in the cruise phase of flight but more the pairing of him with more senior and experienced captains and a fear that he will suffer embarrassment or shame in their presence."

    c. He considered that there was no evidence that the claimant was suffering from any thoughts of suicide or self-harm. He felt there was no evidence that the claimant was suffering from any definable psychological condition.

    d. He noted that the claimant was now on a higher dose of sertraline (100mg, up from 50mg) for a short period and that he may not yet be benefitting from the full effects of the higher dose; and he considered that the claimant would benefit from targeted CBT, focussing on the specific issues which he had now identified.

    e. Professor Bor felt that the causes of the claimant's anxiety had not yet been fully resolved, partly because treatment to date had not been focussed on the issues he had identified. He added:

        > "Furthermore, I have doubts as to whether sufficient progress will be made whilst he is flying the Embraer. One of my suggestions would be that he reverts to the Dash 8 where the sectors are shorter and the command gradient on the flight deck may be flatter."

    f. He was unable to say definitively whether there was a likelihood of the claimant's condition returning in future. He said that with treatment and a return to the Q400 a complete resolution of the claimant's symptoms was "possible". He also said it was "always a possibility" that the claimant's condition could deteriorate further:

        > "The fact that it is entirely situational and does not appear to affect his mood or anxiety levels when he is not involved in flight operations is a good sign. I cannot state with total confidence and certainty that his condition would not however deteriorate although equally I cannot identify or foresee a situation where this is likely to happen."

<u>ERG on 27 October 2016</u>

[5] This arrangement seems to have been discussed at an ERG meeting in August or early September but there are no notes or records of such a meeting beyond a passing reference in an email on 9 September 2016 (page 247).

65. There was another ERG on 27 October 2016. As before, there were no notes of this meeting. However both Mr Stuart and Mr Farajallah gave important evidence about it. They were in attendance along with Colin Rydon. They both accepted, and I find as a fact, that a decision was taken at this meeting by Mr Farajallah and Mr Rydon that the claimant would not ever return to flying operations with the respondent, since they considered that with the claimant flying the risk to safety could not be said to be "as low as reasonably practicable".

66. Mr Farajallah is the respondent's COO and also its accountable manager, which means that he is accountable to the CAA for the safety of the airline's operations. Mr Rydon also held a role in which he was accountable for safety. The decision having been made by these individuals, it was in practical terms difficult to see what chance there was for the claimant to remain employed as a pilot – which was the job he was employed to do.

67. The claimant was not told of this decision. The respondent continued to follow a process which gave the impression that there was a real chance that the claimant might return to flying duties.

68. Mr Stuart put questions to Prof Bor by email on 3 November 2016 and Prof Bor replied the same day. These questions were predicated on the assumption that the claimant might be able to retrain on the Q400.

69. Prof Cleare saw the claimant again on 4 November 2016 and produced a report dated 9 November. He did not recommend that the claimant should be considered fit for a Class 1 medical certificate. He noted that the claimant had started a course of psychotherapy with a new therapist, Sara Sanders, which was clearly tailored to addressing the issues which had bene identified by Prof Bor. Prof Cleare concluded:

> "Overall I was pleased to see that things did appear somewhat improved in response to the more intensive therapy he has now received. I do think he needs to have a full course of psychological therapy. I do think that this would put him in the best position to remain well upon exposure to potentially triggering events upon a return to work and that any further relapses in his condition would seriously threaten his long-term fitness."

70. Prof Cleare suggested that he review the claimant again once the course of therapy was finished. He also said that there was scope to increase the claimant's current dose of sertraline from 100mg to 200mg if needed.

71. Ms Sanders wrote a report on 12 November 2016. She noted that the claimant had come to her in July 2016 at which stage he met the criteria under DSM-5 for a diagnosis of Social Anxiety Disorder. She said that the claimant's anxiety only occurred on the Embraer which was connected with a perceived pressure on him to succeed as a jet pilot. She described a course of therapy which was designed to address the issues which Professor Bor had identified. 14 of the 16 substantive sessions had been completed (a further 4 were planned for a transitional period upon his intended return to work). She observed:

> "Whist Matthew has made good progress in working in a more targeted way on the underlying causes for the social anxiety and ways of managing the symptoms it is difficult to accurately predict the true extent of his progress until he is placed back in the flight deck and tests this out therefore I am

> recommending 4 sessions at the end of therapy (sessions 17-20) to account for this transitional period.
>
> Overall Matthew has shown vast improvements in his emotional literacy and his capacity to challenge his unhelpful psychological processes. His mood is stable and he does not pose a risk to himself or others."

72. She thought the claimant would be fit to return to work on 12 January 2017.

73. On 16 November 2016 Mr Goreham and Mr Stuart provided a "Briefing Memorandum" to Mr Farajallah and Mr Rydon. This gave a precis of the case to date. It noted that the claimant had met with Prof Cleare on 4 November and that his medical certificate had not been reinstated, and that the claimant had another appointment with him on 3 January 2017[6] by which time his therapy sessions would have been complete.

74. Part of the memorandum was redacted by the respondent on grounds of legal advice privilege and litigation privilege. The last part of the document which is visible reads as follows:

> "**Options**
>
> There are two possible options for the way forward with this complex case:
>
> 1. Mr Guest reverts to the Dash 8 where the sectors are shorter and the command gradient on the flight deck may be flatter. This will cost approximately £13k and is not guaranteed success.
>
> 2. We move towards an exit process. This can be commenced/completed now (end November 2016) or following the January 2017 CAA appointment."

75. There is no evidence about what consideration was given to these two options.

76. On 16 November 2016 Mr Firth wrote to the claimant. The letter was headed "Formal Attendance / Capability Meeting". The letter was to invite the claimant to a meeting which was being convened under the respondent's Disciplinary and Dismissal policy. It identified two issues that would be considered:

> "1. The cause(s), duration, continuance of your long-term absences from work; and
>
> 2. Your suitability to return to your role as a Pilot on the EJet [ie the Embraer]."

77. The letter warned that dismissal was a potential outcome. The claimant was informed of his right to bring a companion. The date of the meeting was given as 10 January 2017. It was later rescheduled for 20 January.

78. Before the meeting took place, further items of medical evidence were received.

[6] The date of 3 January 2017 may have been an error, since the appointment actually took place on 13 January 2017; but if it was an error, it originated with the claimant who had given that date to Mr Stuart and Mr Goreham (p271a).

79. The first was a final report, dated 5 January 2017, from Sara Sanders who reported that:

> "Matthew came to me meeting the criteria for a diagnosis of Social Anxiety Disorder … Throughout his time in therapy Matthew has worked intensively … with the work being targeted and specific. I believe he now has a good understanding of the relational contributors and patterns within his relationships and also an increased sense of his own emotional state and the development of techniques to help him manage this in time of anxiety. I do not think he meets criteria for Social Anxiety Disorder presently and he reports feeling ready to return to work and more in control of managing any anxiety should it recur.
> …
>
> At the time of writing this report we have completed the 16 sessions and I now feel Matthew is fit to return to work and support his request for a further assessment by Professor Cleare with regards to reinstating his medical certification.
>
> Whilst Matthew has made impressive progress in working in a more targeted was on the underlying causes for the social anxiety, and ways of managing the symptoms, and has managed all the behavioural experiments well, it is difficult to predict the longevity of his progress until he is placed back in the flight deck and tests this out…"

80. Ms Sanders thought that the claimant's prognosis was good and that he was now fit to fly.

81. The second piece of medical evidence was the report of Prof Cleare dated 16 January 2017 which followed his appointment with the claimant on 13 January 2017. Prof Cleare noted that the course of CBT which the claimant had undertaken had

> "gone into issues in more depth than in his previous CBT and he appears to have a much better understanding of the origins, genesis and management of his social anxiety problems … and the detailed response of the therapist, Ms Sanders, suggests he has made a full response to the therapy".

82. He observed that the claimant had previously received shorter and less well optimised therapy and that he was now on an optimised dose of sertraline.

83. He said that the claimant's overall levels of anxiety and sociability had improved and that the claimant's home life was settled.

84. He wrote:

> "On examination, he presented as well. There was not a suggestion of ongoing social anxiety, albeit that he has of course not been exposed to the main feared situation, that is to say the social interactions on the flight deck when cruising.

85. He had discussed the matter with Dr Dowdall. They were both of the view that the claimant was fit to return to work, though subject to an MFT because the claimant was now on a higher dose of sertraline.

86. Professor Cleare concluded:

> "There remains a risk of recurrence, but this has been minimised by the optimised treatment he has now received."

87. On 17 January 2017 Dr Dowdall wrote to tell the claimant that he was satisfied that he would be fit for a Class 1 medical certification with an OML limitation, subject to a satisfactory medical flight test.

The meeting on 20 January 2017

88. The planned meeting to discuss the claimant's absence and capability took place as planned on 20 January 2017. Mr Firth chaired it, with Mr Stuart advising in an HR capacity. The claimant was accompanied by James O'Brien from BALPA.

89. Mr Stuart took handwritten notes of this meeting but saw fit to shred them once the letter of dismissal had been finalised. All that remains is an email sent at 1.35pm that day in which Mr Stuart briefly summarised what had been discussed.

90. There was a discussion about the claimant's treatment and medication. The claimant made the point that he had now been deemed medically fit to fly.

91. The claimant said he was happy to return either to the Q400 or the Embraer. The point was made that "a return to the Dash held a much lower probability of an issues (*sic*)". The claimant and his representative argued that the claimant was disabled and that transferring back to the Q400 was a reasonable adjustment[7]. Mr Firth and/or Mr Stuart said that a transfer back to the Q400 would entail a training cost of £13,500, and that there was currently no vacancy for a position flying the Q400 from Birmingham.

92. The respondent's concerns as to the safety of allowing the claimant to return to the cockpit were discussed. The point was made that the simulator would not replicate conditions within the cockpit and that a similar (though not identical) position had been reached before with the claimant returning to flying following a period of anxiety. Mr Firth and/or Mr Stuart said that they "needed to be 100% certain before facilitating any return to flying."

93. Mr Firth not make a decision that day. He went on leave that evening until 29 January 2017. He took only two pieces of medical evidence with him on leave, Prof Bor's report and Prof Cleare's report of 13 January 2018. His evidence was contradictory as to whether he saw Sara Sanders' evidence: in his witness statement he said that he had read her report of 5 January 2017 prior to the meeting on 20 January; in oral evidence, which I prefer, he said that he had not seen either of her reports until this litigation started. In any event he did not take either of Ms Sanders' reports with him.

[7] The claimant's case in the employment tribunal was never presented as a disability discrimination case. I was not asked to make any determination of whether the claimant was disabled within the meaning of the Equality Act 2010 and I heard no submissions on the point.

94. An hour or two after the meeting finished, Mr Stuart sent the email to which I have referred above to Mr Farajallah, Catherine Ledger (general counsel and company secretary), Piers Robinson (HR director), Mr Rydon and Mr Firth. Mr Stuart summarised the meeting. He concluded:

> "can you please let me know if I need to get us together for a final discussion regarding this matter before we issue an outcome next week?"

95. The "us" referred to here did not include Mr Firth, since he was going on leave, but presumably involved the other recipients of the email. Mr Stuart's explanation in evidence was that he thought that following discussion Mr Farajallah might revisit his decision that there would be no return to flying.

The decision to dismiss

96. Mr Farajallah replied on 22 January 2017 in the following terms:

> "The position hasn't changed other than to say that whilst Matt is not going to fly again, he can be offered a ground based role if there is one. The issue for me is that if there is a mere suggestion his condition could return, which there is, we aren't in the business of taking risks in the flight deck and with people's lives. He can work almost anywhere else and we can support and keep an eye on him without worrying he may be involved in an accident in an aircraft. That's surely good for him as well as good for the airline and our customers."

97. Mr Farajallah sent his email to Mr Stuart and to all the other recipients of Mr Stuart's email, including Mr Firth (the ostensible decision-maker) and Mr Rydon, who ultimately heard the appeal against dismissal.

98. It is in my judgment telling that Mr Farajallah addressed this email to Mr Firth. Prior to receiving it, Mr Firth had not yet reached his decision. Mr Farajallah stood four rungs above him in the company's hierarchy and was the company's accountable manager on safety issues. Mr Farajallah intended and expected him to comply and knew that there was no real prospect that he would do otherwise. Mr Firth, for his part, omitted to mention this email in his witness statement. In oral evidence he said that he had felt pressured by this email, and when it was put to him that Mr Farajallah's email did not leave open to him the outcome of the claimant returning to flying, he accepted that that was "one way to look at it".

99. Mr Firth did maintain that it was nevertheless open to him to reach a different decision. I did not accept that this is how he felt when he received this email. He had been given a clear instruction with which he was aware he was expected to comply, and he did so.

100. The day after Mr Firth received this instruction, Monday 23 January 2017, he reached a decision in line with it. He discussed that decision with Mr Stuart on the telephone, and Mr Stuart assisted him in drafting an outcome letter: he provided a first draft that day. The dismissal letter was ultimately sent, with few material amendments, on 30 January. It gave a summary of the meeting on 20 January. It informed the claimant of the decision that he would not return to flying. The key reasoning was as follows:

> "It is clear from the medical report dated 4 October 2016 [ie Professor Bor's report] that there is no certainty regarding your fitness to return safely to flying duties. Professor Anthony Cleare's note (undated) states that there still remains a risk of recurrence. The Company remains concerned regarding your fitness to safely fly.
>
> The CAA requires an MFT to be performed before you can return to fly. We believe that in your case this can only be effectively carried out in an aircraft as this is the genuine working environment. Due to the uncertainty of your condition we cannot as an organisation accept the risk to safety.
>
> The medical advice containing the suggestion that your condition could return causes the Company serious concerns and Flybe are not prepared to take risks in the flight deck with people's lives. We are not prepared to take the risk of returning you as a Pilot on the EJet or Dash 8, so we are providing you with formal notice that we intend to terminate your employment on capability grounds."

101. Although the letter was signed by Mr Firth, and although Mr Firth was ostensibly the sole decision-maker, this section of the decision letter was all written either in the first person plural ("we") or the third person ("the Company"; "Flybe are not prepared…"). This does nothing to dispel my view that the decision on this question was not in substance that of Mr Firth but rather was a company decision taken by its COO Mr Farajallah.

102. The letter continued by saying that the company was prepared to consider the claimant for ground-based roles, and a list of current vacancies was enclosed; and it informed the claimant that should no alternative role be found then his employment would end on 28 February 2017 with three months' pay in lieu of notice.

Appeal against dismissal

103. The claimant exercised his right of appeal. His appeal maintained that the decision to dismiss him was contrary to the medical evidence, that he had never compromised safety, that the company had wrongly assumed that he might hide his condition, that the decision to dismiss him would send a dangerous message to others and drive mental health issues underground, that he should take the MFT, and that reasonable adjustments should have been made.

104. The appeal was heard by Mr Rydon. A meeting took place on 27 February 2017. The claimant was accompanied by Chris Jones from BALPA. Anna Lee from HR was present. There was a dedicated note-taker whose notes were in the tribunal bundle. It appears from those notes that there was a full discussion, that Mr Rydon asked pertinent questions and the claimant was able to respond.

105. At the end of the hearing, there was an exchange between Chris Jones Colin Rydon about the decision-making:

> "CJ: So this letter from the pilot manager [ie Mr Firth] saying the termination is effective do they have the authority to do that? Just as you do Colin? I don't think that a pilot manager would effect a termination without considering someone high up.

CR: It wasn't referred to me, it was handled by HR and then brought to me."

106. It is clear from the notes that Mr Rydon had himself spoken to Professor Bor. There is no evidence showing what was discussed, or when.

107. Mr Rydon decided to dismiss the claimant's appeal, and communicated this decision in a letter to the claimant on 8 March 2017. In that letter he explained his decision as follows:

> "During the last 2 years you have had to stop flying on 3 occasions due to an anxiety condition. With respect to your health, I accept that in none of your actions have you compromised safety to date. However, we also need to take into account the degree of certainty about your future prognosis and recovery when weighing the potential risk to the safety of our operation and passengers. In most of the medical reports that you shared with us it is clear that you feel there is an improvement in your condition but this has not been tested in the live environment of operating an aircraft. It was also clear in some of the reports that there was no guarantee that you will not suffer further anxiety incidents.
>
> As a result of this level of uncertainty and the 2 previous occasions of returning to flying being unsuccessful due to anxiety we cannot accept the risk to flight safety that your condition might present. As such I am supportive of the original decision, which is not to allow you to return to flying."

108. Mr Rydon went on in the letter to offer the claimant an alternative role as Flight Safety Support Officer based in Exeter. This was a fixed term role to last for 12 months. The claimant's existing pay would be protected for that fixed term period. Hotel accommodation would be paid for and "some element of remote working should be possible but this will need further discussion with the Safety Department." In subsequent correspondence the claimant was told that if he rejected this role his employment would end on 24 March 2017 with three months' pay in lieu of notice.

109. The claimant contacted Mr Rydon on 17 March 2017 to ask if there was any possibility of an eventual return to flying if he accepted that role. Mr Rydon said that there was not: "the decision regarding return to flying has been made and will not be altered." The claimant decided not to accept the role. Given the temporary nature of the role, the fact that it offered no hope of a return to flying, and the fact that it was based 200 miles away from his home and his young family, this strikes me as both reasonable and unsurprising.

110. The claimant's employment therefore came to an end on 24 March 2017.

The law

111. Section 98 Employment Rights Act 1996 (ERA) provides, so far as relevant:

> 98 General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

[…]

(3) In subsection (2)(a)—

(a) *"capability"*, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

[…]

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Analysis and conclusions

The reason for dismissal

112. The first question posed by s98 ERA is whether the respondent has shown a potentially fair reason for dismissal. I find that the respondent's reason for dismissing the claimant was the belief that his anxiety condition posed a risk to safety in flight operations.

113. There was some discussion before me as to whether such a reason would properly be characterised as a reason relating to capability (s98(2)(a) and (3)(a)) or as "some other substantial reason" (s98(1)(b)). In my judgment it is better regarded as a reason relating to capability, having regard to the broad definition of that term in s98(3)(a), but in any event it was not submitted that any different process would have to be followed, or any different considerations taken into account, if the label of "some other substantial reason" was preferred.

114. I conclude that the respondent has discharged its burden under s98(1) and (2) ERA to show a potentially fair reason for dismissal.

Reasonableness

115. I next consider whether the respondent acted reasonably in dismissing the claimant. At each stage of my enquiry the test of reasonableness is an objective one, in the sense that I must not at any stage substitute my view for that of the respondent. Rather I must assess whether it was open to a reasonable employer to hold the relevant beliefs which the respondent held, to follow the procedure which it followed, and to decide to dismiss.

116. The need for a tribunal to tread carefully in a case such as the present is particularly acute. Questions as to airline safety are not only matters of enormous potential consequence, they are also matters in relation to which the respondent has a particular expertise which the tribunal lacks. It follows that, as Ms Tuck rightly acknowledged, an airline's judgment as to safety risks is one which the tribunal should be particularly slow to characterise as falling outside the range of reasonable responses.

117. Further, when considering the level of risk which a reasonable employer might be prepared to take, I bear in mind the words of Lord Denning MR in *Alidair Ltd v Taylor* [1978] ICR 445:

> "There are activities in which the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure of that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal. The passenger-carrying airline pilot [etc.] … are all in the situation in which one failure to maintain the proper standard of professional skill can bring about a major disaster."

118. Those words related to a different kind of capability issue but have an equal resonance in the current context.

119. I have come to the conclusion that this dismissal was unfair for the following reasons.

The decision-makers

120. When considering whether the claimant would be dismissed, the key question was clearly whether he would be permitted to return to flying. He was employed as a pilot, on a contract which was expressly described as a "pilot's contract" and all of the terms of which were tailored to employment as a pilot. It is a statement of the obvious to say that flying is of central importance to the work of a pilot. An airline which decides that one of its pilots will henceforth be employed permanently on ground duties is proposing a radically different kind of employment for that pilot. The imposition of a unilateral decision to that effect would surely amount to a direct dismissal under the principle described in *Hogg v Dover College* [1990] ICR 39.

121. Here, the relevant decision-maker on that key question was Mr Farajallah. Mr Rydon was also involved in that decision in the sense that he was a member of the ERG in October 2016 which decided that the claimant would not fly again. At the time when the decision was made in October 2016, and when Mr Farajallah reaffirmed it in his email on 22 January 2017, Mr Farajallah had never met the claimant, and the claimant had had no opportunity to speak to him or to address his concerns or to influence his thinking.

122. It is a basic principle of natural justice and of fairness that an employee should have the chance to address the relevant decision-maker. Here, the

claimant had no such opportunity. He was not told of Mr Farajallah's involvement at all. On the contrary he was led to believe that the decision was to be taken by Mr Firth.

123. Even if Mr Firth were properly to be regarded as the decision-maker, Mr Farajallah's intervention on 22 January 2017 was in my judgment sufficient to render the dismissal unfair.

124. In *Ramphal v Department for Transport* UKEAT/0352/14, it was established that an employee facing disciplinary charges and a dismissal procedure is entitled to expect that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability. HHJ Serota QC observed at [48] and [56]:

> "If the integrity of the final decision to dismiss has been influenced by persons outside the procedure it, in my opinion, will be unfair, all the more so if the Claimant has no knowledge of it."

> "I consider that an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability."

125. *Ramphal* was a decision reached on different facts, involving the intervention of an HR department in a disciplinary process, but the basic principles of fairness which it sets out seem to me applicable here.

126. The respondent's disciplinary procedure (which is the process which it purported to follow) does not say, in terms, either that the employee should have the right to address the actual decision maker, or that there should be no outside influence exerted on the decision maker. That is doubtless because these propositions are so obvious that they do not need to be spelled out. The procedure satisfies itself with this:

> "Disciplinary meetings will be conducted in a manner that enables both parties to explain their cases."

The involvement which I have described of Mr Farajallah, who was absent from the meeting, meant that this requirement was not met.

The evidence

127. Further, at the relevant times Mr Farajallah had not seen any of the medical evidence which post-dated the ERG meeting on 27 October 2016, namely the further answers given by Professor Bor, both reports of Ms Sanders, Professor Cleare's report of 13 January 2017 and Dr Dowdall's letter of 17 January 2017. These documents were of course not in existence at the time of the October 2017 ERG. Nor did Mr Farajallah see them (let alone consider them) prior to reaffirming that decision on 22 January 2017, and they were not summarised to him by Mr Stuart or anyone else; nor, as I have described above, did the claimant have a chance to draw their contents to Mr Farajallah.

128. The assessment of safety risks, and the employer's appetite to accept such risk, is at its heart a matter for the employer, subject only to an

appropriately circumspect review on the basis of the band of reasonable responses. But the employer's assessment must be based on evidence. Here, the medical reports to which I have referred contained much evidence which was necessarily relevant, most obviously the final and up-to-date reports of Ms Sanders, Professor Cleare and Dr Dowdall. These reports did not guarantee the absence of risk - as Mr Farajallah accepted no medical reports could ever be expected to give such a guarantee – but they contained material which was at the very least relevant to the assessment of risk. Specifically they lent substantial support to the view that the claimant's recent and better-focussed course of treatment had been successful and that a return to flying, at least on the Q400, could proceed reasonably safely. There was then, and there has been before me, no criticism of the quality of these reports. They come from highly respectable sources: a psychotherapist who had worked with the claimant for 16 sessions, and two consultants from the CAA with particular expertise in aviation medicine.

129. In my judgment no reasonable employer would have failed to take this evidence into account.

130. I have sympathy for the position in which Mr Farajallah found himself. He was responsible and accountable for the safety of the airline; as such he had a legitimate interest in the claimant's safety to fly; and he had real concerns about the claimant's safety to fly. However his involvement could not easily be catered for by the respondent's procedures. If he had to be involved, a way needed to be found to allow for his involvement which was fair and in accordance with the claimant's statutory right to a fair procedure in relation to the resolution of an issue which could, and did, bring about the end of his career with the respondent. It is not for me to prescribe how such a process might have been structured, but rather to consider the process actually followed by the respondent. Here, Mr Farajallah made his decisive interventions without the claimant having any chance to influence his thinking, and without having considered all the medical evidence. That was a process which no reasonable employer would have followed.

The appeal

131. An appeal may sometimes "cure" the unfairness of a dismissal in the sense that it is the fairness of the process as a whole, including any appeal, which needs to be assessed.

132. The respondent's disciplinary procedure provides that (1) the next level line manager will hear the appeal, and (2) wherever possible the respondent will ensure that the person who deals with the appeal will not have had any previous involvement with the disciplinary decision. Mr Rydon was the next level line manager above Mr Firth[8], but he reported to Mr Farajallah, who was in substance, and as Mr Rydon must have known, the relevant decision-maker.

133. Moreover Mr Rydon had himself been previously involved in the matter himself. He was party to the key decision at the October 2016 ERG that the claimant would not fly again. He was an addressee of the memo dated 16

[8] In fact Mr Firth had previously reported, and would later report, to Mr Goreham; but at this particular time Mr Goreham was not in the business and his vacant role had not been filled. Mr Rydon was the next manager up.

November 2016 which offered two options, a return to the Q400 or an "exit process". And he was a recipient of the email exchange on 20 / 22 January 2017 between Mr Stuart and Mr Farajallah, so was aware of the instruction which Mr Farajallah had given to Mr Firth.

134. This question of the degree of independence which Mr Rydon had, and whether he in fact came fresh to the process when he came to hear the appeal, was raised by Mr Jones as I have set out at paragraph 105 above. Mr Rydon appeared to deny any prior involvement by senior management (certainly himself) in the decision to dismiss. Since Mr Rydon was not called to give evidence[9], I was left with unanswered concerns about that exchange. I was also left unaware of what if any information he had gleaned from his (undocumented) discussion with Professor Bor.

135. Proceeding, as I must, on the evidence presented to me I did not conclude that the appeal "saved" the fairness of the dismissal; if anything it compounded the earlier procedural unfairness.

The Attendance Management Policy

136. The process invoked by the respondent in dismissing the claimant was that set out in the respondent's disciplinary and dismissal policy.

137. The disciplinary and dismissal policy provides that it is

> "designed to help and encourage all to achieve and maintain the required standards of conduct, behaviour, attendance or performance."

138. The policy also provides that

> "The disciplinary procedure may be implemented at any stage if the alleged conduct, behaviour, attendance or performance warrants such action."

139. The claimant argued before me a point that had not been raised by the claimant or his BALPA representatives during the course of the dismissal or appeal processes, namely that the respondent acted unreasonably by failing to follow its own Pilot Absence Management Policy (PAMP). This policy states that it

> "Sets out the support process for those pilot employees whose attendance falls below company expectation on a regular basis"

and that

> "all pilot attendance due to sickness will be managed within this process."

140. The policy deals with for short- and long-term absences. It sets out a system of warnings and trigger points. In the case of long-term absences, it provides that (subject, it would appear, to a plea of "exceptional circumstances") mandatory warnings will be issued at various trigger points:

[9] I was told that Mr Rydon is no longer employed by the respondent. That in itself is not a good reason not to call a witness, but Ms Tuck did not submit that I should draw any inference from the failure to call him.

two period of 60+ days within 12 months result in an Attendance Management Plan being triggered; three periods of 60+ days' absence within 18 months trigger a final written warning; four periods of 60+ days' absence within 24 months render the individual subject to dismissal. The policy does not specify whether the reference to 60+ days is a reference to each individual period of absence or to the aggregate amounts of absence.

141. The respondent's position is that the PAMP simply did not apply. The claimant, it says, was not dismissed based on his past and ongoing absence pattern. Rather he was dismissed because of the perception that he may not safely be able to return to flying at all.

142. I heard a good deal of evidence in relation to the various policies. There was a lot of confusion on the part of the witnesses about how the policies operated. I shall not recount all of the evidence.

143. Two matters were relied on to show that the PAMP was being operated by the respondent prior to the claimant's dismissal.

a. In a record of his meeting with the claimant on 1 June 2016 Mr Firth used the expressions AMP4 and AMP2 (p223). The evidence was unclear even about what these abbreviations meant. This would ordinarily be sent to the claimant but in his oral evidence the claimant could not recall being sent it. There is no other evidence of anyone within the respondent purporting to apply the PAMP.

b. Mr Stuart's email of 20 January 2017 and the dismissal letter both said that a return to flying this would be, or would have been, his "final chance to fly". It was suggested that this must have been a reference to the claimant being at the third stage of the PAMP long-term absence procedure, namely that having had three periods of absence a fourth would trigger dismissal. I do not read that remark that way. Nor did the claimant, or he would have picked up on it in his appeal. The reason for the remark was that it was by now quite obvious to everyone that if the claimant returned to work for a third time and for a fourth time had to stop due to anxiety, his career would in all probability be over. Remarks along these lines were made by Prof Cleare (p228) and Dr Renouf (p240) and by the claimant himself in his email to Mr Firth on 10 August 2016, and during his later appeal.

144. In my judgment the respondent did not act unreasonably by not proceeding under the PAMP. This was not a situation where the respondent's concerns related to an attendance pattern as such; rather the issue was a safety matter which raised the question of whether the claimant could *ever* safely return to the cockpit. This was not a case where a system of staged warnings such as is set out in the PAMP would assist in any way. The claimant was plainly doing all he could to address the anxiety condition which was troubling him and which he well knew was putting his career at risk. In short, this was not a set of circumstances to which the PAMP appeared to be directed or at least well-tailored; and in any event I do not consider that the respondent acted unreasonably in not following it.

145. Even if the PAMP did apply, I do not consider that its terms necessarily obliged the respondent to wait until the claimant had had 4 absences in a 24-month period before it could properly move to dismiss him. I do not read the

PAMP long-term absence provisions as imposing such an absolute obligation on the employer, and it would be surprising if it were to do so. Further, the disciplinary and dismissal procedure, which operates alongside the PAMP, expressly provides that it may be invoked at any stage.

146. In conclusion, I would not have found the dismissal to be unfair on this ground.

Contributory fault

147. The respondent contended that the claimant acted unreasonably in refusing the offer of the ground-based role in Exeter made by Mr Rydon. I reject that argument. The claimant's decision was entirely reasonable, and in no way culpable or blameworthy, for the reasons I have given at paragraph 109 above.

Polkey

148. I was invited by the respondent to consider making a reduction in any compensatory award pursuant to *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 ("*Polkey*") on the ground that, even had the identified unfairness not occurred, the claimant would or might have been fairly dismissed in any event.

149. It seems to me that there was a real prospect that the respondent would have gone on to dismiss the claimant fairly had a fair process been followed. It is difficult to know what such a fair process would have looked like. It could have resulted in a dismissal either earlier or later than the claimant was in fact dismissed.

150. As at January 2017 the respondent had a substantial amount of medical evidence. While this evidence did give some solid grounds for optimism, there were also factors which the respondent was entitled to take into account and which might have entitled it to dismiss fairly, including the following:

a. the claimant had suffered from a recurring condition of such severity that it had kept him off flying for three separate periods. This was a real concern which the respondent was entitled to take into account. That is a matter of common sense, but it also supported by the fact that there had been three such instances was in the view of Prof Cleare "clinically significant" and "a significant worry";

b. while the medical evidence suggested that the claimant appeared to have made good progress following treatment, the same had been true prior to the claimant previously returning to work – the optimism in the medical reports at that stage had proved to be misplaced;

c. the medical evidence now available was not unequivocal, particularly because the ground-based assessments which the experts were conducting were of necessity all carried out away from the very particular triggers of the claimant's symptoms. All of the experts therefore recognised that the only way to be assured of the claimant's recovery was to allow him back to the flight deck and to see how got on. That presented the respondent with a catch-22 situation: in order to see if the claimant was fit for the flight deck, he needed to go back to the flight deck, and that carried risk;

d. there was concern as to the level of potential risk anticipated by earlier medical reports notably that of Dr Browne which might be disclosable documents in the event of a subsequent incident;

e. the respondent was entitled to weigh a risk which was difficult to quantify, perhaps small but not negligible, against the catastrophic scale of the consequences should that risk materialise.

151. Even if the respondent could have dismissed fairly, it does not follow that it would have done. Mr Farajallah said, in the course of re-examination, that having now seen the medical evidence which post-dated the ERG meeting on 27 October 2016 he would have decided to dismiss. I am sure that this would have been his instinct, and I think it is more probable than not that he would have done so. But I do not regard it as certain that he (or another decision-maker) would have done so. This was by no means a matter that was absolutely clear-cut. Illustrations of this come from Mr Stuart and Mr Firth, who, having seen most (if not all) of the relevant evidence and heard what the claimant had to say, left the meeting on 20 January 2017 with their minds still open to the possibility of the claimant returning to flying: as noted above Mr Stuart thought there was a chance of Mr Farajallah changing his mind, and Mr Firth did not finally decide that the claimant should not return to flying until Mr Farajallah's instruction two days later.

152. Mr Farajallah's evidence at paragraph 49 of his witness statement was that

> "I did not place any pressure on the hearing managers in Matt's case to reach a particular decision. If either Mark or Colin had reached a decision to retain Matt within the business, I would certainly have been open to discuss this with them to understand the reason for their decision, and whether they had further information or evidence which may have had a bearing on the decision."

153. As will be clear from what I have said above, I reject the first sentence of this paragraph and, to be fair to him, Mr Farajallah himself did not try to maintain this during his oral evidence. But I think the second sentence of this paragraph entails a recognition that, if a case was made and evidence had been presented – which would certainly have happened had a fair process been followed – then Mr Farajallah would have been open to persuasion.

154. Had Mr Farajallah (or another decision-maker) approached the matter fairly he would have kept an open mind, closely considered the evidence, weighed the risk, and heard what the claimant had to say; and had he done that he might have been prepared to give the claimant another chance.

155. In particular he would have considered the following matters:

a. the CAA's own experts had assessed the claimant as fit to fly (subject to an MFT which there is no reason to suppose he would have failed, and with an OML) following a rigorous process of treatment and examination. These assessments themselves took account of the risks inherent in the claimant returning to the flight deck;

b. the respondent, acting as a reasonable employer, was obliged to take an evidence-based approach to risk, including as to the risks inherent in mental health issues; and it was Mr Farajallah's evidence that this

was his approach to such questions. In cross-examination it was put to him that his attitude to the claimant's third period of absence had been one of "three strikes and you're out". While he did not adopt that language, he accepted the essential truth of the proposition. While the fact that the claimant had suffered a third period of absence was a relevant factor, an evidence-based approach could not proceed on such a simplistic basis;

c. the medical evidence, had it been properly and fairly considered, did give real grounds for optimism, backed up by evidence. The root causes of the claimant's condition appeared to have been tackled for the first time by an extended course of targeted therapy and optimised medication;

d. the nature of the claimant's condition was that even while flying the Embraer his condition had never actually jeopardised safety;

e. there were steps which could have been taken which would have minimised risk. One was returning the claimant to the Q400, which he had flown safely and without difficulty for years, and was a course recommended by the expert evidence. There was a logic to that advice. The triggers for the claimant's condition tended to be absent on the Q400: he was familiar with the aircraft and had proven himself on it; there was not the pressure which he associated with being a "jet pilot"; the command gradients tended to be flatter; and flights, particularly the cruise phases, tended to be shorter. Although cost considerations were raised at the 20 January 2017 meeting and in the dismissal letter, the evidence was clear that these were not regarded by the respondent as prohibitive, and while there were then no vacancies to fly the Q400 from Birmingham, such opportunities in practice arose frequently;

f. another step which could have minimised the risk of returning the claimant to the cockpit was allowing him to fly for a time with a supernumerary pilot. This had been done before. This was not of course a complete answer since the claimant had done this prior to his return to flying in April 2016, and his difficulties had only re-emerged after he began to fly alone with just a pilot. But it was nevertheless a step which might mitigate risk, and one which does not seem to have been considered in January 2017.

156. Discussion with the claimant and his representatives might also have helped to correct one particular misapprehension which had formed part of Mr Farajallah's thinking. In his witness statement Mr Farajallah highlighted one particular concern which he had about the claimant returning to the cockpit:

> "We do of course have 2 pilots on every flight, however there are occasions where a pilot becomes incapacitated during flight and where the remaining pilot has to take command and land the aircraft single handed. In these cases the workload and stress levels for the remaining pilot rise exponentially, and given Matt's condition seemed to occur when he was under stress, it could not be argued post an accident that we had sufficiently mitigated against an accident."

157. This seemed to reflect a misunderstanding of the medical evidence. The experts had spoken with one voice that the claimant's anxiety was "entirely situational", as Prof Bor put it, and that was it was experienced during (or in

anticipation of) the downtime in flights. When things needed doing, his symptoms went away. There was no evidence to support Mr Farajallah's concern about the particular risk which he articulated in his witness statement. That is not to say that there was no risk in the claimant's case; merely that a proper engagement with the claimant and his representatives, and with the evidence, could well have made Mr Farajallah (or another decision-maker) think differently about the nature and extent of the potential risk involved.

158. I have not found it easy to assess the probability that had the respondent acted fairly it would have dismissed the claimant in any event. Doing the best I can to recreate the world that never was, I consider that there was a two thirds chance that the claimant would have been fairly dismissed in any event.

159. Accordingly, if an award of compensation falls to be made, any compensatory award will fall to be reduced by two thirds.

Conclusion

160. For the above reasons I conclude that:

(1) the claimant's complaint of unfair dismissal succeeds;

(2) there was no conduct on the part of the claimant such as to make it appropriate to reduction of either any basic or compensatory award;

(3) if the issue of *Polkey* arises (which it will if the claimant is not successful in his application for reinstatement) then the claimant's compensatory award will be reduced by two thirds.

Directions

161. The claimant seeks reinstatement as his remedy for unfair dismissal. Unless the parties are able to resolve the question of remedy, the matter will now proceed to a remedy hearing which has already been provisionally listed at 10am on **30 November 2018**.

162. Of my own motion I make the following directions in preparation for that remedy hearing.

a. On or before **22 October 2018** the parties shall disclose any remaining or new documents relevant to remedy.

b. During the week of **5 to 9 November 2018** the claimant shall provide to the respondent and to the tribunal an updated schedule of loss, with figures calculated as at the date of the remedy hearing (30 November 2018).

c. By **16 November 2018** the respondent shall provide to the claimant and the tribunal a counter-schedule of loss.

d. The parties shall co-operate in agreeing the contents of a bundle of supplementary remedy documents. It is not necessary to replicate documents in the bundle used at the liability hearing. The respondent

shall provide one copy to the claimant by **16 November 2018** and shall bring 3 copies for use at the remedy hearing.

e. By **23 November 2018** the parties shall mutually disclose, and send to the tribunal, the written statements of any witnesses on whose evidence they intend to rely. Each party shall bring 3 copies of their statement/s for use at the remedy hearing.

163. If the parties intend to produce skeleton arguments for the remedy hearing, it would be helpful (though I do not make a direction to this effect) if they could be provided to me by email in Word format by 4pm on the day before the remedy hearing. The parties' representatives are aware of my email address.

Employment Judge Coghlin

5 October 2018